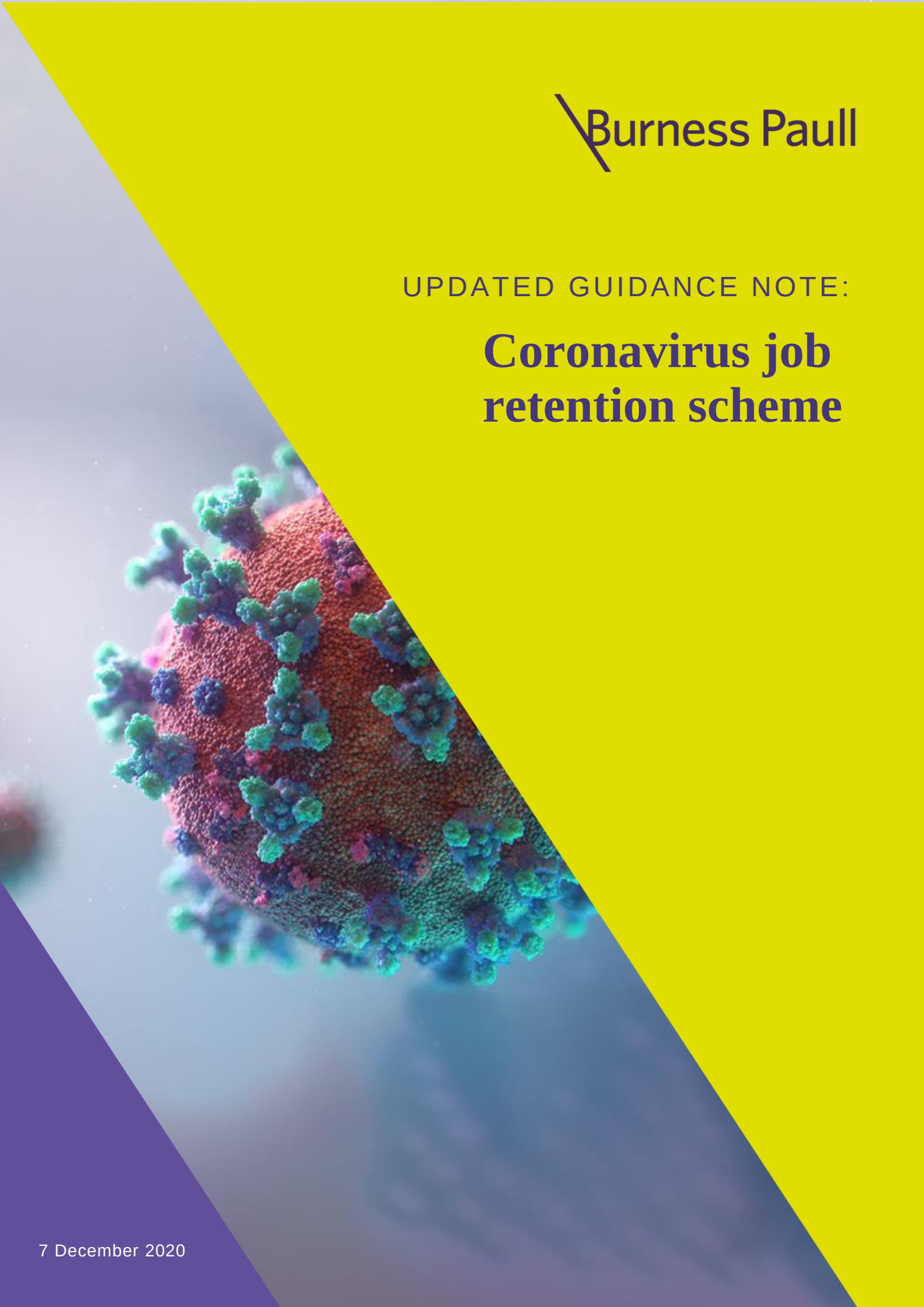
Burness Paull

UPDATED GUIDANCE NOTE:

Coronavirus job retention scheme



7 December 2020

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Executive summary

As part of a package of measures to help businesses cope with the effect of Coronavirus, the Government announced on Friday 20 March 2020 that it was introducing a Coronavirus job retention Scheme (the "**Scheme**"). The online HMRC portal for submitting claims opened on 20 April 2020.

Subject to the conditions of the Scheme being met, employers are able to apply to HMRC for a grant towards the cost of pay for employees who cannot perform their normal hours for reasons relating to COVID-19.

The Government has issued various guidance documents on the operation of the Scheme. The documents issued are guidance only and not legislation. All employers are urged to consider carefully the terms of the Government guidance (which has been updated periodically) to minimise the risk of any claims being rejected or reclaimed by HMRC.

A Treasury Direction ("the **First Direction**") was also issued on 15 April and revised on 22 May (the "**Second Direction**"). The First Direction and the Second Direction only applied to claims under the Scheme until the 30 June. A further Treasury Direction (the "**Third Direction**") was published on 26 June and mainly applies to claims made under the Scheme from 1 July. This was revised on 10 November ("the **Fourth Direction"**). The Fourth Direction makes provision for the extended Scheme to 31 January 2021. Guidance for claim periods from February 2021 onwards, as well as a further Treasury direction, are expected to be published following the Government's review of the Scheme in January 2021.

These directions contain complex and detailed rules on eligibility and conditions for the Scheme, together with comprehensive information on how to calculate claims. Employers need to give careful consideration to how their arrangements comply with the relevant directions as well as the Government guidance.

This briefing note has been updated to 7 December 2020 to include changes made by the revised Government Scheme guidance which was issued on 10 November 2020.

Key information added since the last version of the briefing note is as follows:-

- The new level of furlough grant payable in respect of the period from 1 November to 31 January 2021;
- From 1 December 2020, the grant can no longer be claimed in respect of any notice period worked during the period from 1 December to 31 January 2021;
- More information on HMRC's new powers if you incorrectly claim under the Scheme and their new reporting methods; and

- Updated information on the Job Support Scheme and Job Retention Bonus.

The Scheme is open to all employers in the UK, provided they have a UK bank account and a UK PAYE payroll. To be able to claim under the Scheme from 1 November, employees have to have been on an employer's PAYE payroll by 23:59 30 October 2020 and the employer must have made a PAYE RTI submission to HMRC between 20 March 2020 and 30 October 2020, notifying a payment of earnings for the employee being claimed for. (RTI is the means through which information about deductions under the PAYE system is provided to HMRC by an employer every time an employee is paid.)

There is no requirement for the employer to have used the Scheme previously or for the employee to have previously been on furlough prior to 30 October 2020.This document primarily focuses on how the Scheme will operate from 1 November 2020 but still contains details of the Scheme prior to 1 November 2020 where the information remains relevant to claims under the Scheme from 1 November 2020.

What is the purpose of the Scheme?

To alleviate the economic impact on businesses and, crucially, to protect jobs of those who would be at risk of redundancy, the Government took the unprecedented decision to step in and provide payroll funding through the Scheme.

The clear intention of the Scheme is to save jobs and protect employees' pay during this crisis. In turn, relieving businesses of a large proportion of their payroll costs has clearly allowed a number of businesses to continue trading when they may otherwise not have been able to do so in the current economic situation.

The Third Direction added new wording regarding the purpose of the Scheme stating that the sums paid to an employer pursuant to the Scheme must be *"used by the employer to continue the employment of employees in respect of whom the CJRS claim is made".*

This wording continues to apply to all claims under the Scheme, including prior to 1 July. The reference to 'continue the employment of employees' had lead to concerns that the grant could not be claimed for notice periods following redundancy consultation. After such concerns were raised, the Government guidance was updated on 10 July to provide that "your employer can continue to claim for you while you are serving a statutory notice period, however grants cannot be used to substitute redundancy payments." The revised wording still caused concern as the

use of the words “statutory notice period” implied that the grant could not be claimed in respect of any period of notice which is longer than the statutory minimum notice period. However, the some of the guidance was then updated again on 28 July to make it clear that a grant under the Scheme could be claimed for both statutory and contractual notice periods. The latest guidance changes the ability to claim for notice periods. It provides that for any claim periods starting on or after 1 December 2020, an employer *cannot* claim for any days on which the furloughed employee is serving part of a contractual or statutory notice period for the employer (this includes notice for retirement or resignation).

On or after 1 December 2020, if an employee subsequently enters a contractual or statutory notice period during a period which is being claimed for, the employer must make an adjustment in relation to that claim.

What key points do we know about the Scheme?

Based on the guidance issued:

- **Until the end of July, employers were able to apply to HMRC for a grant to cover the lower of 80 per cent of an employee’s regular wage or £2,500 per month plus the associated employer National Insurance contributions and minimum automatic enrolment employer pension contributions for employees who were recorded as being on furlough and kept on payroll. The Scheme only covered employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution of three per cent) on subsidised furlough pay i.e. so not in respect of contributions above that level.**

- **Between the start of August until the end of October, the overall level of support that workers received whilst recorded as furloughed did not change. Workers, through the combined efforts of the Government and employers, continued to receive the same level of support, at 80% of their salary, up to £2,500. In August, employers were asked to pay employer national insurance and pension contributions. As of 1 September, employers had to contribute 10 per cent towards the 80 per cent furlough grant (resulting in the monthly cap on the furlough grant reducing to £2,187.50) and then from 1 October, employers had to contribute 20 per cent (resulting in the monthly cap on the furlough grant reducing to £1, 875); and they continued to pay National Insurance and pension contributions.**

- **From 1 November 2020 until 31 January 2021, employers can again apply to HMRC for a grant to cover 80 per cent of an employee’s regular wage, for hours not worked,**

up to a maximum of £2,500 per month. They no longer need to contribute towards the 80%, but they are fully responsible for the cost of employer National Insurance contributions and pension contributions for furloughed employees during this time. The employer no longer needs to furlough an employee for a minimum period, but the furlough claim itself must cover a minimum of seven-day period (this is explained further below). The Government proposes to review the level of Government contribution in January 2021 to determine whether the economic circumstances are such that employers should be asked to contribute more after 31 January 2021.

- **Since 1 July, employers have been able to operate "flexible furlough" – e.g. have an employee work two days a week and remain on furlough for the rest of week. Employers must agree such arrangements with their employee and confirm that agreement to the employee in writing. The agreement can provide for any number of part-time hours and any work pattern. Employers will have to pay employees for the hours they work and make the appropriate employer national insurance and pension contributions for those hours. From 1 November, the government will pay 80 per cent of wages up to a cap of £2,500 for the hours the employee does not work. Employers can only claim for hours not worked and they must report hours worked, as well as, the usual hours an employer would have worked during the claim period.**

- **To claim under the Scheme the employers must now report for a minimum period of seven consecutive calendar days. For example, if an employee normally works 9am to 5pm Monday to Friday, their employer would have to show usual hours worked from the Monday to the Sunday as five days at seven hours a day (assuming they get one hour for lunch) and then, if the employee's furloughed hours were to be Monday and Thursday 9am to 5pm, the employer would show the comparison of furloughed hours worked from the Monday to Sunday as two days at seven hours a day. The HMRC would then calculate the grant as 80 per cent of pay for the Tuesday, Wednesday and Friday.**

- **From 1 July to 31 October, the Scheme was only available to employers who had previously used the Scheme and in respect of employees they had previously furloughed at any time in the period between 1 March and 30 June. This meant that the final date by which an employer could furlough an employee for the first time was 10 June, in order for the original three-week minimum furlough period to be completed by 30 June (there were some exemptions to this rule for those returning from statutory parental leave, reservists and TUPE transfers – see "Which employees will be covered by the Scheme" below for more information). However, for claims from 1 November, the employer does not have to have used the scheme before and the employee does not have to have been furloughed before; the only requirement is that the employer must have made a PAYE RTI submission to HMRC between 20**

March 2020 and 30 October 2020, notifying a payment of earnings for the employee being claimed for.

- **The Scheme covers any employer with a UK payroll including businesses, charities and recruitment agencies. The guidance notes that, if an organisation has staff costs that are publically funded, then the organisation should continue to use this money to pay staff rather than using furlough. However, the Scheme is still open to organisations who are not fully publicly funded.**

  Prior to 1 November the Scheme covered employees who were on an employer's payroll on or before 19 March 2020 and who were notified to HMRC on an RTI submission on or before 19 March 2020. It did not cover any employees who started working with their employer after 19 March 2020 or who were not notified to HMRC on an RTI submission on or before 19 March 2020. As noted above, from 1 November, the Scheme will cover all employees who were on the employer's PAYE payroll before 23:59 30 October 2020 and in respect of whom the employer must have made a PAYE RTI submission to HMRC between 20 March 2020 and 30 October 2020, notifying a payment of earnings for the employee being claimed for.

- **For all claims now and since 1 July, there is no minimum furlough period and employees can be rotated on and off furlough. Employers will need to make claims that report a seven day period but the employee does not have to be furloughed for whole seven days. The only exception to this is that an employer can claim for a period of less than seven days if they are claiming for the first few days or the last few days in a month, as claims cannot straddle calendar months (see below).**

- **For all claims now and since 1 July, claim periods will no longer be able to overlap months and employers who previously submitted claims with periods that overlapped calendar months will no longer be able to do this (this is to allow for any changes to the Government contribution amounts).**

- **For periods between 1 July and 31 October 2020 (the original end date for the Scheme), any claims must have been submitted by 30 November 2020. Claims relating to November 2020 must be made by 11:59pm on 14 December 2020. Claims relating to each subsequent month should be submitted by day 14 of the following month, a shorter claim window than under the original Scheme. Where the 14th of a month falls on a weekend or bank holiday, claims should be submitted on the next working day. The Fourth Direction confirms that the relevant deadlines in respect of claim periods up to and including January 2021 are as follows: 14 January 2021 in relation to December 2020 and 15 February 2021 in relation to January 2021.**

- **The 10 November guidance removed the limit on the number of employees an employer can claim for. Employers can now claim for as many employees as they have on furlough, but all employees must be included in *one* claim. For example, if an employer has 12 employees on furlough from 01 December to 07 December, one claim form for all 12 employees would required to be submitted for this 7 day period. Where the employer is claiming in respect of 100 or more furloughed employees, they should use HMRC's templates for claims on or after 1 July 2020 or risk having their claim rejected.**

- **Until the end of June, employees who were furloughed could not undertake work for, or on behalf of, their employer or any linked or associated organisation i.e. such as a group company. Since July, as noted above, employees can return to work on a part-time basis and still be covered by the Scheme. Employees who are flexibly furloughed may undertake work during times when they are scheduled to be working. However, when the employee is not scheduled to be working, they remain subject to the same limitations as all furloughed employees meaning they cannot undertake work for, or on behalf of, their employer or any linked or associated organisation. Employers will need to continue to take care to ensure employees do not work during any furlough period e.g. responding to emails as this will prejudice the furlough claim.**

- **A furloughed employee can take part in volunteer work during the hours that they are furloughed and also undertake studying and training to improve an employee's effectiveness in the employer's business or the performance of the employer's business, provided the volunteer work or training does not provide services to or generate revenue for, or on behalf of, their employer or a linked or associated organisation. However, employers should note that employees are entitled to be paid at least national minimum wage for training hours. In most cases, the furlough payment of 80 per cent of an employee's regular wage, up to the value of £2,500, will be sufficient to cover national minimum wage for any training hours. However, where the time spent training attracts a minimum wage entitlement in excess of the furlough payment, employers will need to pay the additional wages.**

- **Employers can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance. If your employee has more than one employer, they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.**

- **Employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of the workforce during the period which they are recorded as being on furlough without breaking**

furlough. However in doing this, they must not provide services to or generate revenue for, or on behalf of their employer or a linked or associated organisation. Certain work by directors and some pension scheme trustees can also be undertaken during the period which they are recorded as being on furlough without breaking furlough.

- **Employers can choose to "top up" the salary of those employees on furlough, but are not obliged to do so under the terms of the Scheme.**

- **Currently, an employee on furlough can be paid less than the national minimum wage without legal risk as long as they do not undertake any training for their employer during furlough. If employees are working from 1 July, they should be paid their usual pay for hours worked.**

- **It is not currently a condition of the grant under the Scheme that employers have an overall freeze on redundancies – furloughed (or other employees) can still be made redundant subject to existing employment law.**

- **From 1 December 2020, the HMRC will publish information about employers who claim for periods starting on or after 1 December 2020. This is a new feature of the Scheme. The Government has stated that this is in an effort to be more transparent and to deter fraudulent claims. The information will be published on Gov.UK and will include the following: the employer name, an indication of the value of the claim and the company's reference number. Further, the HMRC will also be making available to furloughed employees information on the claims made on their behalf. For claim periods start on or after 1 December 2020, this will be available on their Personal Tax Account on Gov. UK. The HMRC will not publish details of employers claiming through the Scheme if the employer can show that publishing their details would result in a serious risk of violence or intimidation to certain individuals, or individuals living with them. Employers would have to provide evidence of the risk of violence by presenting any of the following: a police incident number, documentary evidence of a threat or attack and evidence of possible disruption or targeting. There are no details yet on how to request that the HMRC do not publish an employer's details - the Government has said this will be published prior to 1 December 2020.**

Which employees will be covered by the Scheme?

Employers can furlough staff under the Scheme if they cannot maintain their current workforce because their operations have been severely affected by COVID-19.

It would seem, when the Scheme guidance and directions are read as a whole, that the Government is keen to give as many employees cover as possible and so, in our view, as long as employers are genuinely trying to protect their workforce from wage loss and potential redundancy, then they would likely be able to demonstrate that they had to furlough employees and be covered by the scheme. Employers should test their rationale for furloughing against the following statements of purpose from the guidance and Direction:

"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 to cover a portion of their usual monthly wage costs where you record them as being on furlough."

"The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees who are within the scope of the Scheme arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."

The directions also provide that an employee is a furloughed employee if the instruction to cease work is given *"by reason of the circumstances arising as a consequence of the coronavirus or coronavirus disease."*

Employers can furlough part or all of their workforce at any given time (subject to the other terms of the Scheme). The guidance doesn't provide any information on selection process where part of the workforce is to be furloughed but does state equality and discrimination laws will apply in the usual way.

SHIELDING EMPLOYEES

Those who were shielding in line with public health guidance **and** those who needed to stay at home with someone who was shielding were covered by the Scheme. It appeared that the Government's intention was to provide a furlough mechanism to give these individuals protection from potential dismissal in circumstances where they cannot attend work (because the Government tells them not to) and they cannot do their work from home.

So an employer might have had two justifications for furloughing shielding employees: the first by reason of their status (so if they can't work from home then they could be furloughed); and

the second being the “standard” furlough situation where you furloughed them like any other employee because of the effect COVID-19 has had on your business.

The Government guidance changed from 1 August when shielding employees who could not work from home could return to the workplace as long as the workplace is safe for the employee (the relevant Scottish and English government guidance on return to work should be considered here as well as the shielding guidance). That position changed with the recent lockdown in England and Wales.

It is now envisaged that a more tailored category of individuals will be recommended to shield. As far as furlough is concerned the Scheme guidance confirms that shielding employees are still eligible for Scheme grants and may be furloughed (assuming all other employee eligibility criteria are met). Consequently, some employees may agree to move onto (or remain on) furlough rather than receiving SSP (see below).

A shielding employee is deemed incapacitated for the purposes of the SSP regulations when shielding in accordance with public health guidance. In the event that an employer chooses not to furlough a shielding employee, and the employee is unable to work from home, the employee will be entitled to SSP (and potentially company sick pay depending on the scheme rules) unless the employer has other suitable policies in place which the shielding employee can utilise e.g. special paid leave.

CARING RESPONSIBILITIES

The guidance makes it clear that the Scheme covers employees who are unable to work because they have caring responsibilities resulting from COVID-19 . The example given is employees who need to look after children (most likely because the child is unable to attend school/nursey as they are clinically extremely vulnerable or school/nursery closures). Our reading of it is that this would be a second example of “status furlough”, comparable to the shielding status furlough and so the same analysis would apply as set out above (i.e. the employer may have two reasons to furlough such employees).

APPRENTICES

The guidance is clear that apprentices are covered by the Scheme just like other employees. The guidance states that:

- **apprentices can continue to be trained during furlough as long as they do not provide services or generate revenue for their employer during any time on furlough;**

- **if apprentices do undertake training whilst on furlough, they need to be paid the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) as appropriate for all the time they spend training. The employer would need to cover any shortfall between the amount claimed under the Scheme and the relevant wage threshold.**

- **The Government have also published specific guidance for apprentices on furlough that should be considered.**

EMPLOYEES ON UNPAID LEAVE

The Fourth Direction states that no claim can be made in respect of any day on which an employee is on unpaid leave or sabbatical between 1 November 2020 and 31 January 2021.

STATUTORY LEAVE

An employee on maternity leave who is furloughed and qualifies for statutory maternity pay will retain their entitlement to SMP. The same applies for paternity, adoption, shared parental pay and parental bereavement pay. When calculating such pay entitlements, an employer may need to calculate an employee's average weekly earnings differently than normal if the employee was furloughed and started leave on or after 25 April 2020. There are new regulations to help employers calculate pay entitlement in the circumstances which provide that the statutory pay that the employee receives should not be affected by their period of furlough.

If an employer offers enhanced maternity pay, the enhanced pay is treated as wages for the purposes of the grant and a claim can be submitted in respect of these costs (subject to the other terms of the Scheme).

In addition to enhanced maternity pay, claims can be made under the Scheme for enhanced adoption, shared parental, paternity pay and parental bereavement pay No claim can be made for the statutory amounts payable.

For claim periods ending on or before 31 October, there is an exception to the rule that employees had to be furloughed by 10 June in order to qualify for the Scheme. Parents returning from maternity leave, paternity leave, adoption leave, shared parental leave and parental bereavement leave after 10 June can be furloughed provided that the returner works for an employer who has previously furloughed employees. When calculating the maximum number of employees an employer can claim for, the number of employees the employer is furloughing for the first time due to them returning from parental leave should be added to any previous maximum.

If an employee returns from maternity, share paternal, adoption, paternity or parental bereavement leave on or after 1 November, and the employer is claiming for a period after 1 November, then the normal Scheme rules apply.

FIXED TERM AND ZERO HOURS EMPLOYEES

Fixed term and zero hours employees can be furloughed. The extension or renewal of fixed term contracts do not create a barrier to a successful claim under the Scheme. An employee on a fixed term contract that ended could be re-employed, furloughed and claimed for under the Scheme, provided they would have been furloughed if they had remained in employment) if either:

- **their contract expired on or after 28 February 2020 and an RTI payment submission for the employee was notified to HMRC on or before 28 February 2020; or**
- **their contract expired on or after 19 March 2020 and an RTI payment submission for the employee was notified to HMRC on or before 19 March 2020; or**
- **their contract expired on or after 23 September 2020 and an RTI payment submission for the employee was notified to HMRC between 20 March 2020 and 30 October 2020.**

RE-EMPLOYED INDIVIDUALS

In the earlier Directions of the Scheme, any employees:-

- who were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer on or after 28 February; and
- who were employed on 19 March 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 19 March) and were made redundant or stopped working for the employer on or after 19 March 2020;

  could be re-employed by their employer, put on furlough and a claim for their wages made through the Scheme from the date they were furloughed, even if there were not re-employed until after 19 March (provided they would have been furloughed if they had remained in employment and they were furloughed for a full three week consecutive period between 1 March and 30 June).

Under the Fourth Direction any employees who were made redundant or stopped working for their employer on or after 23 September 2020 can be re-employed by their employer and put on furlough but only if the employee was employed by their employer on 23 September and the employer made an RTI submission to HMRC for said employee between 20 March 2020 and 30 October 2020.

If an employee had multiple employers over the past year, has only worked for one of them at any one time, and is being furloughed by their current employer, their former employer/s should not have re-employed them, placed them on furlough and claimed for their wages through the scheme.

We consider that employers also needed to ensure that any such arrangements were consistent with the purpose of the Scheme and be prepared to demonstrate that such individuals would have been furloughed had they not left.

TUPE TRANSFER

Employers were eligible to claim under the Scheme for employees of a previous business who transferred after 28 February 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.

Where a group of companies had multiple PAYE schemes and there was a transfer of all employees from these schemes into a new consolidated PAYE scheme after 28 February 2020, the new scheme could furlough those employees and claim under the Scheme (as was detailed in the government guidance).

Note that the 28 February date reflected earlier versions of the government guidance issued. The guidance was then updated on 15 April to change the date from 28 February to 19 March. The First Direction also referred to 19 March. However, on 30 April, the government guidance was updated again and the date was changed back to 28 February. The Second Direction was also updated to refer to 28 February to provide welcome clarity on this point.

In addition, a new employer (the transferee under the TUPE rules) was also eligible to claim under the Scheme in respect of the employees of a previous business transferred after 10 June 2020 as long as the transferring employees were furloughed by the transferor (their old employer) under the Scheme prior to 30 June. The number of these previously-furloughed, transferring employees was added to the overall cap that the employer could claim for in any given claim period, similar to those returning from certain statutory leave and reservists.

The government guidance previously provided that this was subject to the maximum cap the previous employer was subject to. However, this was not included in the Third Direction and the Treasury direction took precedence over the guidance.

Under the Fourth Direction, a new employer is still eligible to claim, after 1 November, in respect of the employees of a previous business transferred if the TUPE or PAYE business succession rules apply. The employees being claimed for should have been transferred from their old employer to their new employer on or after 1 September 2020. They should have been employed by either their old employer or new employer on 30 October 2020. Finally, there should have been a RTI payment submission made to HMRC, by their old or new employer between 20 March and 30 October. There is no cap to the number of employees that can be furloughed. Neither employer has to have used the furlough scheme previously.

There has been some commentary that the wording of the directions do not cover TUPE transfers occurring on a service provision change as the wording refers to the transfer of *"a business or undertaking (or part thereof)".* However, we have heard that HMRC have unofficially confirmed that the Scheme applies to service provision changes. Nonetheless, employers should be aware of the risks in respect of any claim relating to a service provision change.

EMPLOYEES ON SICK LEAVE

The guidance provides that if employers want to furlough employees *for business reasons* and they are currently off sick, they *can* do so - the employee should then no longer receive sick pay and would be classified as a furloughed employee. Employers can claim back from both the Scheme and the SSP rebate scheme for the same employee but not for the same period of time. When an employee is on furlough, employers can only reclaim expenditure through the Scheme, and not the SSP rebate scheme.

EMPLOYEES WHO BECOME SICK WHILE ON FURLOUGH

Employees on furlough retain their statutory rights, including their right to SSP. Therefore, if the employee becomes ill, due to Coronavirus or any other cause, they must be paid at least SSP. This means it is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate.

So if the SSP rate is higher than 80 per cent of the employee's wage (furlough rate), then the employee should really be taken off furlough and put on SSP for the duration of their sickness.

Employers are required to pay SSP themselves, although if the illness is related to coronavirus they may qualify for a rebate of up to two weeks.

If the employee is better off on furlough than SSP, and the employer keeps the sick furloughed employee on the furlough rate, they will remain eligible to claim for these costs through the Scheme.

RESERVISTS

Reservists returning to their day job after completing a period of active duty will be able to be furloughed by their employer under the Scheme notwithstanding that they missed the original 10 June deadline as long as their employer has previously furloughed employees.

This section was not updated in the Fourth Direction, so it still refers to including them into caps and organisations having to have used furlough in the past etc. However, we believe this is an oversight, as all other employees can be added to furlough regardless of whether they have been furloughed previously and currently there are no caps on the number of employees an employer can furlough.

OTHER CATEGORIES

The guidance clarifies that foreign nationals can be furloughed. Grants under the Scheme are not counted as “access to public funds” for the purpose of any visa conditions, and employers can furlough employees on all categories of visa.

As well as employees, the grant can be claimed for any of the following groups if they are paid via PAYE:

- **office holders (including company directors)**
- **salaried members of Limited Liability Partnerships (LLPs)**
- **agency workers (including those employed by umbrella companies)**
- **limb (b) workers**
- **contingent workers in the public sector**
- **contractor with public sector engagements in scope of IR35 off-payroll working rules**

The guidance contains detailed information on each of these categories which should be considered carefully before claims are made. The directions also contain further information regarding some of these categories.

Which employees will not be covered by the Scheme?

The following employees will not be covered by the Scheme:

- **the Scheme is not intended for use for employees on short-term absences from work due to sickness. Short-term illness or self-isolation should not be a consideration in deciding whether to furlough an employee. If an employee is on sick leave or self-isolating as a result of Coronavirus, they'll be able to get statutory sick pay (SSP), subject to eligibility, unless their employer decides to furlough employees for business reasons;**
- **employees who are currently on unpaid leave;**
- **those employees who are able to do their job from home even if their normal place of work has been shutdown;**
- **those employees who reduced their hours/pay but are still working (it is clear that employees must not work for their employers or any linked or associated organisation during the furlough period, so only those who were performing no work were caught prior to 1 July). However, for claim periods starting after 1 July, employers can allow previously furloughed employees to work for any amount of time and any shift pattern, while still being able to claim the Scheme grant for the hours not worked; and**
- **those employees who are otherwise able to attend work and whose employers' operations have not been severely affected by COVID-19.**

Employers will need to address the question of what they will do with new starts, who are not caught by the Scheme. New starts may be eligible to apply for universal credit.

Which employers can claim under the Scheme?

The following section of the guidance sets out the eligibility criterion:

Employers must have:

- **created and started a PAYE payroll Scheme on or before 30 October 2020**
- **enrolled for PAYE online - this can take up to 10 days**

- **a UK bank account**

Any entity with a UK payroll can apply, including businesses, charities, recruitment agencies and public authorities.

Note, however, that the guidance states that if an employer has staff costs that are publicly funded (even if they're not in the public sector), an employer should use that money to continue paying staff, and not furlough their staff. Organisations can use the scheme if they are not fully funded by public grants and they should contact their sponsor department or respective administration for further guidance.

Administrators can also furlough and claim for employees by their previous employer although the Scheme guidance states that:

"…we would expect an administrator would only access the Scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business."

When does furlough start?

Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status.

It has been confirmed that employees can come on and off furlough multiple times, but that for any claims under the Scheme where a period of furlough commenced before 1 July, the minimum furlough period was three weeks. From 1 July, there is no minimum furlough period.

As above, employers will need to make claims that report a minimum seven day period but the employee does not have to be furloughed for whole seven days. The only exception to this is that an employer can claim for a period of less than seven days if they are claiming for the first few days or the last few days in a month, as claims cannot straddle calendar months.

What can we claim for and how do we claim under the Scheme?

The Scheme is operated by HMRC. HMRC have produced a step-by-step guide for employers on how to claim under the Scheme to which employers should refer.

Employers wishing to make a claim will need to calculate the amount they are claiming using the Government guidance available to assist them. The Government has also published a guidance note on steps to take before calculating your claim using the Scheme, guidance on calculating how much you can claim through the Scheme and examples to help you calculate your employee's wages. Employers should use these documents, as well as the Fourth Direction, to help them to claim under the Scheme. The documents should be examined carefully with your payroll team to ensure calculations are correct.

For full time and part time salaried staff the employee's actual salary before tax in their last pay period prior to 30 October 2020 should be used to calculate the amount to be paid.

For employees whose pay varies:

a) if the employee has been employed for a full 12 months employers can claim the higher of (i) the same month's earnings from the previous year or (ii) average monthly earnings from the 2019-20 tax year: or
b) if the employee has been employed for less than 12 months employers can claim for an average of their monthly earnings since they started work.

The directions have very detailed provisions regarding how the reference pay for both salaried and variable pay staff should be calculated. Careful consideration will need to be given to the relevant direction in order for an employer to establish which of the categories an employee falls into. The Government calculation guidance referred to above should also be used.

Employers can claim for any regular payments they are obliged to pay their employees. The guidance states that this includes regular wages, piece rate payments and non-discretionary overtime, fees and commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. The directions also contain very detailed information on what payments are regarded as regular payments and employers should consider this fully before submitting claims under the Scheme.

Employer pension contributions cannot be claimed for.

The following guidance regarding benefits in kind and salary sacrifice is given:

- **The reference salary should not include the cost of non-monetary benefits provided to employees, including benefits in kind (such as a company car). Similarly, benefits provided through salary sacrifice Schemes (including pension contributions) that reduce an employee's taxable pay should also not be included in the reference salary. All the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme. Where the employer provides benefits to furloughed employees, this should be in addition to the wages that must be paid under the terms of the Job Retention Scheme. Notably, the Government has confirmed that COVID-19 counts as a "life event" enabling an employee to switch out of salary sacrifice should they so wish (subject to the relevant contractual change being made).**

Finally, it has been confirmed that both the apprenticeship levy and student loans should continue to be paid as usual and these payments cannot be claimed under the Scheme.

Up to 31 July, employers could claim for the amount of employer National Insurance contributions and minimum automatic enrolment employer pension contributions they were entitled to claim based on the furlough pay **in addition** to the 80 per cent of wages. From 1 August, employers have no longer been able to claim for National Insurance contributions or minimum automatic enrolment employer pension contributions.

Since 1 July, if an employer had agreed with their employee that they could work part-time, an employer would need to pay the employee for the hours worked and pay the normal National Insurance contributions and pension contributions for the hours worked. This remains the case.

An employer will need to work out how many hours each employee usually works and the number of working hours and furloughed hours for each employee. There are different methods of calculation depending on whether the employee has fixed or variable hours and the guidance referred to above provides examples to help employers with their calculations and the Fourth Direction provides detailed information on how to calculate the amount to claim. Employers need to consider the various Government guidance documents and the Fourth Direction carefully before submitting a claim. Employers should allow time to do these calculations if they have a large number of furloughed employees. Another option for an employer may be to consider rotating employees on and off furlough as that could assist to reduce complex calculations.

In addition to the amount they are claiming employers will have to be registered for PAYE online and **provide the following information to HMRC:**

- **PAYE reference number;**

- **number of employees being furloughed;**
- **names, national insurance numbers and payroll/employee number of the furloughed employees;**
- **employer's self assessment unique taxpayer reference or corporation tax unique taxpayer reference or company registration number;**
- **the claim period (start and end date);**
- **amount claimed;**
- **bank account number, sort code and billing address;**
- **employer contact name; and**
- **phone number.**

If you're claiming for employees who are flexibly furloughed, you'll also need to submit:

- **the number of usual hours your employee would work in the claim period**
- **the number of hours your employee has or will work in the claim period**

You will also need to keep a record of the number of furloughed hours your employee has been furloughed in the claim period.

The guidance contains details on how the required employee information should be submitted to HMRC (depending on whether there are fewer or more than 100 furloughed employees).

Employers cannot submit their claim more than 14 days before their claim period end date. Employers do not have to wait until the end date of the claim period for a previous claim before making they make the next claim. The claim can be made more than 14 days in advance of the pay date.

If an employer is eligible for the grant HMRC will pay the amount claimed via a BACS payment. Employers are then required to pay the employee the full grant received.

Employers will need to do calculations themselves before they submit their claims. An employer should retain all records and calculations in respect of their claims. Employers must keep a copy of all records for 6 years, including:

- **the amount claimed and claim period for each employee**

- **the claim reference number**
- **calculations in case HMRC need more information about the claim**
- **for employees flexibly furloughed, usual hours worked including any calculations that were required**
- **for employees flexibly furloughed, actual hours worked**

Employers must tell their employees that they have made a claim and that they do not need to take any more action.When making the claim, employers are advised to use the information contained in their payroll (either shortly before or during their payroll run).

30 November is the last day that an employer can submit claims for periods ending on or before 31 October. The first time an employer was able to make claims for days in November was 11 November. The Government advises that an employer should not claim until it is sure of the exact number of hours an employee will have worked during the claim period. There is, however, a mechanism under which a claim can be corrected.

Since 1 July, employers have not been able to make claims that cross calendar months and the minimum claim period is seven calendar days (subject an exception at the start and end of a month – called “Orphan Periods”). A claim in relation to an Orphan Period can only be made where the employer also makes a claim in respect of that employee for a claim period ending immediately before that Orphan Period. This could create issues for employers who are rotating employees depending on their claim period and employers will need to choose their claim period wisely to avoid such issues. This remains the position for the Scheme post 1 November.

What if an employer gets the calculations wrong?

HMRC will have the right to retrospectively audit any claims that are made and have stated that they will carry out fraud checks before processing the payments. Payments may be withheld or need to be repaid in full to HMRC if the claim is based on dishonest or inaccurate information or found to be fraudulent. There is an online portal for employees and members of the public to report any suspected cases of fraud. As mentioned above, the HMRC will now publish information on employers claiming furlough and information to the employees on claims made on their behalf, in an effort to reduce fraudulent claims and maintain transparency.

The directions are at times very difficult to understand. This is particularly concerning for employers because new legislation provides that employers may face an additional income tax

liability if they make mistakes in claiming grants under the Scheme (the additional liability being equal to the amount the employer was not entitled to claim). The legislation also provides that HMRC will have the power to impose financial penalties on employers who make an incorrect claim under the Scheme although employers will have the opportunity to notify HMRC of a mistake within a prescribed self-reporting period. If employer makes an error in their claim and receives too much, they must pay this back to HMRC by either confirming the error as part of their next online claim under the Scheme (which will be reduced) or by contacting HMRC (if no further claim is being submitted). If an employer has over claimed a grant and not repaid it, they must notify HMRC by the latest of either:

- **90 days after the date the relevant grant was received;**
- **90 days after the date the relevant grant was received that they were not longer entitled to keep because their circumstances changed (e.g. if an employee is no longer employed but the employer continued to receive the Scheme grant for them after they left); or**
- **20 October 2020 (the guidance has not provided an update date).**

Provided an employer complies with such requirements, they will not be charged a penalty. HMRC have confirmed that they will not be actively looking for innocent errors in their compliance approach. However, HMRC will be addressing deliberate non-compliance and if an employer knew that they were not entitled to a grant when they received it or knew when they had stopped being entitled to the grant because of a change of circumstances and didn't inform HMRC in the notification period then that failure will be treated as deliberate and concealed. This means a penalty of up to 100% could be charged on the amount of the grant that the employer was not entitled to receive or keep and had not been repaid within the relevant time period.

If employers have not claimed enough, government guidance confirms how they can notify HMRC. Underclaims relating to the period up to 30 June 2020 cannot be made after 31 July 2020. Further information regarding what to do if an employer has claimed too much, as well as information concerning penalties can be found here. Information on what to do if an employer has claimed too little can be found here.

The new legislation is in addition to HMRC's existing fraud and criminal investigation powers.

What rights do furloughed employees have?

Placing an employee on furlough or flexible furlough will be a change to their contract of employment. The Government's guidance is clear that employers should make any changes to the employee's contract by agreement and that it may be necessary to carry out collective consultation where more than 20 employees are involved. Our understanding is that there is no change to the current triggers for collective consultation and that this obligation would only be engaged where an employer contemplates 20 or more dismissals by reason of redundancy (including dismissal and re-engagement where consent to changes to terms and conditions are not obtained).

The Government's guidance states that employees who have been furloughed have the same rights as they did previously including SSP entitlement, maternity rights, other parental rights, rights against unfair dismissal and the right to a redundancy payment if they are made redundant.

A new law was introduced on 31 July to ensure that furloughed employees will not be short changed if they are dismissed. The new regulations specify how to calculate a week's pay for furloughed employees for the purpose of various statutory payments including notice pay, redundancy pay and compensation for unfair dismissal. Broadly speaking, they provide that, for the purpose of calculating a week's pay, the sums should be based on an employee's normal wages and not their reduced furlough rate. The regulations also apply to certain other statutory entitlements connected to the termination of employment including the calculation of any statutory remuneration for time off to look for employment or arrange training, any statutory sum resulting from a failure to provide a written statement of reasons for dismissal and any statutory sum resulting from a failure to comply with an order for reinstatement or re-engagement. They also set out how a week's pay is to be calculated for the purpose of deciding whether an employee is taken to be on short-time for statutory purposes. The regulations are complex and employers should ensure they are given careful consideration when calculating the aforementioned statutory payments.

Furloughed employees who become ill must be paid at least SSP. It is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate. Employers with enhanced company sick pay provisions should think carefully about this point and may wish to consider seeking agreement to disapply these during furlough, particularly if they are not topping up furlough pay so that it is equal to or more than any company sick pay entitlement. If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. The Statutory Payments Manual for SSP has been updated to make it clear that employees on furlough do not qualify for SSP. Employers are required to pay SSP themselves, although may qualify for a rebate for up to two

weeks of SSP. If employers keep the sick furloughed employee on the furloughed rate, it seem that they remain eligible to claim for these costs through the Scheme.

The Government guidance confirms that an employee will continue to accrue holiday entitlement during a period of furlough and employees can take holidays whilst on furlough. This means that taking holidays during furlough will not break the furlough period. Employees will need to be paid their normal entitlement to holiday pay during holidays i.e. the employer will need to top up the grant amount. The guidance also provides that employers will have the flexibility to restrict when leave can be taken if there is a business need both during the furlough period and the recovery period. The guidance does not confirm whether employers can direct employees to take holidays during the furlough period in the normal way. There is some uncertainty whether a direction to staff to take holidays during a lockdown period, when their activities are severely restricted, is compliant with the European legislation requiring annual leave to provide true rest and relaxation away from work. As such, employers should seek advice before deciding whether to direct employees to take holiday during furlough. It should also be noted that the guidance states that 'during this unprecedented time, we are keeping the policy on holiday pay during furlough under review'. In respect of flexible furlough, the Government guidance confirms that any holiday during the relevant claim period should be counted as furloughed hours rather than working hours. Employers should also not place employees on furlough for a period simply because they are on holiday at that time. It is likely that this would be regarded as an abuse of the scheme.

An employee who has been furloughed by their employer can earn money in a second job. An employee's furlough status with their employer is not linked to or contingent upon any other employment arrangements they have, albeit their employer may have a contractual restriction in place which would prevent the employee having a second job.

What are the payment timescales for the grants?

The Scheme opened for applications on 20 April with the first payments being made by around the end of April. Payments are usually made 6 days after the claim is made. Some employers may have to decide whether to pay furloughed employees the percentage of their salary the employer will claim for until the grant is received (and claim for reimbursement) or place employees on furlough on an unpaid basis until the grant is received (on the basis that any back-pay received would be passed onto the employees as soon as it is received). It's important to note that reducing payments due to employees pending receipt of funding or placing employees on a period of unpaid furlough pending receipt of the funding would be a change to

the employees' contract and the usual principles on changes to terms and conditions would apply.

How do we communicate this to employees?

Communicating this change to employees is the area in which the highest legal risks are likely to arise. Changing the status of employees' remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation.

The usual principles of changes to terms and conditions will apply to placing employees on furlough. We don't anticipate many employees will push back on this designation of furlough status, given it will be far more attractive than the alternative options. However, from 1 November if an employer wishes to flexibly furlough an employee, we envisage that more employees may push back on the basis that staying at home may be the more attractive option to them for a number of reasons. If an employee who has been furloughed prior to 1 November is to remain on furlough doing no work at all, we don't believe that a new agreement needs to be entered into provided that the terms of the furlough agreement are clear that the furlough may continue beyond 31 October.

If you have recently agreed JSS terms with your employees it would be advisable to put this on hold and have a new furlough template signed instead.

Where consistent with employment law, any flexible furlough or furlough agreement made retrospectively that has effect from 1 November 2020 will be valid for the purposes of a Scheme claim as long as it is made according to the conditions. Only retrospective agreements put in place up to and including the 13 November 2020 may be relied on for the purposes of a claim.

The Fourth Direction applies to all claims from 1 November and states that for an employee to be flexibly furloughed (which includes any employee who does not work at all):

The employer and employee must have agreed that the employee:

- **will do no work in relation to their employment; or**
- **will not work for the full amount of the employee's usual hours in relation to their employment.**

The agreement must:

- **State the main terms and conditions on which the employee will do no work in relation to their employment; or will not work for the full amount of the employee's usual hours in relation to their employment;**
- **Be made before the beginning of the period to which the claim relates (but may subsequently be varied to reflect any variation agreed between the employer and the employee during the period to which the claim relates);**
- **Be incorporated (expressly or impliedly) in the employee's contract;**
- **Be made in writing, or confirmed in writing by the employer (which can be by electronic means such as email); and**
- **Be retained by the employer for 5 years' after the agreement was made.**

Collective agreement reached between an employer and a trade union is also acceptable for these purposes.

The wording which provides that the agreement must be made before the beginning of the period to which the claim relates is concerning. It suggests that a retrospective agreement will not suffice to claim under the Scheme and could cause issues for employers relying on implied consent. Employers should ensure agreement is reached before the employee is flexibly furloughed. The agreement can be varied during the claim period.

Employers must therefore keep a record of the written communication for 5 years (note that records for claim purposes must be retained for 6 years as noted above). If no such written notification is issued an employer will not be eligible to receive the grant.

The Government guidance provides that the agreement must be consistent with employment, equality and discrimination laws which essentially means that employers will need to be careful to act in a manner consistent with their existing express and implied obligations to employees when seeking to implement the Scheme and flexible furlough. Any union obligations will also need to be borne in mind. However it is worth noting that the Scheme has been endorsed by a number of trade unions and was created in consultation with the TUC.

One key point to note is that the language you use in staff communications will need to be extremely carefully crafted so as to hinge any entitlement afforded to employees upon acceptance of your claim under the Scheme, so that no contractual entitlement is created inadvertently by way of general promises by an employer to keep people employed and pay them a certain amount of their wages for a specific period of time.

What should we do next?

If you are considering placing employees on furlough or flexible furlough under the Scheme the next steps will be:

- **identifying which of your employees are to be furloughed or flexibly furloughed (and can be flexibly furloughed under the terms of the Scheme);**
- **if required, considering how you will select employees for furloughed or flexible furlough;**
- **deciding whether to take other steps to reduce your costs pending receipt of the grant;**
- **implementing the relevant changes to a furloughed or flexibly furloughed employee's contract of employment (mindful of the usual legal principles);**
- **issuing written confirmation of furloughed or flexible furlough to employees who are to be placed on furloughed or flexible furlough and obtaining employees agreement that they will cease all work during furlough hours and agree to return to work during any non-furloughed hours;**
- **calculating the amount you are going to claim ; and**
- **submitting the information required to claim the grant to HMRC.**

Job Retention Bonus

The purpose of the Job Retention Bonus was to encourage employers to keep people in employment until the end of January 2021, with bonuses to be paid in February 2021. However, as the Scheme has been extended, the policy intent of the Job Retention Bonus no longer applies.

Therefore, the Government have withdrawn the Bonus and it will no longer be paid in February. The Government have stated that a retention incentive will be re-deployed at the appropriate time.

How can we help?

We can help you to put the steps in place to successfully implement furlough and provide you with the documentation you need.

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Across the firm, we have a team of specialists dedicated to provide up the minute advice on COVID-19. For more details, click here.

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