ADDLESHAW GODDARD

NEW FURLOUGH RULES UNDER VARIOUS GUIDANCE PUBLISHED ON 12 JUNE 2020

To begin with we recommend at least the following five sources of information for employers to take note of when considering the revised rules on furlough from 1 July.

SOURCES OF INFORMATION

1. Policy Paper: Changes to the Coronavirus Job Retention Scheme
2. Guidance for employers: Check if you can claim for your employees' wages through the Coronavirus Job Retention Scheme
3. Guidance on eligibility: Check which employees you can put on furlough to use the Coronavirus Job Retention Scheme
4. Guidance on preparing claims: Steps to take before calculating your claim using the Coronavirus Job Retention Scheme
5. Guidance on calculating claims: Calculate how much you can claim using the Coronavirus Job Retention Scheme
6. First Treasury Direction
7. Second Treasury Direction

SECTION A: FURLOUGH RULES FROM 1 JULY 2020

ELIGIBILITY FROM 1 JULY 2020

- The furlough scheme is closed to new entrants from 1 July 2020. For employees to be furloughed from 1 July, they must have already been furloughed for a minimum of 3 consecutive weeks between 1 March and 30 June.

- One exception is those employees who are returning from maternity leave, paternity leave, shared parental leave, adoption leave or parental bereavement leave. Employers can place these employees on furlough leave for the first time, so long as they started their leave before 10 June and returned after 10 June.

- There will be a limit to the number of employees who can be furloughed for any one claim period. The maximum number of employees who have previously been furloughed in any given claim period prior to 1 July will be the limit for any future claim. As an example, if an employer can bring an employee back to work 2 days a week from the week commencing Monday 6 July, then the claim period must be for 7 calendar days from 6 July to 12 July. Note that the claim period does not have to be from Monday to Sunday. But if the claim period crosses over to another month, then the claim period need not be for one week.

- From 1 July, employers cannot make claims that cross calendar months. If an employer's claim period crosses over from June into July, then the employer will have to make two separate claims for June and July.

- However, employers will have until 31 July to claim for periods up to 30 June.

FLEXIBLE FURLOUGHING FROM 1 JULY 2020

- Employers will be able to bring back employees to work for any amount of time and for any shift pattern. To be able to do this, the employer will need to obtain a fresh consent.
- Although the employer can flexibly furlough employees for any amount of time or shift, the period that employers can claim for must be for a minimum of 7 calendar days unless you are claiming for the first few days or the last few days in a month.
- Employers should note that any employee who is being placed on furlough before 1 July must still be furloughed for the minimum of 3 consecutive weeks, even if that period cuts across to July. In this instance, two separate claims must be made for June and July.
- Employers will need to record the employee's usual hours and record the actual hours worked as well as their furloughed hours for each claim period.
- Wage caps are proportional to the hours an employee is furloughed. For example, if an employee is placed on furlough for 60% of their usual hours, then that employee is entitled to 60% of the £2,500 cap.

MAKING FLEXIBLE FURLOUGH CLAIMS

- There are three main steps employers will need to take when making a flexible furlough claim:
    - Decide a claim period;
    - Calculate an employee's worked hours and furloughed hours; and
    - Calculate the employee's reference salary for furloughed hours.
- Claim period
    - Claim periods can be a minimum of 7 days and a maximum of one month but employers should choose a claim period that matches the payroll.
    - Claims can be made 14 days before the end of a claim period but should not be made until employers know exactly how many hours an employee will work.
    - Claim periods cannot run over into a new month which means two claims will have to be made in such event and here claim periods can be shorter than 7 days.
- Calculating worked hours and furloughed hours
    - The method for calculating 'usual hours' is set out in the Guidance for preparing claims (see above).
    - Note that if an employee has fixed hours but is entitled to contractual overtime payment, then the employee is deemed to work varied hours for which calculation is different from those on purely fixed hours.
- Calculating the employee's reference salary
    - Refer to the Guidance on preparing claims and Guidance on calculating claims for this.
- Reduction in government grant from August
    - There will be no change to the government's contribution level in June or July but this will change from August. From 1 August until the end of October, it is the employer that will be responsible for paying employer NI and pension contributions.
    - In August the government will still pay 80% of wages up to £2,500.
    - In September, the percentage will reduce to 70% of wages (up to £2,187.50) and this will reduce further in October to 60% of wages (up to £1,875).
    - It is important to remember the following:
        - For those on flexible furlough, the employer will have to bear the cost of their entire wages for the hours worked including employer NI and pension contributions.

- Even with the reduction in percentages in September and October, the employee will still have to receive 80% of wages up to £2,500, which means the employer will have to contribute 10% in September (up to £312.50) and 20% in October (up to £625).

- The choice of topping up to 100% of wages still lies with the employer in September and October.

SECTION B: PRESCRIBED REQUIREMENTS

WHAT FURLOUGHED EMPLOYEES CAN AND CANNOT DO

- In a flexible furlough scenario, during the time that employees are recorded as not working they cannot do any work for the employer including, but not limited to:
    - making money for the employer or an associated organisation
    - providing services for the employer or an associated organisation
- However, employees can
    - take part in training
    - volunteer for another employer
    - work for another employer if contractually allowed
    - work as union or non-union representatives for the purposes of individual or collective representation of employees or other workers although they must not provide services to or generate revenue for the employer or associated organisation
- It is highly doubtful whether a furloughed employee can undertake scoring exercises as part of a redundancy process. Employers should tread with caution in this scenario.

DOCUMENT RETENTION

- This may not seem like a key issue now but it is absolutely crucial for employers to maintain full documentation in relation to furloughing of employees for the following reasons:
    - Guidance themselves impose this requirement, for instance furlough agreements must be kept for five years;
    - A future HMRC audit is very possible for some large employers who have benefitted heavily from the scheme and such audits will require records to be reviewed (and indeed any dispute with the HMRC will turn on such records);
    - The legal effect of HMRC guidance can only be of persuasive value even though most employers will have relied upon it as though they were the law. This means documenting the decision making processes and thought processes behind furlough will become a crucial evidential tool on the extent of reliance by employers on HMRC guidance.

CONSENT

- Employers will need to obtain fresh consent to place employees on flexible furlough. This means agreeing with the employee that they will be placed on flexible furlough by having a written agreement in place confirming this and keeping this record for 5 years.
- If the employer had previously obtained or included a lay-off or short-time working clause in their agreement with the employee (either in the contract or in a previous furlough letter), there may be a case to argue that a fresh consent may not be needed. However, this turns on the precise wording of the clause in question and appropriate legal advice should be sought on this point.
- For some employers this might be an opportunity to obtain retrospective consent from those who had previously been furloughed but for whom the employer did not obtain express consent or at all in writing.

SECTION C: KEY ISSUES TO CONSIDER

HOLIDAY

- The Employer Guidance makes clear the following:
    - Furloughed employees continue to accrue holiday.
    - Employees can take holiday while on furlough.
    - Holidays should be paid at the normal rate, not the furloughed rate.
    - Employers can, just like during normal times, require employees to take holiday in accordance with the Working Time Regulations.
- Now that it has been made clear that employers can require employees to take holiday, employers can plan their resources accordingly.
- Note that under The Working Time (Coronavirus) (Amendment) Regulations 2020 allow a worker to carry over accrued but untaken annual leave where "in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society)". The leave year which may be carried over is limited to the 4 weeks of annual leave guaranteed by Reg.13 WTR and does not include the additional 1.6weeks guaranteed by Reg.13A.

TUPE

- For transfers after 10 June, a transferee can furlough previously furloughed employees of the transferor so long as TUPE or PAYE business succession rules apply, and the transferring employees had been furloughed for minimum of 3 consecutive weeks between 1 March and 30 June by the transferor. As with the previous iterations of the guidance, the reference to change in ownership suggests that only a business transfer, not a service provision change, can qualify.
- If there is a transfer scenario at the end of June, the seller is advised to claim under the scheme for June period well in advance of the payroll (claims can be made 14 days before the payroll date) so that it can pass on the government grant to the employees before the transfer takes place.
- If this is not practicable, there are two options: either the seller can claim before the end of July (but not later) for the June period or the buyer may be able to claim for the June period before the end of July (but not later). In either case, appropriate indemnity provisions will have to be inserted in the agreement between the parties.

SELECTION FOR FLEXIBLE FURLOUGH

- There is no prescribed legal requirement for selecting which employees the employer should or could bring back to work under flexible furlough arrangement. However, the following considerations are relevant:
    - Operational and business needs of particular employees to carry out duties which are needed by the business;
    - Redundancy considerations post furlough period;
    - Discrimination considerations involving vulnerable employees, pregnant employees and those on statutory parental leave
- Examples of potential discrimination concerns:
    - If furloughing decisions take account of the number of hours particular employees are able to offer, then this could engage indirect sex discrimination considerations.
    - Or if the employer is considering which tasks need to be carried out, this could engage disability discrimination issues especially reasonable adjustments, indirect and discrimination arising from disability.

ROTATION

- It is still possible for employers to rotate employees in and out of furlough from 1 July so long as they have previously been furloughed for the minimum of 3 consecutive weeks prior to 1 July.
- Employers should remember the following:

- Claims cannot cross months from 1 July which means that if an employee is furloughed from 20 June for a minimum of 3 consecutive weeks, the employer must make 2 separate claims for June and July.

- The maximum number of furloughed employees claimed in any claim period before 1 July acts as the limit of the future furloughed employees from 1 July.

EMPLOYEES ON UNPAID LEAVE

- If an employee had been put on unpaid leave on or before 28 February 2020, they would not have been eligible for furlough until their return from unpaid leave, which must not have been later than 10 June (so that the 3-week minimum requirement can be met before 1 July).

- If an employee started their unpaid leave after 28 February 2020, they would be eligible to be furloughed so long as they were put on furlough for the minimum of 3 consecutive weeks between 1 March and 30 June.

EMPLOYEES ON FAMILY-FRIENDLY LEAVE

- The normal rules for various types of family-friendly leave apply. Employers can claim under the furlough scheme for enhanced contractual pay for those who qualify for:

    - maternity pay

    - adoption pay

    - paternity pay

    - shared parental pay

    - parental bereavement pay

- See Eligibility from 1 July 2020 above for closure to new entrants to the furlough scheme and the exception to this rule for those coming back from various parental leave.

- If those coming back from maternity or paternity leave start their furloughing before 1 July, then they must be furloughed for the minimum of 3 consecutive weeks. In such instance, the employer will have to make 2 separate claims, one for June and one for July.

SICK LEAVE AND FURLOUGH

- Although there was an inconsistency between the Guidance for employers and the First Treasury Direction, with the revised wording under the Second Treasury Directions it seems a settled view that employees can be taken off sick leave and furloughed, allowing employers to be able to receive furlough grant in such circumstances.

NON-EMPLOYEES WHO ARE ELIGIBLE TO BE FURLOUGHED

- It is still possible for the following types of workers to be placed on furlough although the closure to new entrants means that they must have been furloughed for at least 3 consecutive weeks between 1 March and 30 June:

    - Office holders

    - Company directors

    - Salaried members of LLPs

    - Agency workers

    - Limb (b) workers

COMPANIES IN ADMINISTRATION

- Administrators can claim under the furlough scheme those who have been furloughed for the minimum of 3 consecutive weeks between 1 March and 30 June. Furlough scheme should only be used "if there is a reasonable likelihood of rehiring the workers".

- In practice the latter requirement is retrospective as opposed to prospective (except in the most obvious cases) and it was recognised as such in Re Carluccio's and Re Debenhams so it is unlikely to be a big hurdle for administrators.

DATA PROTECTION STEPS

- ICO has published 6 data protection steps employers will need to consider regarding the use of personal information as lockdown restrictions start to ease and businesses begin to reopen. These steps include:
    - Only collect and use what's necessary
    - Keep it to a minimum
    - Be clear, open and honest with staff about their data
    - Treat people fairly
    - Keep people's information secure
    - Staff must be able to exercise their information rights
- Employers ought to carefully consider these principles when dealing with employee data both in the context of furlough and return to work more generally.

SECTION D: FURLOUGH AND TERMINATION OF EMPLOYMENT

TERMINATION OF EMPLOYMENT DURING FURLOUGH

- It is possible, under the current guidance, for the employer to make employees redundant either during furlough or afterwards. This necessarily entails that it is lawful for an employer to serve notice of termination to furloughed employees.
- When considering section pools for redundancy, employers should be careful not to blindly pool those who had previously been furloughed. This is unlikely to be seen as being within the range of reasonable responses as the initial selection for furlough would not have been as rigorous as pooling for redundancy. Employees may also be on furlough for health or childcare reasons and therefore selecting them for redundancy on the basis of furlough may be discriminatory.
- If an employee is given notice of termination during furlough, employers will have to work out the appropriate notice pay for the employee during furlough. Whilst it may be tempting to reduce the notice pay to reflect the furlough rate of 80% (if the statute allows you to do this depending on whether the employee has minimum guaranteed notice rights and whether they work fixed or variable hours), there is a concern among practitioners that not paying the full rate as notice pay may invite successful claims by the employees affected. The argument by employees here would be that the employer is using furlough to subsidise the cost of terminating employment contracts.
- There is no question of the employer claiming back a pay in lieu of notice (PILON) payment under the furlough scheme. This is simply not allowed under the rules of the scheme.

CONTINUITY OF EMPLOYMENT

- Continuity of employment is generally broken by a period of more than one week where the relationship is not governed by the employment contract, subject to a few exceptions. There is a consensus the employment contract continues as normal during furlough without breaking continuity (s.212 ERA).
- There may be question marks over continuity for those employees whose employment terminated but then were brought back so that their previous employer can furlough them. Continuity of employment can be preserved where an employee is made redundant following a reduction in the amount of work but is later re-hired (Fitzgerald v Hall Russell) but it is unlikely that this rule (temporary cessation of work rule) would apply if an employee resigned to find a new job.

SECTION E: BEYOND FURLOUGH AND FURLOUGH LITIGATION

FURLOUGH FRAUD

- HMRC has set up a fraud reporting service since the outset for employees to anonymously report suspected fraud by their employers. This can come in many forms including the employer claiming on the employee's behalf without paying the grant to the employee, asking employees to work during furlough or making backdated claims to include times when the employees were not working.
- The government is introducing measures to crack down this issue which includes a draft bill currently being rushed through Parliament and is expected to become law early July as part of the Finance Bill 2020. The new law will introduce a 30-day window for employers to admit to any mistakes made, after which HMRC will pursue incorrect claimants using both criminal and civil powers.

- At the end of May, almost 2000 reports of fraud had been made to HRMC.

HMRC SCRUTINY AND RECORD-KEEPING

- There are various record-keeping duties which employers should be aware of in relation to furlough. An agreement to place an employee on furlough must be documented and kept for five years. Due to the introduction of flexible furlough arrangement which requires fresh consent (see above), this agreement must also be documented and kept for five years as well as the records of how many hours the employees work and the number of hours they are furloughed all of which must be documented and maintained.

- It is generally sensible for employers to document and maintain records of discussions, consents and any other arrangements made with furloughed employees so that paper trail is created that can act as evidence of propriety of the employer's actions.

THE STATUS OF TREASURY DIRECTIONS AND HMRC GUIDANCE

- The Treasury Directions are made under the statutory power conferred by s.76 of the Coronavirus Act 2020 which means they have legal force and are the documents that HMRC must follow when making decisions under the scheme.

- HMRC guidance can be used by courts as a persuasive authority when interpreting statutes but technically speaking where there are inconsistencies between them the language of the directions should prevail. This usual rule has been made more complicated in relation to the furlough scheme because of the reverse nature of how both documents came about viz., the guidance actually preceded the directions to begin with.

addleshawgoddard.com

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hamburg, Hong Kong,
Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office