Freshfields Bruckhaus Deringer

The Coronavirus Job Retention Scheme: Terms Now Published

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HM Treasury published a formal direction to HMRC (the ***Direction***) on 15 April 2020 in relation to the Coronavirus Job Retention Scheme (***JRS***). This Direction sets out the specific terms of the JRS and should be viewed as superseding the previously published governmental guidance. It is likely that the Direction will now form the definitive statement from Government on how the JRS will operate, although further practical and administrative guidance is expected from HMRC when the online portal for applications and payment opens next Monday, 20 April 2020.

For the most part, the text of the Direction reflects how we have previously understood the JRS to work (see our earlier client guides here for a detailed summary). However it also contains a couple of nasty surprises, together with one or two further changes to the position set out in the most recent version of the guidance as well as one glaring omission, with no clarification provided in relation to pay for annual leave.

The biggest twist is the addition of a new requirement for affected employees to have expressly agreed to furlough as a pre-condition to the employer's participation in the JRS. There had been no prior indication that this was necessary and our experience is that a number of employers have relied on implied consent to implement furlough programmes. Unfortunately it is now clear that this will not be sufficient, and that an express consent process will be required. To this extent, at least, the Government appears to have moved the goalposts partway through the match.

We consider below some of the practical implications of the consent requirement, as well as identifying what we see as the other key points arising from the Direction.

Express employee consent is now required

The Direction now states that an employee is only furloughed if the employer has "instructed" the employee to cease all work in relation to their employment. The Direction is prescriptive on what constitutes an instruction for the purposes of the JRS: there can only be a valid instruction if the employer and employee have "agreed in writing" that the employee will cease all work.

The previous versions of the Government's guidance always referred to the need for agreement between the employer and employee, but there was no stipulation that this must be in writing or that express agreement was required. The reference to agreement was understood to mean that normal employment law would continue to apply: in other words, in the absence of agreement, an employee may have a claim for breach of contract or unlawful deduction of wages if salaries were reduced to the 80% / £2,500 level.

A number of large employers sought to take a pragmatic approach and to rely on implied consent to furlough employees. This involved communicating with employees openly and transparently and giving them an opportunity to object to the proposed furlough (but not asking them expressly to give their consent).

Viewed strictly, the new requirement in the Direction is simply to get agreement in writing to the fact that the employee should not perform any work whilst furloughed. Provided this agreement is obtained, employers can claim for wage costs through the JRS. The Direction does not strictly require employee consent to any corresponding reduction in salary to 80% / £2,500. We believe this is because it was always open to an employer to 'top up' the difference between the amounts covered under the JRS and the employee's full salary. Any decision not to top up this difference is purely a matter between the employer and employee and its lawfulness is a separate matter of employment law and not the concern of HMRC.

As a result of the Direction, employers must now as a minimum get written agreement from each employee that they will not perform any work whilst furloughed. This is a condition to participate in the JRS and employers who do not do this, or whose employees do not provide such agreement, are unlikely to have their employment costs met by HMRC.

Can employers seek express consent for the cessation of work, but continue to rely on implied consent for any reduction in salary? We would not recommend this approach. In practice, it is likely to be difficult to disaggregate the two in any communication with the workforce. Additionally, the High Court earlier this week, in the Carluccio's administration case, cast some doubt on the ability to rely on implied consent in the context of furloughing employees (although it did not close the door on it).

Taken together, we now believe the best approach is to seek express written consent from employees for them to be furloughed *and* for their salary to be reduced (where applicable). This can be done electronically – for example by email – and does not require a signature. For employees who do not have access to email, employers may have to go through a more challenging process of relying on post.

Where the employer has agreed that it will top up salaries to their normal pre-furlough level, there is unlikely to be any difficulty in securing employee agreement. Where there has been a pay reduction, however, employees may be more reluctant (notwithstanding that they may have stayed silent to date).

This new requirement applies equally to employees who have already been furloughed, but we believe it is possible to secure employee agreement after furlough has commenced without affecting participation in the JRS.

This change will be unwelcome for employers, and we suspect it has been introduced to manage the number of employers who will seek to rely on Government support. The Government has previously noted in its guidance that an employee who refuses to go on furlough is at risk of redundancy or termination of employment. This remains the case following the publication of the Direction. The possibility that failure to agree to furlough may lead to a redundancy may act as a significant discouragement to objection by employees. Care will nevertheless be needed in deciding how to address any objections that are actually received and to ensuring that the employer is not seen to be 'threatening' employees. We have made the point in our previous briefings that senior employees may wish to "set an example" by agreeing to a corresponding reduction in their own salary. This may help to encourage the wider workforce to agree to being furloughed.

Additional flexibility on employees covered by JRS

In a helpful change, employers are eligible to claim if they had a registered PAYE scheme on 19 March 2020 (closing a potential gap for some employers who may only have set up payroll after 28 February but before the JRS was announced).

In a corresponding change, the Direction also allows claims in respect of employees where the employer has made a payment to them which has been recorded on a Real Time Information return on or prior to 28 February or 19 March 2020 (defined in the Direction as a "relevant CJRS day") – so potentially allowing claims in respect of employees who took up roles between 28 February and 19 March.

However, there is a bit of a trap for the unwary here – it is the RTI return that must have been made before 28 February or 19 March. So if an employee started work on e.g. 2 March but is not paid until after 19 March then, depending on when the RTI return was made, their employer may not be able to claim for them under the JRS.

The other condition that has been introduced is that the employer must not have reported a "date of cessation of employment" before the "relevant CJRS day". We take this to mean that if an employee was paid and their payment recorded on a RTI return submitted on or prior to 28 February, then even if they were made redundant subsequently, they can be rehired and furloughed. And similarly, an employee who was made redundant prior to 28 February but rehired (paid and reported on a RTI return) prior to 19 March would be eligible. In contrast, an employee who was not on the payroll on 28 February but started employment in early March and was subsequently made redundant would not be eligible. And they won't be able to go back to their previous employer if that employer has notified their cessation of employment prior to 28 February. This may be difficult for some employers who have agreed to rehire employees who no longer have new jobs to go to on the basis that they are able to furlough them.

Interaction of sickness absence and furlough

The Direction contains provisions on the interaction of furlough and sick pay (and pay for other types of statutory leave, such as statutory maternity pay and adoption pay). Importantly, the approach in respect of sickness absence now appears to depart from the position set out in the most recent iteration of the Government's guidance, which was issued on 9 April.

In the 9 April guidance, a specific Q&A was included on the interaction of furlough and sickness absence. In it, the Government stated that whilst furlough is not designed to deal with short-term absences due to sickness, it is possible for employers to furlough employees who are on long-term sick leave or who are shielding in accordance with guidance. There is no definition of what constitutes 'long-term sick leave' but the guidance clearly envisages that it could capture someone who remains eligible for receipt of statutory sick pay (***SSP***). That seems an entirely reasonable assumption, given that statutory sick pay is payable for a relatively long period (up to 28 weeks). The inclusion of this Q&A in the guidance gave hope to employers who had been grappling with the tricky question of how to deal with employees on long-term sick leave. It seemed clear that furloughing them was an option (albeit that the guidance made clear that it was not possible to

make a claim under both the statutory sick pay rebate scheme and the JRS for the same period).

That hope now seems to have been dashed, as the Direction states that for an employee who is in receipt of, or eligible for, statutory sick pay when the furlough instruction is issued, the furlough period will *not* start until their SSP eligibility ends. Confusingly, in a later part of the Direction there is a specific instruction as to how to calculate the amounts claimable under the JRS, which explains that the claimed amount must be reduced by any SSP to which a furloughed employee is entitled (suggesting at least that it should be possible to furlough such an employee, even if an amount equivalent to their SSP cannot be claimed).

Given the status of the Direction, it is the provisions of the Direction and not the guidance which should be followed on this point. It appears that the position for the time being is that any employee who is absent through illness or is self-isolating and eligible for, or in receipt of, SSP *cannot* successfully be furloughed for the purposes of making a claim under the JRS.

Interaction of annual leave and furlough

As was the case with the Government guidance, the Direction says nothing about the relationship between furlough and annual leave.

The fact that HM Treasury has decided not to tackle this difficult area in the Direction means that employers are likely to be left to their own devices to grapple with the topic (or wait for the issue to be determined by litigation).

Points on which there is no definitive answer include:

- whether employees continue to accrue annual leave whilst on furlough;
- whether employees can be required to take holiday whilst on furlough;
- the rate at which furloughed employees should be paid whilst on annual leave; and
- whether employers can reclaim amounts paid to furloughed employees who take annual leave, even if such employees are paid at their normal rate of remuneration?

The latest version of ACAS' guidance on coronavirus dated 15 April 2020 states "furloughed workers must get their usual pay in full, for any holiday they take". Whilst the ACAS guidance is not definitive, its approach clearly represents the safer view for employers that furloughed employees who take annual leave (or are furloughed over a bank holiday period) ought to be paid at their full, pre-furlough rate of remuneration. There is nothing in the Direction or the Government's guidance that appears to prevent employers from claiming back the payments made to furloughed employees up to the JRS cap, but this approach is so far untested.

Employers would also be well advised to assume that employees continue to accrue annual leave while on furlough. The question as to whether employees can be required to take holiday whilst on furlough is a very complex issue – but there is a clear risk that a direction to employees to do so may be ineffective.

Furloughed directors

The most recent version of the guidance had made clear that directors could be furloughed, and the fees payable to them recovered under the JRS, subject to the usual JRS caps, provided they did no more work than was reasonably judged necessary for the performance of their duties (and no work to generate commercial revenue or to provide services for or on behalf of the company).

We had indicated that this was a potential cause for concern given that the guidance appeared to take a much narrower view of what was permissible from a directors' duties perspective than that prescribed by the Companies Act (in other words that there was a risk of furloughed directors not being able to fulfil all their statutory duties). That concern is exacerbated by the Direction which states that the engaging company can only seek reimbursement of the director's fees under the JRS where the director's only activities relate to the filing of company accounts or the "provision of other information relating to the administration of the company". On the face of it, this confirms that a furloughed director is at risk of not being able to comply with his or her statutory duties: he or she may therefore be best advised to resign from the board for the duration of any period of furlough.

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