Putting employees on Furlough – Guidance as at 6th April 2020

The Government produced further guidance on the operation of the Coronavirus Job Retention Scheme (CJRS) on 3rd April 2020. The following are now key points to note about the Scheme:

Who is covered by the CJRS?

The latest guidance advises that any UK organisation that cannot maintain its current workforce because its operations have been severely affected by coronavirus (COVID-19), can furlough employees. This eligibility wording has slightly changed each time the guidance has been reissued which is not helpful and it is unclear how one is to determine whether or not the current workforce can be maintained.

Subject to the above, any UK organisation with a UK bank account and a PAYE scheme in operation as at 28th February 2020 can claim in respect of furloughed employees who were on their PAYE payroll on 28th February 2020 including those who were terminated after that date and then re-engaged. There appears to be no restriction on the type of employee so it should cover full and part-timers, those on temporary contracts and those on flexible or zero-hour contracts.

Are any employees excluded from the scheme?

The most obvious exclusion is those who are still working even if they are on reduced hours.

There are also specific exclusions in the guidance for employees who were off sick (see further information below) or on unpaid leave on February 28th.

The guidance also advises that where employers receive public funding for staff costs, and that funding is continuing, employers are expected to use that money to continue to pay staff in the usual fashion and correspondingly not furlough them.

The latest guidance now makes it clear that a single employee paid via PAYE such as a nanny are included within the scope of the Scheme.

What about any staff that an employer "laid off" prior to the scheme being announced?

The CJRS is expressed to apply from 1st March even though it was not announced until 20th March, it is therefore implicit that backdated periods of absence can be caught by the scheme. Because there are specific requirements relating to how employees can be placed on furlough (see below) employers should take advice on how best they can approach regularising the position to give themselves the best chance of successfully submitting a claim for pre-announcement periods.

What about pregnant employees?

The guidance advices that Maternity Leave will start as usual. If the employee's earnings have reduced due to a period on furlough or statutory sick pay prior to their Maternity Leave starting it may affect their Statutory Maternity Pay. The same principle applies to contractual adoption pay, paternity pay and shared parental pay.

What about employees on maternity leave?

Employees eligible for Statutory Maternity Pay (SMP) or Maternity Allowance will be entitled to claim up to 39 weeks of statutory pay or allowance in the normal way.

So qualifying employees will still be eligible for 90% of average weekly earnings in the first 6 weeks, followed by 33 weeks paid at 90% of average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is now £151.20 a week having just risen from £148.68.

Employees can include their wage costs for providing enhanced (contractual) maternity through the CJRS. The same principles apply if to enhanced contractual adoption pay, paternity pay or shared parental pay.

What about sick employees?

The guidance indicates that employees off sick or self-isolating (because they or someone in their household displays COVID-19 symptoms) should receive Statutory Sick Pay (SSP) they can then be furloughed at the end of the period of sickness absence. If an employee notifies their employer that they have become sick whilst on furlough, then the employee must be taken off furlough and placed on SSP (and be paid less!). This seems a little counter-intuitive and there is clearly no incentive for employees to say that they have become sick.

What about shielding employees?

Employers can claim furlough payments for employees who are shielding in line with public health guidance (or need to remain at home with someone who is shielding) if they are unable to work from home and "you would otherwise have to make them redundant". This reference to furlough needing to be an alternative to redundancy is seemingly anomalous as this is not specified other than for shielding employees. Further explanation here would be welcome.

How long does the scheme last?

The scheme is in place to cover the period 1st March to 31st May 2020. It may be extended if the Government believe it is necessary. Employees need to be on a minimum period of 3 weeks furlough for a claim to be made.

What can employees do for their employer on furlough?

It is very clear that employees cannot undertake any work for the employer whilst on furlough without prejudicing the ability to claim under the CJRS. This includes "providing services or generating revenue". It is permissible to undertake training or voluntary work. It is possible for an employee on furlough to take a job with another employer but this must not be done at the behest of the original employer – we presume this is to avoid employers doing "job swaps" that can then be funded by the taxpayer. If an employee works elsewhere, they will likely be much better off financially than normal as they will receive almost two salaries whilst on furlough. Be careful though about declining a request to work for another employer without good reason (e.g. working for a competitor) as this could be potentially breaching the trust between employer and employee and thus possibly be a cause for a constructive dismissal claim.

What can an employer claim?

Employers can claim for "wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance Contributions (NICs) and minimum automatic enrolment employer pension contributions on paying those wages".

You can claim for any regular payments you are obliged to pay your employees. This is now defined to include wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. It is not clear why overtime is referred to as "past overtime" or what meaning "compulsory commission" has. We assume it means contractual commission but again clarification is awaited.

Normal PAYE processing of the furlough pay applies so tax and NI calculations are made as normal.

At what date is the "regular salary" determined?

For full time and part time salaried employees, the employee's actual salary before tax on 28 February should be used.

If the employee has variable pay and has been employed for twelve months prior to the claim the employer can, subject to the £2500.00 cap, claim for the higher of either:

- the same month's earning from the previous year
- average monthly earnings from the 2019-20 tax year

If an employee with variable pay has been employed for less than a year, the employer can claim for the average of their monthly earnings since they started work.

If the employee only started in February 2020, the employer should use a pro-rata for their earnings so far.

After working out the salary to be claimed employers must then work out the amount of Employer's National Insurance Contributions and **minimum** automatic enrolment employer pension contributions to be claimed.

What if an employer tops up wages?

The additional wages and associated costs such as NICs and auto-enrolment pension contributions on the top-up **cannot** be claimed.

How does National Minimum Wage legislation impact on this?

For employees paid at the NMW, paying only 80% of wages will obviously reduce their hourly rate below the NMW threshold. The Government has recognised this and indicated that employees are only entitled to the NMW for the hours they work and as they cannot work on furlough the NMW rules do not apply.

What if an employee has another job?

This will not affect an employer's claim if he places such an employee on furlough. This applies whether the employee in question is furloughed from the other job or continues to work for another employer.

How do employers Claim?

The Government advises that HMRC are setting up a claims portal and further details of how to claim will be made available as soon as practicable. What we know so far is that employers should make sure they have the following information:

- their ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- the amount claimed (per the minimum length of furloughing of 3 weeks)
- their bank account number and sort code
- their contact name
- their phone number

So, what does this mean for me – what do I do now?

Although there is now additional guidance available there are still a number of unanswered questions however that notwithstanding we suggest the following approach be considered:

1. Assess which employees to put on Furlough

Each employer should consider who should be furloughed. These have to be employees who would otherwise have been laid off. In some cases, you may need to furlough some employees out of a pool of employees that are all in similar jobs due to a partial reduction in workload. Whilst we do not think there is a requirement to undertake an extensive selection process it would be sensible to make sure that you have recorded objective reasons for your choices to help avoid any discrimination type claims.

2. Consider how long employees may need to be on furlough.

For many employers it will be too soon to tell and therefore the exact length of the furloughed period needs to be kept open and under review. The guidance now confirms that the minimum period which will permit an employer claim under the CJRS is 3 weeks. It is implicit that employees could therefore be brought back from furlough after such period. This would therefore permit a degree of employee rotation in circumstances where there was still some work available but too many employees for the amount of such work. By way of simplistic illustration if you have 10 employees carrying out a service but demand has halved so you only need 5, then you could operate a "5 on 5 off" rotation every three weeks.

3. Decide your approach to topping up pay.

You are not obliged to but you may wish to do so if you can afford to. It may help with staff loyalty in the longer term. Nothing has been published yet which prevents you applying top ups to those most in need but not others but this may be a minefield that you wish to avoid depending again what you can afford and again also being mindful not to be discriminatory.

4. Communicate with the affected staff

As the furlough leave is stated to be subject to existing employment law, it is likely that you need to obtain the agreement of your employees to the change. A discussion explaining the reasons and the fact that it gives the business the best chance of riding through the situation should typically be an approach that will garner consent without too much trouble. You will also need to explain that this means that the employee is kept on the payroll but cannot undertake any work whilst furloughed. For many employees the alternative may be lay off on £29.00 per day (£30.00 from 6th April 2020), if a suitable lay off clause is in their employment contract, for a maximum of 5 days or redundancy so furlough is an attractive alternative.

The guidance mentions that it may be necessary to formally undertake collective consultation "if sufficient staff numbers are involved". Again, it is not clear at to exactly what this refers but it would cover organisations that have relevant Union agreements in place which require consultation if there are proposed material changes in employment contracts. Where redundancies of 20 plus employees are being proposed at one establishment within a period of 90 days or less, the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) requires that the employer shall consult appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals. So far as timing is concerned, the consultation must begin in good time and in any event

(a)where the employer is proposing to dismiss 100 or more employees at least 45 days before any dismissal; or

(b)otherwise, at least 30 days before the first of the dismissals takes effect.

There is a “special circumstances” defence if this is not reasonably practicable in the circumstances, but this is very much an area where advice on a case by case basis is needed.

5. Keep proper records

Follow up the discussion in writing – confirming a record of the conversation with each affected individual and the fact that the employee has confirmed agreement to being furloughed. Ideally you should get the employee’s agreement in writing particularly if you have any concern that the position may be disputed at a later date. To be eligible for the grant employers must confirm in writing to their employee that they have been furloughed. A record of this communication must be kept for five years.

6. Submit information to HMRC to claim your grant

HMRC will be setting up an online portal for employers to use to submit claims for support. Further details are awaited of the process but see above for required information that should be retained in readiness for submission.

As always, we need to caveat that this is general guidance only in a very evolving situation so do check with your own professional advisers about your particular business circumstances.