

Workplace Newsletter

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

November 2020



Out with the old new Job Support Scheme, in with the new old Coronavirus Job Retention Scheme

Confused? Head spinning? Us too. Forget what we told you last month about government support: the new Job Support Scheme never happened and is on hold until further notice, and the Job Retention Bonus has also been indefinitely delayed.

The Coronavirus Job Retention Scheme, known to most as the 'furlough scheme', is back. Just days before the Job Support Scheme was due to replace the furlough scheme, the government performed a u-turn and, at the same time as announcing a second lockdown, also informed us that the furlough scheme would be extended until December 2020.

Then, just in case we were in danger of resting on our laurels, just a few days later Rishi Sunak announced that the furlough scheme would be extended until March 2021.

The government published a policy paper on 5 November about the extension, which we summarised [here](#).

On 10 November, the government updated 11 separate online pages of guidance, which set out operation of the scheme from 1 November to 31 January 2021. The document which sets out the legal framework for the scheme, the Treasury Direction, was then published in its 5th iteration on 13 November.

The points in the policy paper remain applicable, but the guidance, and Treasury Direction, add further detail and clarity.

[Read the full feature here p2>](#)

Welcome

It seems that as soon as we issue our newsletter, the government makes yet another change, so we have to update our material almost immediately.

Hopefully this month there will be no surprises – this time they told us the furlough scheme extension guidance would be published on 10 November, so we made sure to wait for it.

In this edition we're also catching up on other areas – some changes in the requirements for Modern Slavery statements and supporting employees during lockdown 2.0.

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Potential sticky wickets

With a policy paper, treasury directions and guidance on the furlough scheme all written at speed and various stages in the government's development and announcement of policy, we are left with some sticky areas of the scheme.

What written agreement/documentation do you need to have in place with employees? Can you rely on what you already have in place if you have furloughed employees previously?

Most employment lawyers will advise you to enter into a new written agreement with employees which sets out the exact number of hours they are required to work and be furloughed (as applicable) and for what period. That is certainly a risk minimising, belt and braces approach.

In practice that isn't necessarily workable or a commercial approach for all employers - for example, if you need flexibility to alter working patterns and/or rotate staff. Surely the scheme anticipates the need for flexibility? The guidance states that employers must have confirmed to employees that they have been furloughed, and the employee doesn't have to provide a written response.

Conversely, the guidance also refers to making sure that the agreement is consistent with employment laws, and that to flexibly furlough employees you'll need to agree this with employees, keep a new written agreement that confirms the new furlough arrangement and that employees can enter into a flexible furlough agreement more than once.

Ultimately it's important to consider the documentation you already have in place in the context of the updated guidance, and keep accurate records of the hours staff in fact work and spend on furlough. If you have never flexibly furloughed employees, you will at the very least need to confirm to them in writing their flexible working arrangements. In some cases you may need to seek new agreement. It's safest to take advice if in doubt.

Can you furlough employees who TUPE in to you?

You can, but the guidance published on 10 November stated only if they TUPE'd to your business on or before 1 September 2020 and they were employed by their previous employer on or before 30 October 2020. This made little sense and appeared to be a drafting error. We tweeted HMRC who confirmed it was an error, and should have stated "after" 1 September. The guidance has since been corrected and the new Treasury Direction reflect the corrected position. Provided the employee was employed by their previous employer on OR before 30 October AND transferred to the new employer on or AFTER 1 September, they can be furloughed under the extended scheme.

Can you furlough employees serving a notice period?

Currently, yes. When first published the guidance wording suggested that employers could only claim for statutory notice i.e. not for any excess contractual notice. We tweeted HMRC about this and they clarified that employers can currently claim for both statutory AND contractual notice. However, not only did the government update the guidance to clarify this, but they have also now confirmed that the grant cannot be claim for any contractual or statutory period of notice which covers 1 December onwards. This means that even if you place an employee on notice prior to 1 December, for any period of their notice which runs over, you cannot claim the CJRS grant.

How long must you retain copy records for?

In some places the guidance refers to keeping records for 5 years, in other places, 6 years. Of course its safest to go with the longest period and keep records for 6 years covering all information relating to furloughing employees, including:

- Amount claimed and period for each employee
- Claim reference numbers
- Your calculations
- For flexibly furloughed employees, the usual hours worked plus calculations AND the actual hours worked
- Written agreements/notifications to employees relating to furlough and flexible furlough



What next?

The government is going to review the extended scheme in January, and decide whether employers should be asked to contribute more.

Ahead of that, we expect further guidance to be published in late November which will include more information about the fact that HMRC will publish, for companies and LLPs using the scheme, their name, registered number and an indication of the value of the claim.

The guidance pages

Click on the appropriate heading below to view the full government guidance:

1. [Check if you can claim for wages through the CJRS](#)
2. [Check which employees you can put on furlough](#)
3. [Steps to take before calculating your claim](#)
4. [Calculate how much you can claim](#)
5. [Claim for wages](#)
6. [Examples of how to calculate employees' wages, NI and pension contributions](#)
7. [Examples of calculations for flexibly furloughed employees](#)
8. [How to pay back grant money which has been over claimed, or you've decided is not needed](#)
9. [Further guidance on other types of employees you can claim for](#)
10. [Reporting wages in PAYE RTI to HMRC when you've claimed under the furlough scheme](#)
11. [Guidance for employees on whether their employer can use the furlough scheme](#)
12. [5th Treasury Direction covering operation of the CJRS from 1 November to 31 January](#)

Read the extended version of this article [here](#).



The benefits of linking performance management and employee engagement

Performance management and employee engagement have traditionally been two separate facets of HR's role. But, in order to get the most from their people, organisations should look at aligning the two.

It's well understood that there's a strong link between employee engagement and overall business performance. While there is a clear correlation between the two, bringing performance management and engagement into alignment requires careful balancing by HR departments.

These two activities grew out of quite different parts of HR:

- The CIPD defines performance management as 'the activity and set of processes that aim to maintain and improve employee performance in line with an organisation's objectives'.
- Although there are many concepts of employee engagement, it typically focuses on listening and feedback. According to Gallup (2004), employee engagement isn't binary. There are actually three classifications; engaged, not engaged, and actively disengaged.

Processes that focus only on engagement and that aren't linked to performance management may not serve the organisation's best interests. It's only by bringing the two concepts together that HR can create programmes that lead to happiness and success at work. When companies help people to develop their skills and recognise them for great performance, engagement increases.

A balanced approach



The combined approach can be very powerful. A £7 billion integrated global health company that took part in Harvard Business Review Analytic Services research has tied engagement to metrics including patient satisfaction scores, quality scores, patient safety, readmissions, and even hospital revenue. It found a strong correlation between near-miss safety incidents and low employee engagement, too.

Likewise, a 7,000-person software company with offices in the US, India, the Philippines and Spain has demonstrated a positive correlation of +0.97 between engagement and the company's stock price. A correlation of +1.0 is a perfect correlation, meaning that the variables in question, in this case engagement and stock price, move together in the same direction and by the same percentage.

Finally, the research found that those respondents who agree with the statement "We do a good job linking employee performance/engagement to business outcomes," outperformed the rest of the respondents on a variety of business metrics, from revenue growth, quality, customer satisfaction, productivity to profitability, and more.

Of course, ensuring that performance management and employee engagement work in partnership isn't easy. The two disciplines have evolved in their own silo, which means they are likely to use separate systems, rely on disparate data, and have different people managing them.

Bringing the two together requires a new approach. Having integrated systems and processes is the ideal, but the reality is that most organisations still operate with engagement and performance management in those silos.

The role of line managers



The manager's role in an integrated approach is critical. The key is for companies to equip managers with the skills and mind-set to manage performance in this new, unified and agile way, and offer managers training to focus on development and coaching. Discussing engagement scores frequently at management meetings, with a focus on conversations and taking action, needs to become commonplace.

Effective performance management that also increases engagement requires the right data and tools in addition to training. Without access to the right data, managers will struggle to take effective action.

Finally, by providing them with access to the data and the tools they need, managers can have much more meaningful employee conversations about priorities, goals, and growth.

By viewing performance management and engagement in this way, organisations can reap the benefits of both happy employees and productivity gains.

Recent Case Decisions

Limiting promotion opportunities to a specified pool may be age discrimination

Ryan v South West Ambulance Services NHS Trust

The employer set up a talent pool, the criteria for joining being graded as “exceeds expectations” (on appeal or otherwise) or by self-nomination. The talent pool was used by the Trust to fill vacant positions quickly, with high performing individuals.

Mrs Ryan, who was in her late 60s, missed out on two promotion opportunities because she wasn’t in the talent pool. She went on to argue that, as the pool consisted mainly of employees under the age of 55, the requirement to be in the pool in order to be considered for the promotions was indirect age discrimination.

The employer argued that Mrs Ryan had not appealed the fact she hadn’t been awarded an “exceeds expectations” grade, and hadn’t nominated herself to be in the pool – so effectively, it was her fault she wasn’t in the pool and not age discrimination.

However, on appeal, the EAT agreed with Mrs Ryan and confirmed:

- On the face of it, there was a group disadvantage as the pool was dominated by under 55s, therefore there was a prima facie case of discrimination to answer
- Mrs Ryan was placed at an individual disadvantage for not being considered for roles because she wasn’t in the pool
- No evidence was provided as to why Mrs Ryan hadn’t been awarded “exceeds expectations” and added to the pool automatically, or whether she would have been added had she appealed her grading or self-nominated. The Trust therefore couldn’t show that Mrs Ryan wasn’t in the pool because she was undeserving, rather than as a result of indirect discrimination
- The Trust could not make out the objective justification defence, for example it didn’t consider:
 1. Why the positions in question had to be filled quickly
 2. What the actual discriminatory effect of the provision (to be considered for promotion, an employee had to be in the pool) was in general and specifically in relation to Mrs Ryan
 3. Could lesser measures have achieved the same aim, for example, membership of the pool being a desirable, rather than mandatory, condition of being considered for the promotions

This case highlights some important points for employers to consider:

- Be wary of provisions which may inadvertently create underrepresentation of employees with protected characteristics, resulting in negative impact for individuals
- Consider whether any such provisions can be adapted to remove or lessen any indirectly discriminatory effects
- Don’t assume that giving an opportunity to employees to challenge the provision is a fail safe

Believe it or not?

What perks does your business offer?

Here are some benefits offered by some well-known businesses to give you some inspiration...

Ben & Jerry’s employees get 3 pints of ice cream a day... not sure if that’s such a perk for the waistline but apparently they are encouraged to share with family and friends

Netflix don’t keep track of working hours or holiday for their staff in California... as long as you get your work done, they’re happy!

In the USA, Starbucks offers employees tuition fees for earning a degree in an online university programme

Yahoo has foosball tables, sweets and comfy break out areas in its London office...so staff can make the most of their down time

Airbnb offers employees £1,413 travel credit each year... probably not the greatest perk of 2020, but here’s to looking forward!

Most people know that John Lewis employees are all Partners, but did you know they also have access to some amazing benefits... like the use of yachts on the Solent.

UK GOVERNMENT MODERN SLAVERY STATEMENT

Modern Slavery statement changes

The Government has confirmed that it is going ahead with major changes to the duty on large employers to publish an annual modern slavery statement.

What are the current rules?

1. The duty to produce a modern slavery statement currently applies to commercial organisations with a total turnover of at least £36 million per year. This threshold will remain the same.
2. The Modern Slavery Act 2015 states that a Modern Slavery Statement “may” include the following areas of information about an organisation’s:
 - Area 1: structure, business and supply chains;
 - Area 2: policies in relation to slavery and human trafficking;
 - Area 3: due diligence processes in relation to slavery and human trafficking in its business and supply chains;
 - Area 4: business parts and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
 - Area 5: effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against performance indicators that it considers appropriate; and
 - Area 6: training about slavery and human trafficking available to its staff.
3. There are no particular enforceable timelines for when an organisation must publish its statement.
4. Currently, employers must publish the modern slavery statement on their website and include a link to the statement in a prominent place on the homepage.

What are the changes?

The Government has confirmed that it is going ahead with a number of changes that will apply in England, Wales and Scotland. These include:

- bringing large public-sector organisations in England and Wales within the scope of the duty to produce a modern slavery statement;
- mandating the areas that a modern slavery statement must cover (rather than the areas to cover being recommendations only) – although there may be tweaks made to the 6 areas currently listed;
- introducing a single reporting period and annual reporting deadline for all employers covered (the statement will have to cover the period from 1 April to 31 March. There will be a single annual reporting deadline of 30 September); and
- requiring employers to publish their statement on a Government-run reporting website.

When are the changes coming?

The Government is expected to publish updated guidance for employers on the new requirements. There is no date yet for when these changes will take effect, with amending legislation due to be brought forward “when parliamentary time allows”.

What can employers do to prepare?

- Where your organisation is already covered by the legislation, review the structure of your modern slavery statement to ensure that the six reporting areas are already covered where relevant.
- Where you expect your organisation to be covered when the legislation is changed, collate the steps your organisation takes in relation to the six reporting areas. This should make drafting your first modern slavery statement easier when the time comes.
- If you find an area where your organisation takes no steps, use this as an opportunity to think about why this is and whether or not this needs to be remedied.
- If there is a particular reason why no steps are taken in a particular area, be prepared to explain why when drafting your modern slavery statement.

Why is this important?

Even if your organisation isn’t caught by the legislation, you might be required by a supplier, customer or client to have a statement in place, or you may simply consider it important to have one – particularly if you operate in a business area where modern slavery is known to be an issue.

Making clear what steps are being taken to tackle modern slavery can enhance your organisation’s reputation and contribute to your Corporate Responsibility Programme.

What do I do about... employee well-being during lockdown 2.0?

Lockdown v 2.0 is well underway and many staff are facing more (or continuing) time working remotely. This challenging landscape means that the mental health and wellbeing of staff has never been a more important consideration for employers.



We look at some practical tips for employers to consider implementing, sharing and promoting, all in the spirit of combating the increased risks of mental health problems caused by coronavirus impacts and lockdown.

Encourage best practice for staff working from home

Although lockdown is no longer new, not everyone will be used to remote working. Simple things like properly setting up a workspace that is separate from ‘home’ space, taking regular screen breaks and clearing away at the end of the day can help people switch off their ‘work mode’ and decompress. The simplest tasks, like hiding your work phone in a drawer, closing your notebook, and tidying your stationery away can help compartmentalise and separate work from home.

Be flexible and compassionate

These are unique and extraordinary times which will be challenging for all of us in different ways. Examples such as elderly relatives who require assistance will add to the stresses and strains of everyday life. Encouraging flexible working hours and paying extra attention to workload management will help people balance their ‘work’ and ‘home’ lives.

Connect authentically

With most of us working remotely there is less room to bump into each other, chat organically, or discuss concerns we might have. Video conferencing software is a great way to connect. Seeing a friendly face can mean more than just hearing a friendly voice.

Arranging more informal sessions such as a remote team coffee every morning can help teams stay connected and reduce feelings of isolation.

Look at creating fun with how you connect too. Quizzes were a big thing in the first lockdown and we think they’ll play a part this time round. Activities such as this can - and in the main, should - include any staff who may have been furloughed.

Make time for supportive conversations

Giving support to people who may be struggling with their mental health in a remote setting is vital. If you are not sure how to, you could use mental health first aiders or train yourself to become one. Start by applying the same principles of having a supportive conversation as you would in person – set enough time aside, minimise distractions around you (you may need to move to another room), and give the person your full focus by turning off your notifications and other devices. Whether you’re a Mental Health First Aider or just someone who wants to ensure they are supporting colleagues effectively during this period, good advice is readily available.

Don’t pour from an empty cup

When supporting your staff’s wellbeing it is important to remember to prioritise your own wellbeing. This will give you the best possible chance of providing effective support. Consider the support measures you have around you, whether that’s an Employee Assistance Programme, a peer support network, or Mental Health First Aiders, and encourage others to do the same.

Looking after our physical self to aid mental wellbeing

Exercise, eating well, and practicing self-care can have a big impact on mental and physical wellbeing. It can sound rather obvious but a little fresh air and exercise can go a long way. Where possible, we all should try to put exercise as a daily task, perhaps at a set time and stick to it.

It can be easy for us all to stay in our comfy clothes and move from one room to another – depending on whether we’re working/eating/washing. In the short term it’s fine, and perhaps even enjoyable, but in the long term it’s surprising the effect this can have on mental wellbeing.

It may sound silly, but dressing in “normal” clothes, and presenting yourself as you would if you were going to your usual workplace can make a big difference to how you feel. You can try this in non-work settings too – there’s no reason you can’t wear your finest gladrags in 2020, even if it is to sit down to dinner with those in your own home!

Eating well isn’t always easy when we are in lockdown, with easy access to delivery services such as Just Eat, Deliveroo and Uber Eats. Even so, not having to commute should enable us more time for cooking fresh and healthy food. Let’s not forget to treat ourselves now and again though.

Set tasks and allow yourself to do nothing

We all know that if you look hard enough there is always something to do. It is important to set yourself tasks in order to solve the material and conceptual items that affect our lives.

One key part of that list should be that you take time out to do nothing. A bit of escapism through a book or film can go a long way. Meditation or a period of quiet reflection, if that’s your thing. The important thing is, it’s your time to do whatever you want – just keep it light.