BRIEFING NOTE UPDATE (5)

FURLOUGH SCHEME

The Government introduced the Coronavirus Job Retention Scheme ("CJRS") known as the Furlough Scheme with effect from 1 March 2020.

As detailed in the previous Briefing Note (4) the Furlough Scheme changed on 1 July 2020. Further Government Guidance and Treasury Direction have been issued.

SUMMARY OF CHANGES

The CJRS closed to new entrants on 10 June 2020. This means that employees who had not been furloughed prior to that date will not be able to be furloughed under the flexible furlough scheme, which came into effect from 1 July 2020.

The only exception to the 'no new entrants' rule is where an employee is returning from statutory parental leave (maternity, paternity, adoption and shared parental leave) after 10 June 2020, provided at least one other employee within the organisation had been furloughed for at least three consecutive weeks at any time between 1 March and 30 June 2020.

FLEXIBLE FURLOUGH

Until 30 June 2020, employees who were furloughed could not do any work for their employer during the period they were on furlough.

From 1 July 2020 there is no longer a minimum furlough of three weeks and employers can bring furloughed employees back to work for any amount of time and on any work pattern.

However, an employer can only make one claim for any given furlough period and the minimum period of claim is seven calendar days. The exception within the guidance for employers is where the furlough period spans two months. This means an employer could furlough an employee for just one day a week as long as the employer then claims for the minimum period of seven calendar days.

WHO DOES FLEXIBLE FURLOUGH APPLY TO?

Only those employees who have previously been furloughed for at least three consecutive weeks anytime in the period 1 March 2020 until 30 June 2020 can be flexibly furloughed (or furloughed at all) from 1 July 2020.

A cap applies to the number of employees an employer can claim for. The guidance states that the number of employees an employer can claim for cannot exceed the maximum number of

employees they claimed for by 30 June 2020 at one time. The cap does not apply to those who are returning from statutory parental leave.

Where there is a TUPE transfer after 10 June 2020 the maximum number of employees the new employer can furlough is a total of the number of employees who were furloughed pre-transfer, plus the number transferred to the new employer who had been furloughed for at least three consecutive weeks by their former employer in the period 1 March to 30 June 2020.

HOW WILL FLEXIBLE FURLOUGH WORK?

There will need to be individual notification and acceptance of new flexible furloughing arrangements and there can be more than one, or one or more collective agreement(s).

Employers will need to ensure that the hours employees are flexibly furloughed for and the hours they work do not discriminate for a protected characteristic and the overall arrangements should be reviewed with the Union.

Calculating the hours and pay

When an employee is flexibly furloughed, the employer will need to work out the employee's usual hours:

- For employees who have fixed hours and whose pay does not vary, the employee's usual hours are based on the hours the employee was contracted to work at the end of the last pay period ending on or before 19 March 2020.

- For employees who work variable hours, the usual hours are the higher of the average number of hours worked in the tax year 2019-2020, or the corresponding calendar period in the tax year 2019.

The government proposes to wind down payments to employers under the CJRS but for the months of July and August the employer will need to pay at least 80% of the employees' wages for the period they are furloughed in addition to the employee's full contractual pay including overtime for the hours actually worked.

UPDATED TREASURY DIRECTION

On 8 July 2020 the Chancellor of the Exchequer was asked in parliament whether employers are prohibited from using grants obtained under the CJRS for employees placed on notice of redundancy.

The question arose as a consequence of amendments made to the Treasury Direction on 25 June 2020. The revised Treasury Direction stated that integral to the purpose of the CJRS is that the grant is used by the employer "to continue the employment of employees whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission."

Jesse Norman MP who is Financial Secretary to the Treasury has stated:

"The CJRS is designed to protect jobs and to keep people in employment. Where employers must make redundancies, they should do so in accordance with the normal rules and with contractual obligations. This includes giving a notice period and consulting staff before a final decision is reached.

"Employers may continue to claim under the scheme for a furloughed employee

who is serving a statutory notice period subject to eligibility based on contact of employment."

It appears therefore that, insofar as the government is concerned, the revised wording in the Treasury Direction is not an attempt to prevent employers accessing a grant from the CJRS even if they do intend to embark on a redundancy exercise.

THE AVAILABILITY OF CJRS

However, even if the revised Treasury Direction is not intended to implement an outright ban on an employer continuing to make use of the CJRS when making an employee redundant, it nevertheless emphasises that the purpose of the scheme is that the money afforded under it is used by employers to keep workers in jobs.

The CJRS provides significant financial support to employers and any redundancy will be considered in that context. Until 1 August 2020, it will continue to run as it currently does. From 1 August 2020, employers will be required to contribute employer national insurance and pension contributions. In September, employers will also be required to contribute 10% of wages and the government will contribute 70% to meet the 80%. For October, the employer contribution increases to 20% and the government will contribute 60%.

COLLECTIVE REDUNDANCIES

In any collective redundancy situation in which section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 applies, the consultation will engage with the reasons for the dismissals. Some are of the view that the financial support made available by the state is a factor which means the employer is able to avoid making redundancies.

The fact that employees remain on furlough and social distancing rules continue to apply will almost certainly be a relevant factor to how long it takes to carry out any meaningful collective consultation exercise. The prescribed 30 and 45 day periods are statutory minimums and in the current climate it is likely an effective collective consultation exercise will take longer.

INDIVIDUAL REDUNDANCIES

The availability of this financial support will also be a relevant consideration to any individual consultation meetings over proposed redundancies. Redundancy is a potentially fair reason for dismissal, but it must also be reasonable in all the circumstances to dismiss for that reason. On this basis, the support provided by the CJRS remains a relevant factor when considering whether legal obligations are met in the course of a redundancy exercise.

Employers will also have to be careful when applying selection criteria in any redundancy exercise which involves employees who have been furloughed. Some criteria may disadvantage furloughed workers to such an extent that any subsequent dismissal would be held to be unfair.

Employers will also need to ensure the selection process is not discriminatory.

Given the purpose of the Treasury Direction to continue the employment of employees adversely affected by the coronavirus employers should ensure that those who are most vulnerable and who are shielding should continue to remain furloughed even as employers introduce measures to ease employees back to work.

Any employer considering a redundancy exercise while employees remain on furlough (flexible or otherwise) will therefore need to think carefully about the process they adopt.

NOTICE PAY

The right to notice pay can be complicated, but in broad terms employees who have been continuously employed for one month or more are entitled to statutory notice pay where they are willing and able to work but where no work is provided. The amount of notice is one week's pay for those who have less than two years' service and one week per year of service for each year above two years' service. Statutory notice pay is payable at the rate of a normal week's pay for those who have normal working hours and not at the lower rate paid to the employee during furlough. The statutory right to notice pay overrides any contractual right for the employer to withhold pay if, for example, an employee has been laid off.

However, where an employer is contractually required to give notice which is at least one week longer than the applicable statutory notice period (for example, an employee who has four years' service has a contractual right to five weeks' notice) then the statutory provisions do not apply and the employee is entitled to notice pay under the contract. Generally, where an employer gives the employee notice but tells them not to come to work the employee is still entitled to be paid the normal sums payable under the contract of employment. However, if the contract has been lawfully varied under a furlough agreement then, depending on the terms of the furlough agreement, the employee may be only entitled to notice pay at the furlough rate of pay i.e. if this is 80% of normal pay then the notice pay they will receive will be at that rate.

IMPLICATIONS OF THE UPDATED TREASURY DIRECTION ON HOURS & PAY

A significant proportion of the updated Treasury Direction explains how to calculate pay for those who can now be flexibly furloughed.

Flexible furlough provides employers with an opportunity to bring workers back to work gradually, while still being able to claim a grant towards the wages of employees for the period in which they are not working.

However, the employer will have to carry out a detailed calculation to claim the grant towards the wage costs for employees on flexible furlough by working out the usual hours worked by the employee in the claim period (a period of seven days or more) and deducting the number of hours actually worked. The calculation is complex and involves applying a particular formula depending on the period being claimed for and whether the worker is a fixed rate employee (i.e. salaried) or non-fixed rate employee There is concern that some employers may choose to make employees redundant rather than spending large resources on carrying out detailed calculations to work out furlough pay.

VARYING HOURS

The Treasury Direction makes clear that under the flexible furlough scheme there is no minimum period which an employer has to flexibly furlough an employee.

FLEXIBLE FURLOUGH PAY

Although the level of grant which the employer can claim towards its wage costs is being reduced the employer is required to continue to pay its employee at least 80% of their "regular salary or wages" (capped at £2,500 per month) for each period they are furloughed.

Regular salary or wages does not include benefits in kind, anything in lieu of a cash payment (i.e. salary sacrifice) or anything else which is not regular. Nor does it include discretionary payments. The Treasury Direction confirms that the following are non-discretionary payments and so should be included in regular salary or wages:

- overtime, fees, commissions or piece rates
- payments made in recognition of the employee undertaking additional or exceptional responsibilities
- payments made in recognition of the circumstances in which the employee undertakes the employee's duties or time when they are undertaken (e.g. shift premiums).

The Treasury Direction also makes clear that performance related payments can be included in regular salary and wages where these are set out in a legally enforceable agreement which prescribes how the payment is calculated.

IMPACT ON EMPLOYEES

The way in which pay is calculated can give rise to pay differentials between groups of employees. For example, a furloughed employee may receive more money for the hours they work under flexible furlough than an employee who was put on reduced hours at the beginning of lockdown.

JOB RETENTION BONUS

The Chancellor announced the introduction of the Job Retention Bonus.

This is a one-off payment of £1,000 to employers for each furloughed employee who remains continuously employed until 31 January 2021.

To be eligible, the employees for which the employer will receive the grant will need to:

- Earn above the Lower Earnings Limit (£520 per month) on average in November, December and January and be paid in each month;

- Have been furloughed by that employer at any point and legitimately claimed for under the Coronavirus Job Retention Scheme;

- Have been continuously employed by that employer until 31 January 2021; and

- Still be employed by the same employer as of 31 January 2021.

The bonus will be paid to employers from February 2021 once HMRC receive accurate RTI data from employers for the period up to 31 January 2021.

It is anticipated that further detail will be available at the end of July 2020 and full guidance will be available in the autumn.

RMT LEGAL DEPARTMENT
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