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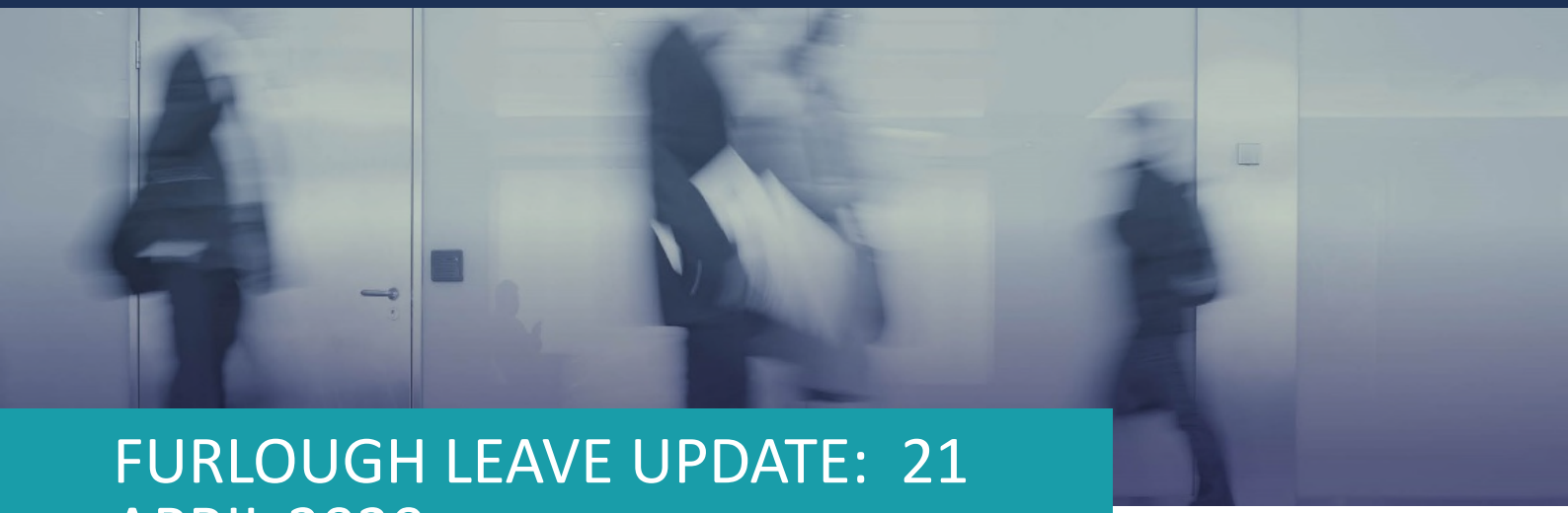

FURLOUGH LEAVE UPDATE: 21 APRIL 2020

Portal now live and further guidance published

The government announced basic details of the new Coronavirus Job Retention Scheme (the "JRS") on 20 March 2020. Guidance was released on 26 March 2020 which has now been updated 6 times, with the latest update being on 20 April 2020 (the "Guidance"). The latest version of the Guidance for employers can be found here and for employees can be found here.

On 15 April 2020 the Treasury issued a Direction (the "Direction") which sets out the legal basis for the JRS. The Direction can be found here. As set out below, there are a few critical inconsistencies between the Direction and the Guidance.

The HMRC portal for claiming under the JRS is now live and can be found here.

HMRC has also published two new guidance documents. One is a 'step by step' guide for employers on how to claim under the JRS, setting out the information that they will need to provide and the processes they will need to follow (the "Step by Step Guide"). This can be found here.

The other is a guide to calculating 80% of an employee's wages (the "80% Guide") for the purpose of claiming under the JRS. This includes guidance on which payments can be taken into account and which cannot. This can be found here.

We set out below a summary of the key points in the Guidance and Direction, together with some key outstanding questions.

1. WHO CAN CLAIM UNDER THE JRS?

The JRS is stated to be open to all UK employers that have:

- created and started a PAYE payroll scheme on or before 19 March 2020;
- enrolled for PAYE online; and
- a UK bank account.

2. DOES THE EMPLOYER HAVE TO PROVE A "SEVERE EFFECT" ON THEIR OPERATIONS TO BE ELIGIBLE FOR THE JRS?

The employer Guidance states that the JRS "is designed to support employers whose operations have been severely affected by coronavirus to retain their employees and protect the UK economy". It goes on to say that "all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus."

The Direction states that an employee is a furloughed employee if they have been instructed to cease all work in relation to their employment. This instruction must be given "by reason of circumstances arising as a result of coronavirus or coronavirus disease." When applying on the HMRC online portal for a grant, employers must confirm that they "are claiming costs of employing furloughed employees arising from the health, social and economic emergency resulting from coronavirus."

Although the Guidance, Direction and portal confirmation do not require employers to provide evidence of the negative impact of coronavirus when applying for a grant under the JRS, it would be wise for employers to retain such evidence. HMRC reserves the right to retrospectively audit all aspects of an employer's claims. Therefore, employers should ensure that they are able to produce evidence of the effect of coronavirus on their business and its impact on their ability to retain their employees if this evidence is later required by HMRC.

3. DOES AN EMPLOYEE HAVE TO BE AT RISK OF REDUNDANCY TO BE FURLOUGHED?

The first iteration of the guidance referred to the JRS applying only to employees who "would otherwise have been laid-off" (i.e. made redundant or provided with no work and no pay). It was therefore assumed that employees could only be furloughed if there was a redundancy or lay off situation. This caused a potential problem for employers who were experiencing an overall reduction of work, but without a justification to make any particular employees redundant or where cost savings are needed but there may not strictly be a redundancy situation.

The employee section of the Guidance partly retains this original concept by saying that an employee can be furloughed if their employer has "no work" for the employee to do because of coronavirus. It also says that furlough can be used if an employer is "unable to operate". The reference to redundancy/lay off has, however, been entirely removed from the employer Guidance and is replaced by the statement about "severely affected" operations. Although there are some conflicting concepts in the employer and employee Guidance, overall it appears that there is now no specific requirement for furlough to be offered as an alternative to redundancy or lay-off. Instead it would seem that the focus is now more on the effect on the employer's operations overall. It seems unlikely that HMRC will have the resources or inclination to forensically review the furloughing of each employee. It seems more likely that they will focus on the overall company situation.

When submitting a claim in the HMRC portal, employers must simply confirm that they "are claiming costs of employing furloughed employees arising from the health, social and economic emergency resulting from coronavirus". This is now very broad and suggests there is no longer a requirement for there to be an underlying risk of redundancy.

That said, the position is not completely clear. Given the uncertainty on this point, the lowest risk approach would be for employers, where possible, to retain a written record of the following:

a) Evidence to show that their operations have been negatively affected by coronavirus and the effect this has on the workforce; and

b) Where possible, evidence to show that each employee being furloughed has no work and would otherwise have been made redundant; or

c) Evidence that the employee was furloughed for another reason arising from coronavirus, such as if the employee could not work due to childcare commitments.

4. WHICH EMPLOYEES CAN EMPLOYERS CLAIM FOR?

Initially, the Guidance stated that the JRS covered all furloughed employees who were on the employer's payroll on or before 28 February 2020. The latest version of the Guidance states that employers can claim for furloughed employees:

- who were on the employer's PAYE payroll on or before 19 March 2020, and
- which were notified to HMRC on an Real Time Information ("RTI") submission on or before 19 March 2020.

Although this may seem like a widening of the scope of the JRS, in practice many employers will not have made an RTI submission notifying payment by the 19th of the month for those who started work in early March (or even in late February). As such, the increase in the number of employees who are now covered by the JRS may well be limited. There is also a risk that some employees who joined in late February may not be covered by the JRS ether.

5. DOES THE JRS APPLY TO WORKERS?

The Guidance is now clear that workers directly engaged on a company's PAYE payroll on 19 March 2020 are covered by the JRS. As with employees, such workers must have been on the employer's PAYE payroll on or before 19 March 2020 and have been notified to HMRC on an RTI submission on or before 19 March 2020.

Those not on payroll, such as self-employed workers or those who have been paid cash in hand, are not covered by the JRS.

6. WHO ELSE IS COVERED BY THE JRS?

The Guidance now makes it clear that the following types of employee and worker can be furloughed where they are paid by PAYE, were on the payroll on or before 19 March 2020, and have been notified to HMRC on an RTI submission on or before 19 March 2020:

- Apprentices - they can continue to train whilst furloughed and the employer must pay them at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage.
- Employees on fixed term contracts - their contracts can be renewed or extended during the furlough period. However, the latest Guidance now states that those employed under fixed term contracts which ended, without extension or renewal, on or before 19 March 2020 will not qualify for the grant once the fixed term contract ended.
- Office holders (including company directors) - the furlough arrangements should be adopted formally as a decision of the company.
- Salaried members of Limited Liability Partnerships (LLPs) - the furlough arrangements should be adopted formally as a decision of the LLP.
- Agency workers (including those employed by umbrella companies).
- Those employed by individuals as individuals can furlough their employees – such as nannies.
- Administrators can access the JRS if there is a reasonable likelihood of rehiring the workers.

7. CAN NON-EEA NATIONALS WITH LIMITED LEAVE TO REMAIN THE UK BE FURLOUGHED WITHOUT BREACHING THEIR VISA CONDITIONS?

In most cases, it is a condition of leave that non-EEA nationals with limited leave do not claim public funds. However, the Guidance confirms that grants under the JRS are not counted as 'access to public funds'. Therefore, those with limited leave to remain will not be regarded as breaching their visa conditions if they receive funds under JRS. However, we strongly recommend that employers take advice before furloughing anyone who is sponsored under

Tier 2 in particular as there may be other considerations to bear in mind, such as whether it is possible to reduce the employee's pay without breaching the sponsorship rules and whether any notifications to the Home Office are needed.

8. WILL EMPLOYEES WHO LEFT THE COMPANY AFTER 28 FEBRUARY 2020 BE COVERED?

The Guidance now makes it clear that the JRS covers employees who were made redundant and those who stopped working for a reason other than redundancy on or after 28 February 2020, if they are re-hired by their employer and placed on furlough. This applies even if the employer does not re-employ them until after 19 March 2020. The Guidance states that employees will be covered by the JRS if they were on the employer's payroll as at 28 February 2020 and had been notified to HMRC on an RTI submission on or before 28 February 2020.

Our view is that it should also be possible to re-employ and then furlough employees who joined after 28 February 2020 but on or before 19 March 2020 and whose employment had terminated. This is provided that the employee was on the employer's PAYE payroll on or before 19 March 2020 and was notified to HMRC on an RTI submission on or before 19 March 2020. However, this is not absolutely clear from the Guidance so there is potentially an element of risk with this approach.

It is not entirely clear cut however, as the Direction provides some room for confusion on this point. It says that "No CJRS claim may be made in respect of an employee if it is … contrary to the exceptional purpose of CJRS." As regards the purpose of the JRS it says - "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 arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease". The Direction also says that an employee is a furloughed employee if their employer has instructed them to cease all work in relation to their employment and "the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease". This is backed up by the confirmation that must be given by employers when submitting a claim in the HMRC portal: "you are claiming costs of employing furloughed employees arising from the health, social and economic emergency resulting from coronavirus".

It seems likely from this that someone who resigned and is rehired but has no work to do because of coronavirus is still covered under the JRS. It is less clear for someone who was made redundant for another reason and is rehired, where such person has no work to do because their job had disappeared for a reason unrelated to coronavirus.

Employers should take care if they do rehire employees to furlough them in any event and should take advice before doing so. For example, for employees who do not yet have 2 years' service, re-hiring them may mean that they accrue 2 years' service and therefore the right to claim unfair dismissal. The employer will also have to pay their salary until such time as HMRC starts paying out grants, with the inherent risk that grants may not be forthcoming as soon as hoped or at all in some cases.

9. CAN THOSE HIRED AFTER 19 MARCH 2020 BE FURLOUGHED?

Those employees hired after 19 March 2020 (or hired before 19 March 2020, but whose employer had not notified to HMRC on an RTI submission on or before 19 March 2020) cannot be furloughed or their salaries claimed for in accordance with the JRS.

10. CAN EMPLOYEES UNDERTAKE WORK WHILE FURLOUGHED?

The Guidance states that, when on furlough leave, an employee cannot undertake work for or on behalf of their employer. This includes providing services or generating revenue for their employer or for a company linked or associated to the employer.

It is now clear that employees may get a new job and work for another employer whilst on furlough leave, provided they are contractually allowed to do so. Employers should address this when putting employees on furlough leave.

Where employees already have more than one job, their employment with each employer is treated separately. They may be furloughed in relation to each job. They may also be furloughed from one employment and remain working for their other employer and receive their normal wages.

The Guidance says that furloughed employees may also undertake volunteer work or training, as long as this activity does not provide services to, or generate revenue for, or on behalf of, their employer or for a company linked or associated to the employer. The Guidance says that employers should encourage furloughed employees to undertake training.

There may be some other types of work that may arguably be permitted whilst on furlough leave. These might include work by trustees of a pension scheme (their work is for the pension scheme, not the employer) or work by a trade union representative/employee representative (their work is on a voluntary basis, without pay and is for employees rather than the employer).

The Direction specifically allows company directors to carry out legal obligations that relate to the filing of company accounts or the provision of other information relating to the administration of the company.

Many employers are keen to know if employees may carry out small tasks whilst on furlough leave. For example, if those still at work need to seek information for the handover of files, can furloughed employees help? This has not yet been clarified by HMRC but the current Guidance suggests that any type of work, however minimal, will risk invalidating a claim for reimbursement.

11. WHAT AMOUNTS CAN THE EMPLOYER CLAIM FOR?

The information on what can be claimed for can now be found in the 80% Guide. This states that the grant from HMRC will cover the lower of 80% of an employee's wages or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that reduced wage.

The 80% Guide sets out examples for calculating the employee's wages. For details and particular examples, see the 80% Guide itself. It covers two main categories of employee:

- fixed rate full or part time employees on a salary
- employees whose pay varies

Fixed rate full and part time employees on a salary

For full time and part time salaried employees, the 80% Guide states that the salary in their last pay period prior to 19 March 2020 should be used to calculate the 80%.

The 80% Guide goes on to state that if, based on previous iterations of the Guidance, employers have calculated their claim based on the employee's salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020) they can choose to still use this calculation for their first claim.

Employees whose pay varies

Where the employee's pay varies, and the furloughed employee has been employed from 6 April 2019, the employer can claim for the higher of either the same month's earnings from the previous year or average monthly earnings for the 2019-20 tax year.

If the furloughed employee started employment after 6 April 2019, the employer can claim for 80% of their average monthly earnings since they started work until the date they are furloughed.

The 80% Guide gives no further details on which category employees should fall into. We assume, however, that anyone with a fixed salary, even if they have some variable elements of pay, fall within the first category.

12. WHAT ELSE IS COVERED OTHER THAN BASIC SALARY?

The 80% Guide states that employers can claim for any regular payments that employers are obliged to pay employees. Specifically included within this are regular wages, non-discretionary overtime, non-discretionary fees, non-discretionary commission payments and piece rate payments Specifically excluded are payments made at the discretion of the employer or a client, where the employer or client was under no contractual obligation to pay, including tips, discretionary bonuses, discretionary commission payments, non-cash payments, non-monetary benefits like benefits in kind (such as a company car) and salary sacrifice schemes (including pension contributions) that reduce an employees' taxable pay.

There is no mention of allowances, but we think that, arguably, a regular contractual cash allowance (such as a car allowance) should be included.

Apprenticeship levy and student loans are not covered under the JRS and so these should continue to be paid as usual and would not be reimbursed.

13. WHAT ABOUT SALARY SACRIFICE?

The 80% Guide says that benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should not be included in the reference salary. Therefore, employers should use the lower post-salary sacrifice amount on which to base their claim to HMRC.

The Guidance says that employees should be able to switch freely out of a salary sacrifice scheme as coronavirus counts as a life event that could warrant such changes if the relevant employment contract is updated accordingly.

Employers are required to pay all the grant received under the JRS to employees in the form of money. As mentioned above, employers are not permitted to use the grant to pay for the provision of benefits or payments or benefits under a salary sacrifice scheme.

Where an employer provides benefits to furloughed employees, including through a salary sacrifice scheme, these benefits should be paid in addition to the employees' wages and the cost of these benefits cannot be claimed under the JRS. If the employer is under a contractual obligation to provide certain benefits (e.g. childcare vouchers), and the employer is unable or unwilling to continue to do so in the current climate, the employer should seek the employee's written agreement to temporarily suspend the provision of such benefits while the employee is furloughed.

14. WHAT ABOUT PENSION CONTRIBUTIONS?

The grant covers the minimum automatic enrolment employer pension contributions on the 80% (3% of "qualifying earnings"), but if the employer is making more generous pensions contributions than the statutory minimum then these are not covered by the grant.

15. DO EMPLOYERS HAVE TO TOP UP THE REMAINING 20%?

The 80% Guide confirms that employers can choose to provide top-up salary in addition to the grant. However, employer National Insurance contributions and automatic enrolment contributions on any additional top-up salary will not be funded through the JRS.

Although it is optional under the JRS for the employer to fund the difference between HMRC's grant and the employee's usual salary, unless there is a contractual agreement to withhold and reduce pay, it will most likely be a breach of contract/unlawful deduction of wages not to top-up. Therefore, we recommend that employers obtain employees' written consent before reducing their pay.

16. HOW DO YOU CALCULATE PAY FOR THOSE ON MATERNITY LEAVE OR SICK LEAVE AT THE RELEVANT CALCULATION TIME?

For those employees furloughed on return from a period of statutory leave (such as maternity leave or shared parental leave or paternity leave), claims should be calculated against their

salary, before tax, not the pay they received whilst on statutory leave (which may have been lower than their salary; for example, statutory maternity pay).

If an employee's pay varies, and they are furloughed on their return from statutory leave, their employer should calculate the grant using either the same month's earnings from the previous year or the average monthly earnings for the 2019 - 2020 tax year.

The same rules apply if an employee was off sick. Their normal salary (not sick pay) is used to calculate the 80%, the same as for family leave situations.

17. IS THE GRANT SUBJECT TO INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS?

As the JRS is a reimbursement scheme and HMRC are not paying the furloughed employees themselves, employers will need to continue paying such employees. Furloughed employees remain on the payroll of their employer, and the 80% Guide makes it clear that their salary will be subject to the usual income tax and other deductions.

The grant from HMRC covers the lower of 80% of an employee's wages or £2,500 per month, plus the associated employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that reduced wage.

The 80% Guide includes sections on how to calculate claims for employer National Insurance contributions and minimum automatic enrolment employer pension contributions. Particular care should be taken if there are salary sacrifice arrangements in place, as set out above.

18. WHAT IS THE TAX TREATMENT OF THE GRANT?

Payments received by companies under the JRS must be included as income in the business's calculation of its taxable profits (for the purposes of corporation tax in the case of companies or income tax for unincorporated businesses/partnerships) in accordance with normal principles. When payments representing the grant monies are made to furloughed employees (this is likely to be before the receipt of the grant itself), the employer's National Insurance Contributions are paid to HMRC and the minimum automatic enrolment employer pension contributions are paid, and these will be tax deductible in the usual way. This should have a neutral impact for the employer as the receipt of the grant monies should be matched by an equal tax deductible payment (assuming no augmentation payment is made by the employer).

19. DOES THE NATIONAL MINIMUM WAGE APPLY TO FURLOUGHED EMPLOYEES?

The 80% Guide states that employees are only entitled to the National Living Wage (NLW) or National Minimum Wage (NMW) for the hours they are working. Furloughed employees, who, by essence of being on furlough leave, are not working, may be paid the lower of 80% of their salary or £2,500, even if, based on their usual working hours, this would be below NLW/NMW.

However, if employees are required to do training during furlough leave, they will be entitled to the NLW/NMW for time spent training, even if this is more than the 80% in respect of which their employer is entitled to a reimbursement.

20. CAN EMPLOYERS CLAIM A GRANT IF THEIR EMPLOYEES ARE WORKING REDUCED HOURS OR ON REDUCED PAY?

The Guidance specifies that "If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme".

Our view is that this is simply intended to clarify that employers are only able to claim under the JRS when employees are furloughed and are not working at all for the employer. Claims cannot be made under the JRS when an employee is working but on reduced hours or on reduced pay. However, it seems that it should be possible to subsequently furlough these employees under the JRS, provided they are not working for the employer and the other

requirements of the JRS are met. That said, there is some ambiguity here so employers may wish to be cautious.

21. CAN THOSE ON UNPAID LEAVE BE INCLUDED?

The Guidance says that if an employee started unpaid leave after 28 February 2020, employers can put them on furlough leave instead.

If an employee went on unpaid leave on or before 28 February 2020, they cannot be furloughed until the date on which it was agreed they would return to work.

The Direction states that "No claim to CJRS may be made in respect of an unpaid sabbatical or other period of unpaid leave of an employee beginning before or after 19 March 2020". It seems therefore that employers cannot backdate furlough to cover periods of previous unpaid leave even if related to coronavirus.

22. DOES THE EMPLOYER HAVE TO PAY THE EMPLOYEE BEFORE MAKING THE APPLICATION UNDER THE JRS?

When submitting a claim on the online portal, employers must confirm that "all employees have been paid their wages before the claim was submitted or will be paid in the next payroll".

So, payment must either already have been made or must shortly be made in the next payroll. HMRC say that they should be able to make payments within 6 working days of an application. Therefore, employers should take care to submit their claims in time before their payroll deadlines.

23. IS EMPLOYEE WRITTEN AGREEMENT REQUIRED?

The Guidance says that "employers should discuss with their staff and make any changes to the employment contract by agreement". It also says that, in order to be eligible for the grant, employers must write to their employee confirming that they have been furloughed and keep a record of this communication for 5 years. The Guidance is specific that there needs to be a written record, but the employee does not have to provide a written response.

The Direction is not consistent with this. It says that an employee is a furloughed employee if the employee has been instructed to cease all work in relation to their employment. This instruction will only be effective "if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment."

This aspect of the Direction may be an issue for employers who have already furloughed employees by simply notifying them and not getting a written acceptance from the employee. There is a risk that a failure to comply with the Direction will affect their access to the JRS. However, there are three points of comfort on this:

1. There is no requirement within the Direction for the agreement in writing to predate the period of furlough. Therefore it is open to employers to seek the written agreement of the furloughed employees now. Provided the employees do sign the agreement in writing, there should be no barrier to accessing the JRS.

2. When submitting a claim on the online portal, employers must confirm that their claim is "in accordance with HMRC published guidance". It does not specify that it has to be in compliance with the Direction.

3. The final iteration of the Guidance came out 5 days after the Direction and is very clear.

For a bit of added complication, the ACAS guide also says "Furlough is where an employee or worker agrees in writing with their employer that they're not to work temporarily because of coronavirus."

Aside from the rules of the JRS, employers should ensure that they have written consent to changing the terms of the contract. In particular, consent is needed is for any reduction in

pay. Without consent, the employer will be at risk of breach of contract claims or unauthorised deduction from wages claims. It is important, therefore, that where an employer is reducing an employee's pay, the employee signs and returns a furlough agreement or letter consenting to the reduction to their pay before the reduction in pay takes place.

24. LAY-OFF

There is no clarity on the interplay between a contractual right to lay-off and the right to furlough. It may be that some employers have a right to lay-off or to place employees on short term working arrangements that allows them to pay a reduced salary to employees without risking breach of contact claims. However, the wording of the contract needs to be carefully considered. Invoking statutory lay-off also has other implications which potentially muddies the water when mixed with the separate right to furlough leave.

25. HOW LONG WILL THE JRS LAST FOR?

The Guidance confirms that JRS will now be open for at least 4 months starting from 1 March 2020 and ending on 30 June 2020, but it may be extended if necessary. In some circumstances claims can be backdated to 1 March 2020 where employees have already been furloughed.

26. DOES THE JRS COVER EMPLOYEES WHO ARE SELF-ISOLATING OR ON SICK LEAVE?

The Guidance clarifies that the JRS is not intended for short-term absences from work due to sickness or self-isolation and, in any event, the minimum period of furlough leave is three weeks. Employees who are on sick leave or self-isolating are entitled to receive statutory sick pay (SSP) if they meet the other eligibility conditions for payment.

However, the Guidance now confirms that employees who are on sick leave may be furloughed, if the employer has business reasons for furloughing them. This applies to any employee on sick leave, including those employees on long-term sick leave and those who are shielding in line with public health guidance (or those who need to stay at home with someone who is shielding).

Once an employee is furloughed, the employer can only claim under the JRS and can no longer claim under the Coronavirus Statutory Sick Pay Rebate Scheme in respect of that employee.

Confusion on this point is brought in by the Direction. It says that where SSP is payable or liable to be payable in respect of an employee (whether or not a claim for SSP has been made) when an instruction to cease work is given, the furlough period cannot start until the 'original SSP' period has ended. This is inconsistent with the Guidance. Technically, the Direction is the legal basis of the JRS as it is issued by the Treasury under the powers conferred by the Coronavirus Act 2020. From a purely legal perspective, the Direction therefore takes precedence over the previously issued Guidance. Therefore there is a risk in furloughing employees who are off sick that the JRS will not apply to them. However, it would seem grossly unfair to penalise employers for relying on very clear government guidance.

27. DOES THE JRS COVER EMPLOYEES WHO ARE SHIELDING?

Individuals who are classed as extremely vulnerable and at very high risk of severe illness from coronavirus are advised to remain at home for at least 12 weeks (known as shielding). Sick pay regulations have been amended to entitle those who are shielding to SSP from 16 April 2020 onwards.

The Guidance states very clearly that employees who are unable to work because they are shielding in line with public health guidance (or need to stay home with someone who is shielding) can be furloughed. However, the Direction applies as above to suggest that employees cannot be furloughed until the end of the SSP period. For shielding employees this would be 12 weeks. The explanatory notes to the amendment to the SSP regulations say: "This is intended as a safety net for individuals, in cases where their employer chooses not to

furlough them under the Coronavirus Job Retention Scheme and does not have other suitable policies in place (e.g. the ability to work from home, or the provision of special leave)." This suggests that the Guidance is correct on this point. One possible explanation is that the extension of SSP to those shielding happened on 16 April 2020, one day after the Direction came out. Possibly, the exclusion in the Direction for those on SSP was not designed to apply to extremely vulnerable employees who shield for 12 weeks.

28. CAN EMPLOYERS FURLOUGH EMPLOYEES WITH CARING RESPONSIBILITIES?

The Guidance says that employees who are unable to work because they have caring responsibilities (such as looking after children) resulting from coronavirus can be furloughed.

29. WHAT ABOUT EMPLOYEES ON MATERNITY OR OTHER FAMILY FRIENDLY LEAVE?

The Guidance states that, if an employer offers enhanced contractual maternity, adoption, paternity or shared parental pay to employees, this can be claimed under the JRS. Employers cannot claim under the JRS unless they have furloughed the relevant employee. This seems to suggest that employees can be on furlough leave at the same time as being on maternity or other family-friendly leave. If this is correct, employees will not need to end their maternity leave before they can be furloughed and employees will go back onto maternity leave after furlough leave with no impacts on maternity leave (such as reducing the maternity leave period). This, however, is far from clear and we await confirmation about the effect on maternity leave of furloughing.

The situation is clearer in relation to those returning from maternity/other leave. They can be furloughed in the same way as other employees although there may be a higher risk of a discrimination claim in some circumstances.

30. CAN EMPLOYERS ROTATE EMPLOYEES IN AND OUT OF FURLOUGH LEAVE?

The Guidance says that employees can be furloughed for a minimum of 3 weeks and employers can put the same employee on furlough leave more than once. Therefore employers could rotate employees in and out of furlough leave, provided that the employee spends a minimum of three weeks on furlough leave on each occasion.

31. HOW DO EMPLOYERS SELECT WHO TO PUT ON FURLOUGH LEAVE?

The Guidance states that "When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way." Employers will need to take care to avoid discrimination in any selection exercise but it may be justifiable to prioritise those who are regarded as being vulnerable (for example, the over 70s), or even a reasonable adjustment to select disabled employees. Legal advice should be sought prior to setting up a selection process. The manner of selection now for furlough could impact on the fairness of redundancies later.

32. COLLECTIVE CONSULTATION

The Guidance says very clearly that, if sufficient numbers of staff are involved, it may be necessary to collectively consult to procure agreement to changes to terms of employment when putting employees on furlough leave. A protective award of up to 90 days' gross pay for each affected employee can be awarded to employees where their employer fails to collectively consult. We recommend taking advice as to whether there is a need to carry out collective consultation.

There is an exception to the obligation to collectively consult. The exception applies where there are "special circumstances which render it not reasonably practicable" for the employer to comply with the requirements. This exception is very narrow and does not necessarily remove the consultation obligations entirely. Where the exception applies, the employer "shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances". Even if the special circumstances defence did apply to this extraordinary current situation, employers could still potentially consult for a shorter period than the usual statutory 30/45 days. Taking no steps at all to consult may increase the risk of claims.

33. DOES HOLIDAY CONTINUE TO ACCRUE AND CAN IT BE USED DURING FURLOUGH LEAVE?

The employee Guidance and the 80% Guide now deals with certain aspects of taking holiday during furlough leave. These confirm that, whilst furloughed, employees continue to accrue leave as per their employment contract. Employees can take holiday whilst on furlough leave.

Pay for holidays is governed by the Working Time Regulations 1998 ("WTR") and is complicated even in normal circumstances.

The Guidance confirms that employers should pay employees their "usual holiday pay" based on the WTR whilst on furlough leave. Although not clear, there is a good argument that a salaried employee is entitled to their normal pre-furlough pay for any days of holiday taken during furlough. Employees with a variable rate of pay are entitled to an average rate of pay over 52 weeks. Where an employee has normal working hours, this 52 week period should arguably end before the period of furlough leave, thus excluding the furlough pay).

The Guidance confirms that "employers will be obliged to pay the additional amounts over the grant". This also indicates that employers should top up pay on any holiday taken so that the employee receives their normal pay.

On a practical level, employers might wish to provide that employees do not take holiday during furlough leave if they cannot afford to top up to pre-furlough salary for holidays.

The Guidance confirms that employers and employees can agree to vary holiday entitlement as part of the furlough agreement. It clarifies however, that employers cannot reduce holiday entitlement below the 5.6 weeks of statutory paid annual leave each year.

34. CAN EMPLOYEES CARRY OVER HOLIDAY?

Employees can now carry over 4 weeks' statutory untaken holiday for a period of 2 years, where it is not reasonably practicable for them to take some or all of their holiday as a result of the effects of coronavirus. The government has amended the WTR to relax the restriction on carrying over untaken holiday to achieve this. This measure does not appear to have been designed with furlough employees specifically in mind, but it should alleviate any large amounts of accrued holidays being used straight after furlough leave, if employees do not take holiday during furlough.

35. CAN EMPLOYERS CLAIM HOLIDAY PAY UNDER THE JRS?

Although not explicit, it seems that the Guidance is saying that employers can claim under the JRS for reimbursement of holiday pay. The Guidance says "Employers will be obliged to pay the additional amounts over the grant". When referencing bank holidays, the Guidance says "If you usually work bank holidays then your employer can agree that this is included in the grant payment".

36. CAN EMPLOYEES TAKE SICK LEAVE DURING FURLOUGH LEAVE?

Furloughed employees retain their statutory rights, including their right to SSP. This means that furloughed employees who become sick must be paid at least SSP. In most circumstances, the furlough pay will be greater than SSP, so this should not be problematic. The Guidance says, however, that it is for the employer to decide whether to keep the employee on furlough leave or to "move" the employee onto SSP. If the employer decides to "move" the employee to SSP, it is unclear what impact, if any, this has on the employee's furlough leave. What is clear is that, if the employer decides to pay the employee SSP, the employer can no longer claim for reimbursement of the employee's wage costs under the JRS. The employer may, however, qualify for a rebate for up to two weeks of SSP under the Coronavirus Statutory Sick Pay Rebate Scheme.

Provided that an employee's furlough pay is greater than SSP, it would only be beneficial to employees to claim sick leave during furlough leave if they are entitled to enhanced sick pay that exceeds the 80% paid during furlough leave. Employers may want to seek to specify in

any furlough agreement/letter that contractual sick pay is paid at 80% too (and is capped at £2,500 per month).

37. CAN EMPLOYEES WHO TUPE TRANSFER TO A NEW EMPLOYER BE FURLOUGHED?

The Guidance now states that a new employer is eligible to claim under the JRS in respect of the employees of a previous business who transferred to them after 19 March 2020 if either TUPE or "PAYE business succession rules" apply to the change in ownership. The Direction confirms this.

This is welcome clarification for business transfers. However, there is still some uncertainty as the wording of the Guidance and Direction does not cover service provision changes (insourcing, outsourcing and re-tendering).

38. WHAT ABOUT PAYE CONSOLIDATIONS?

The Guidance also states that where a group of companies have multiple PAYE schemes and there is a transfer of all employees from these schemes into a new consolidated PAYE scheme after 19 March 2020, the new scheme will be eligible to furlough those employees and claim the grants available under the JRS.

39. WHAT HAPPENS IF AN EMPLOYER GIVES AN EMPLOYEE NOTICE DURING FURLOUGH LEAVE?

If an employer wishes to serve notice on an employee whilst they are on furlough leave, it is currently unclear what the appropriate rate would be for notice pay and whether this may be recoverable under the JRS.

40. WHAT RECORDS SHOULD THE COMPANY KEEP IN RELATION TO FURLOUGH?

Records of the communication with furloughed workers confirming that they have been furloughed must be kept for 5 years. It would also be prudent to keep contemporaneous details of the decision making process as to the impact that coronavirus is having on the business generally (ideally including a quantitative assessment of the financial impact and cash flow modelling), details of the rationale for furloughing for a particular role/job type and details of the way in which changes to the relevant terms of employment have been achieved.

41. WHAT DO EMPLOYERS NEED TO PROVIDE TO HMRC TO MAKE A CLAIM?

The Step by Step Guide sets out the basic information which is required in order to make a claim. Employers need the following initial information:

- the number of employees being furloughed
- the dates employees have been furloughed to and from
- details of employees – the name and the National Insurance Number of each furloughed employee
- employer's PAYE scheme reference number
- the employer's Self-Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number
- the employer's bank account details
- the employer's registered name
- the employer's address

Claims can only be made once every 3 weeks.

The Step by Step Guide states that if the employer uses an agent who is authorised to act for an employer for PAYE purposes the agent will be able to make a claim on the employer's behalf.

42. WILL HMRC CHECK CLAIMS AT THE TIME THEY ARE MADE?

HMRC have said that they will check claims made through the JRS. They have a short period of time between submission of the claim and the payment being made (6 working days) to make background checks to risk assess claims. Payments may be withheld if the claim is based on dishonest or inaccurate information or found to be fraudulent.

43. CAN HMRC AUDIT RETROSPECTIVELY?

Any calculation of the amount of the grant that employers are claiming for may be subject to a retrospective HMRC audit meaning employers may have to repay amounts incorrectly claimed. In the FAQ section on Business Support website there is the statement that the "Government will retain the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claims". Therefore, even in the case of an honest mistake, there is the potential for a clawback.

HMRC has confirmed that it has the ability to enforce criminal penalties in cases where businesses 'knowingly try to defraud' the JRS.

44. HOW MIGHT HMRC FIND OUT ABOUT FRAUDULENT CLAIMS?

HMRC has put in place an online portal for employees and the public to report suspected fraud in the JRS. The employee Guidance provides that employees should make a report if their employer is claiming under the JRS and not paying the employee what they are entitled to, if they are being asked to work whilst on furlough, or if the employer has made a backdated claim that includes times when the employee was working.

KEY CONTACTS

For further information about any of the issues raised in this guide, please contact:

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This guidance is correct as at 21 April 2020. It is not intended as legal advice and should not be used as a substitute for such advice.

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