

THE CORONAVIRUS JOB RETENTION SCHEME – MORE QUESTIONS THAN ANSWERS....

On Friday 20 March 2020, the government announced the Coronavirus Job Retention Scheme to help stem the tide of employees being laid off without pay or made redundant in the current crisis.

At the time of writing only a broad outline of the scheme has been published. Draft legislation is awaited which will provide details of the scheme.

What we know so far

This scheme applies to all UK businesses whose employees are on the PAYE payroll. It is designed to help employers who cannot afford to pay their employees' wages and who would otherwise be laid off or made redundant.

Under the scheme employers can claim up to 80% of an employee's wage costs from HMRC, which is capped at £2,500 a month. It seems that employers still need to pay their staff per agreed arrangements (i.e. weekly or monthly) and then seek reimbursement from HMRC of up to 80% of the employee's wage costs. This scheme applies from 1 March 2020 and is to last for an initial period of 3 months. The government has said that they could extend this period if needed.

In order for employers to be reimbursed money from HMRC they first need to designate an employee as a 'furloughed worker'. Once furloughed, employees cannot undertake any work for the employer.

The government have said that the scheme is subject to existing employment law and therefore it is assumed that employers cannot designate employees as furloughed without the employees' express agreement, unless possibly there is a lay-off provision in the employment contract. If there is a lay-off provision it may mean that the employer could designate an employee as furloughed without their agreement. It is not known at this time whether as with lay-offs and short time working (where employees receive less than half pay) employees who are furloughed and who have at least 2 years' service could resign and opt to receive redundancy pay under the statutory scheme where the furloughed status had lasted for 4 or more consecutive weeks or for 6 or more weeks in a 13-week period.

Employers will have to submit information to HMRC about the employees who are designated as 'furloughed workers' and their earnings through an online portal that HMRC are currently setting up.

Employers will not have to top up the wages of furloughed employees to 100% but can choose to do so. Depending on the contract of employment, an employer may need to reach agreement with its employees to receive less than their normal pay and benefits where they don't top-up.

This scheme is due to be up and running by the end of April 2020.

Areas for clarification

Whilst the broad idea of the scheme is straightforward the details of it will be important to work out in order for employers to avoid any future disputes. The following are examples of areas where we have questions which hopefully will be addressed when the full details of the scheme are known.

- How will the 80% of salary be calculated for staff whose earnings vary e.g. zero hours staff?
- Will the £2,500 reimbursement from HMRC include basic salary only or other employment costs such as employee benefits and National Insurance contributions?
- Can an employee be furloughed then brought back to work again and then furloughed for a second period?
- How open to fraud is the scheme? For example, could someone on maternity leave receiving no pay or only standard rate maternity pay return to work early in order to be furloughed and start receiving 80% of their normal pay?
- What information and evidence will employers need to provide to HMRC when they seek reimbursement under the scheme?
- How soon will employers receive payments under the scheme? Will certain businesses or sectors be prioritised?
- If an employer has already terminated the employment of staff for redundancy, can they rehire those staff and then furlough them? If so, can the employer clawback any termination payments that have been paid to the employees?
- Can an employee designated as furloughed work elsewhere thus potentially gaining a windfall?
- How does pay under the scheme interact with the national minimum wage (NMW) rules for staff on NMW?
- If an employer dismisses for redundancy rather than furlough the employee could it be liable for a later unfair dismissal?

These and other questions remain to be answered and we await further information from government so that we can advise our clients fully on the scheme. If you have any queries regarding the scheme or any other employment law issue please contact our employment team.