

Workplace Newsletter

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

May 2020



Furlough – the latest

Since our last newsletter there have been updates here and there to the various government guidance notes, but the big announcement has been the extension of the Coronavirus Job Retention Scheme to 31 October 2020.

Between now and the end of July 2020 the scheme will continue to operate exactly as it does now. From 1 August there are changes coming.

We don't know the finer detail of these changes but the government guidance confirms that:

- Employers will have flexibility to bring furloughed employees back to work part time and still claim support under the scheme
- Employees will continue to be guaranteed a minimum of 80% of their salary up to £2.5k per month
- Employers will have to start sharing the burden of the cost of the scheme with the government

Guidance as to exactly what this means is expected to be published by the end of May 2020. In the meantime, employers can extend furlough periods up to and including 31 July on their current terms, and continue to make claims for reimbursement in the same way under the scheme.

Once further information is available at the end of May, employers will be in a better position to assess what changes to make to how it operates furlough for its employees from 1 August onwards.

Welcome

We hope you're all keeping safe and well during these strange times which have now become our new normal.

Since our last newsletter there have been yet more furlough scheme updates, but we've also included some insights on the transition back into the workplace for many for the first time in several weeks.

As always, please follow us on [LinkedIn](#) for our latest updates. We are especially excited about our new Friday "Meet the Team" series where you can find out a bit more about the advisers you deal with.

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

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Practical steps to ensure a smooth return to the workplace.



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Holiday entitlement and pay during COVID-19

The government published new guidance on 13 May setting out how holiday entitlement and pay operate during the coronavirus pandemic, where this is different from the usual rules.

The guidance confirms the advice set out in our previous article (in the April newsletter). The key points to note from the government guidance are below.

The full guidance is available [here](#).



Key points

- 1 Employers can require employees to take holiday at specific times, whether during furlough or otherwise (and it won't affect furlough). To do so the employer must give the employee twice the amount of notice as the holiday they are required to take, e.g. 4 days' notice to take 2 days holiday, and specify the days they are required to take that holiday.
- 2 Employers can cancel a pre-booked period of holiday. This might be, for example, where business operations mean you need the employee to be at work. To cancel holiday you must give the employee the length of the planned holiday in notice, for example, 2 days' notice to cancel 2 days leave.
- 3 For furloughed employees, employers can claim up to 80% of the cost of that day's holiday under the CJRS scheme.
- 4 In terms of holiday pay, employees must be paid in respect of holiday at their normal rate of pay. In practice this means that for employees on furlough, you will likely need to top up days taken as holiday to their full pay.
- 5 Workers on furlough are unlikely to need to carry forward statutory annual leave as they should be able to take it whilst on furlough.



Mind Matters

We're departing from our usual "believe it or not" feature at this time to bring you some food for thought in maintaining good mental health at this challenging time.



It's normal to feel sad, stressed, confused, scared, angry, during a crisis, and to have good and bad days. Don't be hard on yourself.

Maintain a healthy lifestyle as much as you can – sleep well, move around, don't forget your fruit and veg but cake is also needed sometimes!



Try to limit how much media coverage you take in. We all need to keep up to date, but perhaps cut off after a certain time and turn to the trashy tv!

Stay connected to people – when you're very busy it can be easy to go for days without speaking to family or friends, but try to make the time, it does wonders.



Try to keep structure in your day. Particularly if you're working from home, juggling childcare and other responsibilities can mean that work creeps into your entire life. Try to separate it – physically and timewise.



Furlough and sick leave

In our April newsletter we confirmed that the latest government guidance set out that employers are able to furlough employees who are on sick leave, shielding, self-isolating or have caring responsibilities.

However, the situation is not as clear cut as some sections of some of the guidance would have us believe. Key points for employers to consider depend on whether the sickness is short or long term or whether an employee is shielding.

Short-term sickness

The furlough scheme is not designed to cover short term sickness absence, so if they would have been working but for being sick, you should think twice about furloughing them instead. However, if you would have furloughed the employee regardless of sickness, it would seem compatible with the spirit of the scheme to furlough them and claim under the scheme.

Long-term sickness

The guidance saying employers can furlough those on long term sickness contradicts the treasury direction. The treasury direction states that where SSP is payable (or liable to be payable, whether or not a claim is made) when the employee consents in writing to be furloughed, the period in respect of which a claim can be made from the CRJS does not start until the SSP entitlement period has ended. The safest approach would be to follow the treasury direction and not furlough an employee until their entitlement to SSP has expired.

Shielding

The position on this is unclear due to conflicting guidance and regulations. Previously shielding employees were not entitled to SSP so the government and Acas guidance states shielding employees can be furloughed. However this is in contradiction to the Treasury Direction as described above. This is further contradicted by the amendments to the Coronavirus provisions for SSP which states it is payable to shielding employees “in cases where their employer chooses not to furlough them”.

Based on current conflicting government guidance, regulations and directions, the safest approach currently is as follows:

- **Furloughed before 16 April** – shielding employees were not entitled to SSP prior to 16 April therefore if they were furloughed before this date then furlough can continue and you can claim reimbursement under the CJRS
- **Furloughed on or after 16 April** – the treasury direction should be followed, and you should only furlough an employee once their entitlement to SSP has expired

It is a frustrating situation to face: where one set of government publication contradicts another, particularly where most will simply be reading and following the readily available guidance, rather than reading technical directions and regulations.

The worst case scenario is that HMRC later audits a claim made under the scheme and demands repayment from the employer.

Many employers will want to follow the government guidance where it states you can furlough employees on sick leave or shielding. Our suggestion if you do decide to follow the current guidance is:

- Print/download the guidance from the government website
- Highlight the relevant wording you are relying on
- Keep it in a safe place along with your furlough records

You can then seek to rely on this in the event of an HMRC audit later down the line. It would seem very unfair (and unlikely) for an employer to be penalised for acting in accordance with the guidance as at that date, even if it was later changed.

Getting back to the Workplace

An update to the current government guidance and practical steps to ensure a smooth return to the workplace.

On 10 May 2020 the Prime Minister addressed the nation. Among other things, he confirmed:

- ✓ A new Covid Alert System will be in place
- ✓ The system will be made up of 5 levels, the level will be determined by 'R' (the rate of spread infection) and the number of coronavirus cases
- ✓ The Covid Alert Level will tell us how strict our social distancing measures need to be
- ✓ The lower the Covid Alert Level, the fewer the measures, the higher the level the more strict the restrictions will be
- ✓ Level One means the disease is no longer present in the UK and Level Five is the most critical
- ✓ Over the period of lockdown we have been in Level Four
- ✓ We are now in a position to "begin to move in steps to Level Three"
- ✓ We must continue to comply with government guidance and rules, including in relation to social distancing, in order to prevent the spread of COVID-19

For employers, right now, this means:

- Those employees who can work from home should continue to do so
- Only if an employee cannot perform their role from home, should they attend the workplace
- Those who cannot work from home, e.g. those in construction or manufacturing, are actively encouraged by the Government to go to work
- Employers must follow new government guidance to make workplaces "COVID-secure"

Requiring employees to attend work

If an employee is able to perform their role from home then you should allow them to do so.

Employers will be expected to go to reasonable efforts to enable an employee to carry out their role at home. This might involve, for example, making adjustments to the role and/or providing additional equipment or training.

If an employee's role cannot be performed from home, for example because it is a driving role or involves using specialist tools or machinery, then you can require them to attend their normal place of work.

However, this will be subject to you following government guidance to make the workplace "COVID-secure". You must also bear in mind whether the employee is in a health category which prevents them from attending the workplace in line with current government guidance.

Employees who can't attend work

Employees who are self-isolating or shielding in line with government guidance must not be required to attend their usual place of work. They can work at home, if well enough.

There is a difference between someone who is shielding, self-isolating and social distancing, whether they can be required to attend work is determined by which category they fall in, see the next page.

Self-isolating



This is where, in line with government rules, someone is required to stay at home due to suspected Coronavirus i.e. the individual or someone they live with has COVID-19 symptoms and/or has tested positive.

If someone is self-isolating they are not permitted to attend the workplace (or go anywhere) and must stay at home. If they can't do their job from home therefore they should be on sick leave.

Shielding



This applies to those who are “clinically extremely vulnerable”. Individuals in this group will have received an NHS letter or been told by their GP that they are in this group. Note that over 70s and pregnant women, for example, are not automatically in this category.

Those who might be in this group include, for example, people with cancer receiving chemo treatment.

Those who are shielding are “strongly advised” to stay at home so must not attend their usual place of work and should be on sick leave if they cannot work from home.

Social distancing



This is anyone who is not self-isolating and not shielding as set out above. Such individuals can be required to attend their normal place of work if their workplace is open and they are unable to perform their role from home. Within this category there is the sub-category of “clinically vulnerable people” which includes over 70s and pregnant women (for example).

The guidance states they should “take particular care to minimise contact with others outside your household”. This does not entitle them to be treated as on sick leave if they do not attend their usual place of work, but you should exercise extra caution when deciding how to pay them if they do not want to attend work but you require them to.



Making the workplace COVID-19 secure

The government has published 8 detailed guides covering a range of different types of work to help employers make the workplace Covid-secure. All employers must consult these guides when developing their strategies to make the workplace safe. The full set of guidance notes is available [here](#).

There are 5 core elements of the government's guidance for staying COVID-secure which apply to every employer:



Carry out a COVID-19 risk assessment and share the results with your staff



Put in place cleaning, handwashing and hygiene procedures in line with government guidance



Take all reasonable steps to help people work from home



Take all reasonable steps to maintain a 2m distance in the workplace



Where people cannot be 2m apart, do everything practical to manage transmission risk

All employers are required to consult with their workforce about health and safety. Doing so in relation to COVID-19 is a particularly valuable exercise as it will help you to address concerns and ease the transition of returning staff to the workplace, at the appropriate time.

Every employer should consider introducing a COVID-19 & Social Distancing at Work Policy. This will help you keep your workforce informed about the steps you are taking but also the standards expected of them.

Getting back to the Workplace continued.



Employees who refuse to attend work

COVID-19 has created a very uncertain and worrying time for most, and there will be many individuals who will be nervous about attending/returning to their usual place of work.

Effective communication will play a key role in successful collaboration with your employees. If, despite your communications and safety measures, an employee refuses to attend work because they are fearful of the risk to their health, the employer should take a risk based approach.

If the employee is not in a high risk category and you are comfortable that the safety measures you have in place are consistent with government guidance, you could potentially place them on zero pay and/or consider disciplinary action.

You should carefully consider whether disciplinary action is appropriate on a case by case basis, taking into account:

- the reasons for refusal to attend work
- the potential for carrying out their role (or an alternative role) from home
- the possibility of making use of the furlough scheme
- whether another type of leave might be appropriate (e.g. family related leave or an unpaid sabbatical)

If your risk assessment determines the risk as too high in relation to a particular employee and it is the employer which requires them to remain at home, then that should be on full pay unless the employee agrees otherwise.

Recent Case Decisions

Duchy Farm Kennels Ltd v Steels

Not necessarily. Steels entered into a COT3 agreement with his former employer to settle his Employment Tribunal claim against them. The settlement sum was payable in a number of instalments. The COT3 contained a confidentiality provision and Steels was later found to have breached it, by telling various third parties about the terms of the agreement.

Duchy Farm refused to pay Steels the final instalment of the settlement sum on the basis he had breached the agreement. However, the High Court agreed that the payments were still payable to Steels because neither was:

- payment conditional on him complying with the confidentiality provisions; nor
- the breach fundamental

Does an employee forfeit sums for breaching confidentiality provisions in a termination agreement?

This provides a valuable lesson in ensuring key terms of settlement agreements are carefully drafted so that if they are breached, the employee ceases to become entitled to payment.

Further information

There are a number of sources of government guidance relating to working practices and social distancing during the COVID-19 crisis.

These are regularly updated so you should always check the latest version when implementing or updating a measure or responding to a query from an employee:

[Working safely during Coronavirus](#)

[Staying alert and safe – social distancing](#)

[Coronavirus outbreak FAQs: what you can and can't do](#)

