

# Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

April 2020



## Coronavirus special edition

It's been a whirlwind few weeks since our last newsletter - so much has happened. The landscape for employment law and businesses changes on an almost daily basis.

We are continuing to work hard for our clients as we face these tough times with you. Luckily our systems have always been designed for remote working so we have been able to easily adapt without our service levels suffering.

We can't pretend life is normal at the moment, so we bring you this special edition newsletter which covers almost exclusively COVID-19 related issues and concentrates especially on furlough.

As so much is evolving constantly, please follow us on [LinkedIn](#) for our latest updates and get in touch for advice about your employees and business.

Wishing you all safety and good health from everyone at the Outset Group.

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Key information for businesses on the Coronavirus Job Retention Scheme

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## Furlough – the latest

The Coronavirus Job Retention Scheme (CJRS) continues to be the key focus for most businesses and employees as we all struggle to maintain stability and financial security in this crisis. The scheme has now been extended to 30 June 2020 and may be extended further still if the government thinks it's necessary.

The [online system](#) for employers to make CJRS claims went live on Monday 20 April, along with an [online calculator](#) so you can check your calculations before you make your claim.

**It is up to employers to make their own determination about who you can claim in respect of and how much you can claim.** HMRC can audit at any time for up to 5 years and issue claw back notices, fines and penalties - so it's important you are familiar with the rules and only claim in respect of eligible employees and wage costs.

The employer CJRS guidance has changed several times and as at the morning of 20<sup>th</sup> April was in its 7<sup>th</sup> iteration. There are several sources of detailed government CJRS information available, as follows:

- 1 Employer HMRC Guidance** – check if you can claim (you must read this before claiming).
- 2 Government Guidance for employers** – working out 80% of wages this is a detailed explanation of how to calculate 80% of wages, national insurance contributions and pension contributions, and includes an online calculator for you to check your calculations.
- 3 Government step-by-step guide to claiming wages through the CJRS scheme** this is a summary guide of the claim process, linking to relevant guidance.
- 4 Government YouTube coronavirus videos** helpful for those who would benefit from listening to someone explain the rules.
- 5 Employee HMRC Guidance** this is a helpful link to pass employees who have questions about the scheme.
- 6 Coronavirus Act 2020 Treasury direction** this sets out the legal framework for the CJRS. It confirms HMRC are responsible for the scheme and details how they must administer it.

Claims can only be submitted once every 3 weeks and it's important that you check the guidance each time for any updates. If you aren't sure whether or how it has changed, look at the top of the guidance page: it states when it was last updated and there is a hyperlink to "see all updates".

If you follow that link and expand further you can find a list of when the guidance was first published, each time it was updated and what was changed in it.



## Furlough and family related leave

When calculating furlough pay for an employee who has recently returned from family related leave, including maternity and paternity leave, employers should use their normal full salary, not the pay received whilst on leave.

Claims for those on variable pay returning from statutory leave should be calculated using either the:

- same month's earning from the previous year
- average monthly earnings for the 2019 to 2020 tax year

**Employees due to go on maternity leave should start that leave as normal.** Whilst they can be furloughed, employers cannot claim for statutory family related payments under the CJRS scheme. Employers can however claim under the scheme for enhanced, contractual family related pay.

If an employee received reduced pay due to being on sick leave or furloughed before going on maternity leave then this could potentially affect the amount of maternity pay they are entitled to. This depends on the timings involved.

Statutory maternity pay is calculated by reference to average weekly earnings during the 8 week period that immediately precedes the 14th week before the Expected Week of Childbirth.

In simpler terms, as a rule of thumb, the earnings taken into account for monthly-paid employees are those set out on the last two pay slips before the end of the Qualifying Week (which is the 15th week before the EWC).

## Furlough and holiday

It has always been clear that employees continue to accrue holiday during furlough, but beyond that we were not certain what would be permitted under the scheme in terms of taking holiday.

The government has now confirmed:

- employees can take holiday whilst on furlough
- where an employee does take holiday during furlough, the employer must top up their pay so that they receive their normal earnings for those days
- if an employee normally works on a bank holiday this can be claimed by the employer and the day paid to the employee at the reduced 80% furlough rate (i.e. because it is a normal working day)
- if the employee does not normally work bank holidays EITHER the employer can top up pay as noted above and it is treated as holiday, or the employer can give the employee a days' holiday in lieu

### Requiring employees to take holiday

This is welcome news for employers which desperately need to look at cost savings. You can require employees to take their holiday during furlough by giving them twice the amount of notice as the holiday they are required to take, e.g. 4 days' notice to take 2 days holiday, and specifying the days they are required to take that holiday.

Up to 80% of the cost of that day's holiday can be claimed under the CJRS scheme with the employer only having to fund the top up. This will mean that later down the line the business won't be faced with employees taking large amounts of holiday when they're needed at work, or having to be paid holiday in lieu if redundancies are necessary.

### Calculating holiday pay

Employees must be paid in respect of holiday at their normal rate of pay. Where the rate of pay varies, the employee must be paid on the basis of the average pay received by them in the previous 52 working weeks. When carrying out an average pay calculation you should ignore any weeks the employee received reduced pay, for example due to family related leave, sickness or furlough, even if pay was only reduced for part of the week.

### Changing holiday entitlement

You can agree with employees to reduce their holiday entitlement, although not below the minimum 5.6 weeks per year. Bear in mind that unless an employee is willing to voluntarily agree to reduce their contractual holiday entitlement, you will need to consult with them about the change.

### Carrying over holiday

As part of the emergency Coronavirus measures the government has announced that employees may carry over the first 4 weeks of their statutory leave for up to two years. This has not previously been possible. The aim of this is to ensure that those key workers who are required to work as normal at this time will be able to take their accrued holiday at a later date.

**A word of warning – the government has stated that it will keep the situation regarding holiday under review as it is such a key issue for both employers and employees.**





## Furlough and sick leave



The latest government guidance has confirmed that employers are able to furlough employees who are on sick leave, shielding, self-isolating or have caring responsibilities.

Although sickness shouldn't be a deciding factor, if you want to furlough any particular employee you can essentially ignore the fact that they are off sick/shielding/self-isolating and furlough them. The decision is entirely for the employer to make. It is also up to the employer what to do if a furloughed employee becomes sick – you can choose to move them to sick leave and claim up to 14 days SSP under the rebate scheme where eligible.

You can claim both under the SSP rebate scheme if you qualify, and under the CJRS for the same employee although not in respect of the same time period.



## Furlough and EMI share options

Enterprise management incentive options (EMI Options) have become a popular way for companies to recruit, retain and incentivise talent. They are flexible and come with significant tax advantages.

### Continued Employment Condition

One of the conditions which an EMI Option holder must meet is that they must work at least 25 hours per week, or 75% of their total working time.

If an EMI Option holder is an employee who has been furloughed, these working time requirements will not be met. Technically this will be the trigger for a "disqualifying event" leading to the loss of the tax benefits and perhaps even the lapse of the EMI Options.

HMRC has not yet confirmed that the tax benefits attaching to EMI Options will not be lost as a result of furloughing. There are further concerns as to what will happen if EMI Option holders are ultimately made redundant.

We are currently helping both EMI Option holders and companies to engage in constructive dialogue around the likely impact of Covid-19 on the company and the employment status of EMI Option holders.

If your employees are EMI Option holders and you are considering furloughing them, please get in touch for specific advice.



## Believe it or not...

As though being in the midst of a global pandemic and national lockdown wasn't surreal enough in itself...

Across the world people are reporting an increase in dreams, with the Google search term "why am I having weird dreams lately" having quadrupled in the USA.

There have been many coronavirus conspiracy theories circulating, including one that COVID-19 was released by Disney to coincide with the launch of its new Disney + channel.

There have been some startling natural wonders in the face of lockdown, including visibility of the Himalayas from Punjab as pollution decreases, the canals in Venice clearing up enough so that fish can be seen, deer frolicking in a housing estate in east London and goats taking over Llandudno in Wales.

## Recent case decision

When is an employer vicariously liable for an employee's actions?

### Morrisons v Various

A disgruntled employee, an internal auditor, uploaded payroll data to the internet instead of sending it to the supermarket's auditors, causing a data breach. In a group action, the Claimants succeeded in the High Court and the Court of Appeal for breach of statutory duty under the Data Protection Act 1998, misuse of private information and breach of confidence. It is well established that employers can be held liable for the actions of their employees.

The Supreme Court held in this case that Morrisons were not vicariously liable for the employee's act. The court stated it is not enough that the employee's act arose from a task 'closely related to what he was tasked to do'. There is vicarious liability where 'the employee is engaged, however misguided, in furthering his employer's business'. There is no vicarious liability where an employee is 'on a frolic of his own'.

The judgment compared a Managing Director at a Christmas Party who punched an employee when illustrating who was in charge of the business (employer liable), with a police officer who left his post and accidentally shot a bystander when enraged after finding his girlfriend in a bar with another man (employer not liable).

Where an act is one of 'personal vengeance', or an act that is in pursuit of private ends, an employee is not acting on his employer's business as in this case. Therefore, Morrisons were not vicariously liable for their employee's actions.



## Update on SSP

Employers with fewer than 250 employees on 28 February can reclaim up to 14 days Statutory Sick Pay for absences connected to coronavirus.

The rebate claim facility is not yet live but government guidance is available [here](#).

There have been a couple of other important updates to SSP:

- Employees do not qualify for SSP if they are on furlough. It is up to the employer to decide whether the employee stays on furlough or moves to sick leave and SSP.
- Someone who has to shield according to government guidance because they are in the extremely vulnerable category may now be entitled to SSP (if they cannot work from home). Previously it was only those self-isolating in accordance with government guidance who would be eligible for SSP.

## COVID-19 information

There is a lot of official resource available online covering various COVID-19 issues facing businesses and individuals:

[Government coronavirus response page](#) – contains the latest government directions and links covering all topics including, for example, driving (extension to MOTs) and advice on travel and immigration

[Government Guidance for employers and businesses on COVID-19](#) – covers how employers should operate if they are remaining open, including social distancing rules

[Government Guidance for businesses which must close](#)

[Government Guidance on social distancing in the workplace](#) – sector specific

[Government Guidance on shielding and protecting extremely vulnerable people](#)

[Government Coronavirus FAQs](#) – useful guidance on what you can and can't do during lockdown

[Government stay at home guidance](#) – the rules to refer to concerning self-isolation where coronavirus is present, suspected or possible

[NHS self-isolation guidance](#) – includes the ability for employees to obtain an isolation note