Freshfields Bruckhaus Deringer

The Coronavirus Job Retention Scheme

Further guidance published on 3/4 April 2020

The Government published further clarifications to the Coronavirus Job Retention Scheme (the ***Scheme***) on 3/4 April 2020. The Scheme is the mechanism under which employers can obtain a grant from HMRC to cover 80% of earnings, subject to a cap of £2,500 per month, for any employees who are furloughed (i.e. who are suspended from active work).

A copy of our existing client guide to the Scheme can be found here and should be read alongside this summary of the Government's further clarifications. These clarifications are generally helpful and in some cases confirm (beneficial) changes to the operations of the Scheme.

This further guide sets out the position as at 6 April 2020.

Further confirmation that there are no conditions to participation in the Scheme

It has always been our view that there are no conditions to participation in the Scheme.

We are aware of suggestions in some quarters that access to the Scheme was intended to be more limited – and that unless employees were close to redundancy their employer could not seek reimbursement of a relevant portion of their earnings under the Scheme. It is now clear that this is not the case.

Although the revised guidance reiterates that the Scheme has been designed to help employers whose operations have been severely affected by COVID-19 to retain their employees and protect the economy, it now also explicitly states that all employers are eligible to claim under the Scheme.

In other words, any employer who furloughs employees in accordance with the requirements of the Scheme is eligible to participate. However, the guidance sounds a note of caution in relation to insolvency practitioners – making it clear that the Government does not expect administrators to furlough staff and seek reimbursement under the Scheme unless there is a reasonable likelihood of rehiring the workers. And employers more generally should be aware of possible future public criticism if they are viewed as having relied on the public purse with no business need to have done so.

The revised guidance adds further detail on the notification that is required to be given to employees placed on furlough. The record of the written notification must be retained for 5 years, which suggests that HMRC may undertake a subsequent audit of grants paid out under the Scheme.

Timing – cashflow and other implications

The revised guidance now makes clear that the HMRC online portal through which employers will be able to apply for grants to cover the relevant portion of their employment costs is expected to be available by the end of April 2020. If it does not become operational sooner, employers are likely to need to have run their payrolls for April (as well as for March) in advance of receiving any Government grant unless a deferral can be agreed with employees.

The guidance re-confirms that although the Scheme is in place for three months from 1 March 2020, it may be extended if necessary. Employers can take advantage of the Scheme at any time during this period.

The guidance now spells out what had previously been implicit – that claims can be made in respect of the period beginning on the furlough start date and not when the decision is made or when employees are written to confirming their furloughed status. This means that employers who may not have complied to date with the notification requirements under the Scheme are still able to benefit, provided they now make written notification, confirming the start date of the furlough.

Other flexibilities are re-confirmed

We indicated in our earlier client guide that there was no restriction on extending the term of any fixed term employee to allow them to continue to be paid through the Scheme. This is now expressly confirmed by the updated guidance. There is no suggestion that it will be necessary to show that there would have been any need for these individuals to continue to work (but for their furlough).

Although the guidance still does not state in terms that employers may postpone the scheduled redundancies of employees (even where the redundancy is for a non COVID-19 reason), it is entirely consistent with the confirmation given in relation to fixed-term workers and the objective of protecting the economy that underpins the Scheme, that this is also permitted.

Further clarification on re-engaging employees who have already left

It had already been clear that any employees made redundant since 28 February can be rehired and then be put on furlough and participate in the Scheme. The revised guidance makes clear that this flexibility applies to employees who have left for any reason, including where they have resigned. It follows from this that employees made redundant for reasons wholly unconnected to COVID-19 can also be re-engaged. Employers may find themselves coming under pressure from recent leavers to be re-hired.

We set out in our prior guidance a number of practical and legal matters that employers who are contemplating rehire would need to bear in mind (for example there may be questions surrounding the treatment of termination payments that have previously been made, and concerning the terms on which rehire would take place – presumably on a fixed term basis, although this may not be entirely straightforward when the end date for the Scheme is not known). The process is not necessarily as easy as the guidance might suggest.

To enable employees to be paid the full amount covered by the Scheme, employers will need to re-engage such employees on a wage that will allow them to reclaim 80% of that amount under the Scheme up to £2,500, thus giving the relevant employee the same take-home pay as if they had remained in employment and then been furloughed. This will complicate the re-hire process: the employee will need to be re-engaged on their full wage (up to the monthly cap) but waive any entitlement to receive the difference between the maximum reimbursable under the Scheme and the individual's full wage – otherwise the employer may end up out of pocket. In any event, the employer may be faced with irrecoverable additional costs (for example, in relation to accrued holiday pay and apprenticeship levy costs (as to which see further below)).

Further clarification on furloughed employees being able to take on other work

We have previously advised that employees may take on new work with a direct employer while on furlough (and that doing so does not prevent the furloughing employer from claiming reimbursement for them under the Scheme). This is now made explicit in the updated guidance, which expressly contemplates that employers can agree to find furloughed employees new work or volunteering opportunities while on furlough (provided this is in line with public health guidance).

We have previously said that any alternative jobs should not be undertaken during time that individuals were contracted to perform work for their furloughing employer (as that was inconsistent with them remaining in employment with that organisation, which is a requirement of the Scheme). However we read the updated guidance as permitting employers to agree a more flexible approach to alternative employment (although the employer may be reluctant to agree to this for manning reasons, even if permission is only given to take on alternative employment for the duration of the furlough period).

Confirmed that employees can be rolled on and off furlough

The revised guidance makes explicit that employees can be rolled on and off furlough on multiple occasions. The only requirement is that employees are furloughed for minimum periods of three consecutive weeks at a time.

There is further clarification on the categories of employees and workers in respect of whom an employer can claim

The amendments to the Government guidance formally confirm various points relating to the categories of employee and others whose earnings can be reimbursed under the Scheme.

This include confirmation that, as we had indicated in our client guide, "workers" can fall within the scope of the Scheme if paid through PAYE. In addition, the new guidance now also makes clear that fixed profit allocation (i.e. salary equivalent) paid to salaried members of limited liability partnerships can be reimbursed under the Scheme if they are furloughed.

Fees paid to directors and office holders can also fall within the scope of payments that can be reimbursed under the Scheme (see further below for further discussion of fees). It is probably unlikely that directors of large employers will be furloughed. However there could be practical difficulties if they are. It is of course a requirement of the Scheme that those who are furloughed must not undertake any work. Given that a director will have statutory and fiduciary duties, he may be in breach of obligation if he ceases to fulfil all duties. The revised guidance acknowledges this by confirming that furloughed directors may fulfil their statutory obligations "provided they do no more than reasonably be judged necessary for that purpose". However the guidance continues by stating that they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provide services to or on behalf of their company. This seems to suggest that work undertaken should be limited to administrative matters such as ensuring statutory filings are made. But a failure to take steps to generate commercial revenue is arguably a breach of a director's statutory duty to promote the success of the company for the benefit of its members as a whole. It is arguable that in these circumstances directors should consider resignation if they feel they are unable to fulfil their statutory duties (especially if there are other continuing unfurloughed directors).

Further clarification is also provided in relation to agency workers. Furlough is a matter to be agreed between the agency as the deemed employer and the worker. In practice, of course, agencies will be in close contact with the organisations who make use of the agency workers to establish whether it will be necessary to furlough. The payment obligations of end-users will obviously depend on the terms of the relevant agency contract. Similar principles will apply to workers made available by umbrella companies.

Apprentices can be furloughed in the same way as other employees and can continue to train while on furlough. As explained in our previous client guide, employers are required to ensure that apprentices (and other employees) who undertake training while on furlough receive the Apprenticeship Minimum Wage, the National Minimum Wage or the National Living Wage, as appropriate, for time spent training. This may require employers to top up amounts reimbursed under the Scheme.

The revised guidance provides further clarifications on whether employers can claim under the Scheme for employees directly affected by coronavirus issues

As explained in the initial Government guidance, employers cannot claim for employees while they are in receipt of statutory sick pay. This will cover employees who are sick or are self-isolating. We have previously said that it is not clear on how employees in receipt of enhanced contractual sick pay should be treated; this remains the case under the updated guidance. Arguably those employees also cannot be furloughed until such time as they would have been well enough to return to work.

The revised guidance confirms that claims may be made under the Scheme in respect of employees who are furloughed and who are shielding in accordance with public health guidance or need to stay at home with someone who is shielding. The guidance does suggest that claims can only be made in respect of employees who are unable to work from home and who would otherwise need to be made redundant. This latter requirement is slightly at odds with the tone elsewhere in the revised guidance suggesting any furloughed employees can participate, regardless of whether they would have been made redundant. We do not think in practice that there will be any issues with claiming under the Scheme for shielding employees who are furloughed and do no work while on furlough, regardless of the reasons for this.

The guidance also spells out that employees who are unable to work because of caring responsibilities (for example, for children) can be furloughed. This means that employers will be able to claim for them under the Scheme.

Employees on unpaid leave

As confirmed by the Government's initial guidance, employees who commenced unpaid leave after 28 February 2020 are eligible to participate in the Scheme. Any amounts received in respect of the relevant employee must be paid over to him or her.

What payments are covered under the Scheme

The Government's original guidance was not clear on what elements of pay were eligible for reimbursement under the Scheme, and used phrases such as "salary", "wages" and "earnings" interchangeably, even though earnings ordinarily has a wider meaning than salary or wages.

We now have confirmation that any "regular" payments an employer is obliged to pay employees can be subsidised under the Scheme (subject to the Scheme per employee cap). The focus is therefore now on contractual payments, which are covered, as opposed to discretionary ones, which are not. That means that contractual allowances, including attendance allowances, car allowances and the like, as well as contractual overtime (and all past overtime, which contractual or voluntary) will be covered. One important change is that contractual commissions are now covered by the Scheme (the previous guidance had suggested that all commissions were irrecoverable).

What this means in practice is that the amount of (for example) contractual commission or overtime to be taken into account (assuming this is a variable monthly amount) should be calculated by reference to the test set out in the guidance for determining what portion of variable regular remuneration is eligible for reimbursement. The test provided for in the guidance takes the highest of either the same month's earnings from the previous year or average monthly earnings for the 2019/2020 tax year (which has of course just come to an end). We think on balance that the guidance does allow employers to reclaim in relation to other regular payments, even if not strictly contractual in nature (for example, non-contractual overtime).

A further change confirmed by the revised guidance is that fees can now be reimbursed under the Scheme (the earlier guidance had suggested they were excluded). It is assumed that the reference to fees is intended to cover fees paid to directors who are furloughed. Directors' fees are subject to PAYE.

The new guidance confirms that all discretionary payments and non-cash benefits are excluded.

Employers may not use the Scheme to claim reimbursement for statutory redundancy payments.

Note that apprenticeship levy payments are not covered under the Scheme

The grants payable by HMRC under the Scheme will extend to employer NICs arising on the capped earnings that are also reimbursed. However it is now clear that apprenticeship levy is ***not*** also covered and remain payable by the employer.

How are salary sacrifice arrangements treated?

Not surprisingly, the updated guidance confirms that salary that has already been sacrificed and applied to the provision of benefits cannot be covered under the Scheme. This is because by definition the employee has already waived the right to be paid the relevant salary (which reduces his or her taxable pay).

However the Government has helpfully indicated that "COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly". Although the reference to "could" sounds unhelpfully contingent, our view is that the wording provides the necessary confirmation that, by agreement, employer and employee may unwind salary sacrifice elections. This may not be straightforward for some benefits without increasing employer cost (for example, where the sacrificed money has already been applied to acquire a particular benefit for a defined period).

Some points are left outstanding – holidays

The guidance gives no further explanation of the position in relation to holidays, which is an area of increased concern for many employers. We will be addressing this shortly in a follow-up blog.

And what about TUPE transfers?

Employers may not claim for employees who join payroll after 28 February 2020. It is not clear whether employees who join an employer's payroll by way of TUPE transfer after this date are eligible for coverage under the Scheme. In principle the answer must be yes. The purpose of the 28 February cut-off is to prevent abuse of the system by hiring sham employees. That would not be a concern with a TUPE transfer. However the fact that there has been no explicit confirmation of this point will give rise to uncertainty for employers who have taken on employees as a result of recent TUPE transfers. Although the statutory novation principles underpinning TUPE mean that transferee employees are deemed to have been employed by their new employer since the start date of their employment with the transferor it does not follow from this that third parties such as the HMRC are required to apply the same principles.

Kathleen Healy
Partner
T +44 20 7832 7689
E kathleen.healy@freshfields.com

Nicholas Squire
Partner
T +44 20 7832 7419
E nicholas.squire@freshfields.com

Caroline Stroud
Partner
T +44 20 7832 7602
E caroline.stroud@freshfields.com

Alice Greenwell
Partner
T +44 20 7716 4729
E alice.greenwell@freshfields.com

David Mendel
Senior Associate
T +44 20 7716 4586
E david.mendel@freshfields.com

Holly Insley
Senior Associate
T +44 20 7785 2237
E holly.insley@freshfields.com

Kate Pumfrey
Senior Associate
T +44 20 7427 3570
E kate.pumfrey@freshfields.com

freshfields.com