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EMPLOYMENT | COVID-19: UK Government Publishes Further Guidance on Furlough Scheme

The UK Government has published a slew of Guidance Notes in connection with the changes to the Furlough Scheme applying from 1 July 2020. The updates to Guidance Notes have been spread liberally throughout the existing Guidance Notes, and new Guidance Notes have been created. New Guidance Notes include examples of how to calculate a claim for a flexibly furloughed employee and how to calculate generally how much the employer is entitled to claim under the Scheme. The multiplicity of Guidance Notes and worked examples, together with the fact that we are up to the 14th iteration now of the main Guidance Note is making life harder for employers wanting to make use of the scheme but concerned about falling foul of the increasingly complex arrangements.

Whilst a lot of the attention will be focused on the detail of the Flexible Furloughing Scheme (with more than one lawyer making the connection between the initials of the Flexible Furloughing Scheme and their complexity), there are a number of other important changes buried in the detail.

However, it is important to remember that the Guidance Notes have in the past departed from the Treasury Direction. It has been reported that there will be a Treasury Direction on Thursday 18 June 2020, and further information may well come out of that document and shed yet further light on some of the issues in this bulletin. We will produce a further update when that is published.

1. Is consent to furlough necessary?

As those of you who have been following this series of updates will recollect, one of the issues, which has been of primary concern to employers, is the extent to which employee consent was needed in order to be able to furlough staff validly. At one point the Treasury Direction did seem to lend quite strong support to the idea that some form of explicit consent was required by the employee. However, helpfully, the latest Guidance Note has provided some much needed clarity.

The previous Guidance Note, on 29 May, stated "*To be eligible for the grant employers must confirm in writing to their employee confirming (sic) that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the basis of claiming through the scheme. Collective agreement reached between an employer and a trade union is also acceptable for the purposes of such a claim*". That left open key issues as to whether or not an employee who was furloughed in accordance with a legitimate business instruction could be taken to have agreed to the furlough by virtue of having signed up to the contract pursuant to which the instruction was given.

The relevant provision now states "*To be eligible for the grant employers must have confirmed to their employee (or reached collective agreement with a trade union) in writing that they had been furloughed. You must:*

- *make sure the agreement is consistent with employment equality, and discrimination laws;*
- *keep a written record of the agreement for five years;*
- *keep records of how many hours your employees work and the number of hours they are furloughed.*"

This goes further than any Guidance Note previously, in indicating that the employee's agreement to being furloughed is now a thing of the past. Unless an employer is making changes to the contract, then a specific agreement does not appear to be necessary. This does mean that the reference, in the bullet points quoted above, to "*keep a written record of the agreement for five years*" is slightly anomalous. However our view is that this is simply a hangover from the previous version which has not been corrected. It is presumably intended to mean that the employer should keep a written record of the document evidencing the furlough but there does not need to be an agreement. This position is contrasted with the obligations on employers who are looking to furlough employees flexibly. In this Guidance Note, in the paragraph immediately following the one we have set out above, it states "*If you flexibly furlough employees you will need to agree this with the employee (or reach collective agreement with a trade union) and keep a new written agreement that confirms the new furlough arrangement*".

Pausing there, this does seem to be drawing a clear distinction between the original requirement to be furloughed and individuals coming back on a flexible basis. There seems to be precious little logic for this distinction. Why is express agreement needed to have an employee partly suspended under the contract but there is no need to have a written agreement with the employee if they are being, in effect, fully suspended from work? However the Guidance Note on this point is clear. However of course this leaves open what amounts to agreement for these purposes. Clearly it will be sufficient if the employee countersigns a letter or a similar written acceptance via email. However is the employee agreeing the flexible arrangement simply by turning up for work at the pre-ordained time, and then accepting pay for that period worked based on the fact that they are working? Since there is a reasonable amount of time before flexible furloughing can begin, we would suggest that employers side step this by seeking to have a written agreement with each employee or a written document which can be accepted, either before or say on the employee's first day back at work, if it is otherwise difficult to get a signature. The advantage is that, by seeking a written agreement, the employer can be very clear about the extent of the employee's instructions to attend work and know that the employee has, in countersigning this, accepted it. As we mentioned in our previous update on the transitional arrangements (End of the Line: UK COVID-19 Furlough Scheme Update, and related

Checklist for UK Employers), employers probably want to ensure that their furloughed documentation, to the extent that individuals are being instructed to work flexibly, is clear about the hours to be worked and the hours to be spent on furlough.

The other question of course is what is to happen if the employee refuses to consent to being flexibly furloughed? The Government's insistence that there needs to be an agreement with the employee seems to give the employee a choice as to whether or not to accept flexible furloughing. Many employees may be concerned about a return to work. If employers are looking to ease employees back gently into the working environment, by making use of flexible furloughing, the right to consent (or not) to flexible furloughing hands a key element of the decision making back to the employee concerned. This seems to place the employer in the slightly odd situation of being able to furlough or bring an employee back on a full-time basis but not to require a part-time return to work.

2. Test for Claiming Under the Scheme

The other point that comes out from a reading of the Guidance Note "Check if you can claim for your employees' wages through the Coronavirus Job Retention Scheme" is that the basic threshold test for being able to claim has been softened. Whereas the previous Guidance Note had said "*If you cannot maintain your workforce because your operations have been severely affected by Coronavirus (Covid-19) you can furlough employees and apply for a grant…*"(emphasis added). This has now been amended to say "*If you cannot maintain your workforce because your operations have been affected by Coronavirus (Covid-19) you can furlough employees and apply for a grant…*". It must make it easier for employers to build a rationale for claiming under the Scheme. We have seen, from a HMRC factsheet (entitled Coronavirus Job Retention Scheme Statistics June 2020 the breakdown by industry sector for claims under the Furlough Scheme. Some sectors have stayed away from it, for fear of provoking a public reaction. However, if employers have made claims, then the current wording of the Scheme would seem to give an ample justification, unless they are one of the presumably vary rare businesses that has not been affected in any way by the pandemic.

3. Timescales and Time Limits

As we reported in our previous bulletin the Furlough Scheme is being adapted from 1 July and as a result there are a number of time limits and timescales that have been introduced as part of a transition process. For example, no new employees can validly be furloughed after 10 June 2020, since the Furlough Scheme only remains open after 1 July for employees who have already previously been validly furloughed. Although one of the new Guidance Notes talks about the employer having successfully made a claim for the previously furloughed employee in question, this is not the formulation that is used throughout the Guidance Notes. Obviously someone who is only furloughed on, say, 9 June, may not have had a claim submitted by 30 June and it may also be unclear as to whether or not such a claim has been "successful". We therefore think that in practice provided the employee has been furloughed for three weeks by the end of June, this is sufficient to base a claim for that employee beyond 1 July 2020. We knew that employers were going to be capped at the maximum number of employees they had previously furloughed although there was very little guidance on that particular test.

First, we now have an exception to the rule about being able to furlough new employees and in

relation to the total number of employees that can be furloughed after 1 July. Individuals who are returning from maternity, shared parental leave, adoption leave, paternity or parental bereavement leave after 10 June can validly be furloughed for the first time, provided the employee started that period of leave prior to 10 June and are returning after 10 June. The employer in question must also previously have submitted a claim for other furloughed employees, i.e. this is not their first furlough claim. Similarly when calculating the cap for the maximum number of people that can be furloughed by the employer, no account needs to be taken of individuals being furloughed for the first time by virtue of this exception for maternity returners etc.

We now have further details about how the cap on future numbers is to operate. After 1 July the employer cannot claim for a number of furloughed employees that exceeds the number of employees furloughed validly in any claim period prior to 30 June. The Guidance Note gives the example of an employer who has submitted monthly furlough claims for 30, 20 and 50 employees. The maximum number therefore of employees who can be furloughed after 1 July is 50. Employers are going to have to look carefully at where they are proposing to make ongoing use of the Furlough Scheme after 1 July to ensure that they bear this cap in mind. This could especially be an issue where employers, looking to the future, are increasingly pessimistic about their prospects of being able to reopen the business at all and so may be looking at winding down even residual activities which were being undertaken up until now.

Under the Furlough Scheme at present, as is well known, the employee must be furloughed for a minimum of a three week period. After 1 July this requirement will drop away, but there is a trap. If an employee is furloughed before 30 June then that furlough period must last for a minimum of three weeks even if it completes after 1 July. The ability to furlough employees for a shorter period only applies to new furlough arrangements which are put in place after 1 July.

Secondly the Guidance Note resolves an illogicality that had existed in the previous explanations. Since the employer and the employee can agree any flexible furloughing arrangement they like, for any period, it made little sense to talk about a minimum period of the flexible furloughing being not less than seven days. However the Government has clarified that they are talking about a claim being made for a minimum period of one week.

Claims for furloughed employees from 1 July must be made on a calendar month basis (i.e. they must not cross into a new month). It is no longer going to be permissible to have a furlough claim that covers a longer period. Employers may only make one claim for a furlough grant per period, so it is obviously important that the employer gets it right, when submitting the claim. This may particularly be an issue with employees who are flexibly furloughed. The Guidance Note says that employer should claim when it has certainty about the number of hours its employees are working. Interestingly the Guidance Note contemplates that the employee might be brought back on a flexible basis, but in practice then work more hours, necessitating an alteration in the grant claimed. So, although the employee's agreement is needed to come back on a flexible basis, which is to be recorded in writing, it looks as though parties might in practice vary that, and this then is reflected in the application for the grant. Clearly if employer and employee agree a different working pattern from that recorded in writing, then the parties would be well advised to have a document somewhere that records this revision, against any future HMRC audit. The Guidance Note indicates that claims for grants can be made 14 days before the claim period ends and are usually paid out within six working days after the

claim is made.

The Guidance Note "Steps to take before calculating a claim meeting the Coronavirus Job Retention Scheme" provides significant further detail about the Flexible Furloughing Scheme. This is then backed up by examples which have been issued as part of the guidance.

The most straight forward example is for an employee who is paid monthly and who is contracted to work, a set number of hours per week. However, even here the worked example covers two full pages of explanation and it requires 11 basic steps, together with 8 further steps in connection with calculating National Insurance and 8 further steps for calculating pension contribution payments (only applicable during July).

However the key point to bear in mind is that the Government has opted for the less generous approach to flexible furloughing. This is most easily illustrated by an employee who is currently furloughed, on a salary of £3,125 per month. The employer claims 80% of that back up to the maximum monthly cap of £2,500. The employer is paying a further 20% to the employee (i.e. the balance of the salary). Under one option for flexible furloughing, if the employee then comes back one day a week and the employer is paying 20% of salary, the employer would still be able to claim £2,500 in respect of the other 4 days of the working week.

However that is not the approach which the Government has taken. Instead (and very broadly speaking), the employer who asks the employee to work 20% of their time will receive a commensurately lower furlough grant. In slightly further detail, the employer, in this basic example mentioned above needs to work out the usual hours worked by the employee. This is the basic contracted hours. Therefore, if, in practice, the employee tends to work more than their basic hours, this is irrelevant unless it can be said that there has been a contractual amendment such that the employer and employee have agreed to a higher number of basic hours. Secondly it is necessary to identify the working pattern. So if an individual is required to work 40 hours per week, then the working pattern is a weekly one. The employer then works out the daily rate by dividing the number of hours (in this example 40 hours by the number of calendar days (not working days) in the working pattern (i.e. 7)). This then gives a daily number of usual hours, which is then multiplied by the total number of calendar days in the paid period in question. In calculating this the employers are to ignore any periods of annual leave, sick leave or family related statutory leave, and run the calculations as if the employee was at work in the normal way.

For employees with variable hours where pay varies by the amount of time worked, the calculation to establish "usual hours" is a little more complicated. It can be based on the average number of hours worked in the tax year 2019-20 or looking at the precise corresponding calendar period in the year 2019-20. This has to be repeated each month for the corresponding calendar period. For such employees it is only permissible to include overtime "*if the pay for those hours was not discretionary*". This is marvellously ambiguous. Where employees work overtime, they then become entitled to pay pursuant to the contract. Is that sufficient for these purposes or does the employee have to have a contractual right to work overtime rather than a contractual right to be paid for any overtime actually worked? We think it is likely to mean that the employee has the right to work overtime, rather than a right to be paid for overtime worked.

Having worked out the usual hours then the next step is to calculate the furloughed hours during the period for which the claim is being made. This can be done by calculating the total number of usual hours, and then subtracting the hours actually worked "*even if this is different to what you agreed*". The employer is then able to claim a percentage, up to £2,500 per calendar month or 80% of the employee's wages, whichever is the lower, reduced by a fraction equivalent to the number of furloughed hours over the employee's total usual hours. In short, for the employee who works half of their time whilst furloughed, the employer will only be able to claim up to a maximum of £1,250 per month for the furloughing scheme.

4. Practicalities

There is undoubtedly a lot of benefit to employers in being able to reintroduce individuals back into the working environment on a flexible basis. To that extent it is obviously helpful that the Government has sought to make this as amenable as possible. The employer and employee can agree whatever pattern they see fit. However, the complexity of running calculations to work out a claim in respect of a flexibly furloughing employee is going to deter many. Equally an employer who is looking to organise a flexible return to work scheme is going to be unimpressed to find that employees can, apparently, validly refuse their consent to a partial return to work. This may make it more difficult for the employer to organise a structured return to work, especially if those returning are concerned about health and safety issues and see other employees refusing to return. In truth this is probably a wider issue than simply affecting the flexible furloughing. It is for this reason that employers need to think carefully about how fast a return to work and what measures can or should be put in place to demonstrate the safety in the workplace and to maintain that difficult balance between being fair to all but making appropriate exceptions where circumstances justify.

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