Pandemic Law by Twitter: How the Coronavirus Job Retention Scheme has already changed

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On Saturday 4 April 2020, a day on which beautiful spring sunshine belied the economic hardship facing many employees and workers as a result of the coronavirus pandemic, HMRC published updated guidance (‘Updated Guidance’) on the Coronavirus Job Retention Scheme (‘CJRS’). Like the guidance originally published on 26 March 2020 (‘Original Guidance’), the revised guidance is in two parts, viz Guidance for Employers (‘Employer Guidance’) and Guidance for Employees (‘Employee Guidance’).

The Updated Guidance alters the scope of the CJRS in significant ways, most importantly by extending it to individuals who are not employees but are taxed through PAYE, and answers a number of questions about the way the CJRS is intended to work which were left unanswered by the Original Guidance.

But it makes no attempt to fill some of the most controversial gaps in the scheme, including the exclusion of employees whose employment commenced after 28 February 2020 and the absence of any incentive for employers to furlough employees or workers who have no contractual right to be provided with work.

This briefing summarises the main differences between the Updated Guidance and the Original Guidance. It also highlights some anomalous differences between the support provided to employees and workers under the CJRS and that afforded to self-employed individuals under the Self-employment Income Support Scheme (SEISS), in particular the differential treatment of those with more than one source of income and the denial of income protection to self-employed individuals who previously earned more than £50,000. These differences have been thrown into particularly sharp relief by the extension of the CJRS to individuals who are not employees but are treated as such for tax purposes.

Purpose of the CJRS

The Original Employer Guidance stated that the CJRS “is designed to support employers whose operations have been severely affected by coronavirus ...”. This pithy wording has been expanded in the Updated Employer Guidance, which now says that the CJRS is “designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy” (emphasis added).

The equivalent wording in the Employee Guidance has not been changed, and continues to state that the employer “might be able to keep you on the payroll if they’re unable to operate or have no work for you to do”.

Although the position is not entirely clear, the wording added to the Employer Guidance tends to confirm that furlough is essentially intended to be offered to employees who would otherwise have been laid off or made redundant. But it remains to be seen whether HMRC
will put in place any system for verifying an employer’s reasons for placing any individual employee or group of employees on furlough.

Which employers can claim?

A third condition has been added to the requirements which an employer must satisfy in order to claim under the CJRS. The employer must not only have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account but must also have enrolled for PAYE online. It is not, however, necessary, for the employer to have met this third requirement by 28 February 2020. The employer can enrol for PAYE online before a claim is made. The Guidance points out that enrolment can take up to 10 days.

Administrators

The Updated Employer Guidance confirms that an employer in administration can access the CJRS but makes the additional point that the Government does not expect an administrator to use the scheme unless “there is a reasonable likelihood of rehiring the workers” e.g. where the administrator is pursuing a sale of the business.

It is often difficult for an administrator to determine, particularly when first appointed, what prospect there is of securing a sale of all or part of the business. The current suspension of so much economic activity is likely to make this difficulty even more acute than it would be in normal times. There is therefore a danger that, in cases where a business is on the borderline of being susceptible to rescue, this qualification to the guidance will discourage administrators from mothballing the business until the relaxation of the current lockdown gives them renewed hope of finding a purchaser.

Eligible employees

New starters

One of the most controversial aspects of the CJRS is the exclusion of employees who were not on the payroll on or before 28 February 2020. A Twitter Q&A hosted by the Chancellor of the Exchequer on 3 April 2020 using the hashtag #AskRishi elicited a stream of questions from employees who had started or hoped to start new jobs after 28 February 2020, many of whom protested that this exclusion had left them “high and dry”.

Unfortunately the Updated Guidance confirms that employees hired after 28 February 2020 cannot be furloughed under the CJRS. According to the Chancellor, this is necessary to prevent fraud and facilitate the verification of claims.

Employees whose employment ended after 28 February 2020

During his Twitter Q&A, in response to a question from consumer rights champion Martin Lewis, the Chancellor announced that he had decided to revise the Guidance to make clear that any employee who ceased working for their employer after 28 February 2020, whether by reason of redundancy or for any other reason, can be re-engaged and placed on furlough. This may help employees who were in the process of changing jobs when the CJRS was introduced, albeit only if the old employer is willing to re-employ them.
Shielding employees

The Original Guidance stated simply that “Employees who are shielding in line with public health guidance can be placed on furlough”. The Updated Guidance makes clear that shielding employees include those who are personally advised to shield and those who need to stay home with someone else who is shielding. But it also states that in both cases the employee will only be covered by the CJRS if they are “unable to work from home and [the employer] would otherwise have to make them redundant”.

The requirement that, to be eligible to be furloughed, a shielding employee must be someone whom the employer “would otherwise have to make … redundant” is confusing but would appear to mean that a shielding employee should only be furloughed where the statutory definition of redundancy is satisfied and not where their role still exists but they cannot perform it because they are shielding.

The Updated Guidance therefore provides no comfort to shielding employees who would not otherwise be redundant or to those whose employer is unwilling to place them on furlough. Unless sick or or self-isolating, shielding employees are not entitled to receive Statutory Sick Pay and, if they are unable to work from home, may have no contractual right to be paid by the employer. It is hoped that the Government will take urgent action to give shielding employees a statutory right to be paid during any period in which public health guidance advises them to stay at home.

In the absence of such measures, it is possible that, in the wholly exceptional circumstances created by the pandemic, protection of pay would be regarded as a reasonable adjustment for a shielding employee who has a disability within the meaning of the Equality Act 2010 (‘EqA’).

Employees with caring responsibilities

The Updated Guidance adds to the list of employees eligible to be furloughed employees who are unable to work because they have caring responsibilities resulting from coronavirus, giving as an example employees that need to look after children.

This clarification is helpful and may encourage some employees with caring responsibilities to volunteer to be furloughed. But it goes without saying that employers should be careful not to select employees for furloughing on the basis of caring responsibilities, as doing so is likely to be in breach of the EqA.

Employees with more than one job

The Original Guidance explained that an employee with more than one employer can be furloughed for each job, in which case the £2,500 cap on pay applies to each employer individually. The Updated Guidance makes clear that an employee who has been furloughed in one job can continue working for another employer and receive their normal wages in that other job.

Employees on fixed-term contracts

One question that was not answered by the Original Guidance was whether an employee whose fixed-term contract is coming to an end can be furloughed. The Updated Guidance confirms that an employer will not breach the terms of the CJRS if it extends or renews a fixed-term contract during the furlough period. Where, on the other hand, a fixed-term
contract expires without being extended or renewed, no further grant can be claimed for that employee.

**Apprentices**

The Updated Guidance includes a new section on apprentices, confirming that they can be furloughed in the same way as other employees and that they can continue to train whilst furloughed. The point is made that apprentices must be paid at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage, as appropriate, for time spent training.

**Employees employed by an individual**

The Updated Guidance confirms that employees who are employed by an individual e.g. nannies can be furloughed, provided that the employer pays them through PAYE and they were on the payroll on or before 28 February 2020.

**Eligible individuals who are not employees**

Perhaps the most important feature of the Updated Guidance is the confirmation that the CJRS applies to certain individuals who may not be “employees” but are paid via PAYE. The individuals who are eligible for support under the CJRS even though they are not employees are described in the paragraphs which follow.

**Office holders**

The Updated Guidance states that office holders can be furloughed and supported through the CJRS.

**Company directors**

The Updated Guidance removes any room for debate as to whether salaried company directors are within the scope of the CJRS. It states that where the decision to furlough a director is taken by the board, it should be formally adopted, noted in the company records and communicated to the relevant director in writing. The point is also made that a director who has been furloughed can carry out their statutory obligations under the Companies Act 2006 provided they do no more than is reasonably necessary for that purpose. The director must not, however, do work of the kind they would normally carry out to generate commercial revenue or provide services for or on behalf of their company.

**Salaried members of limited liability partnerships**

The CJRS has been extended to members of LLPs who are designated as employees for tax purposes. The Updated Guidance points out that the terms of the LLP agreement may require formal amendment if a member of an LLP is to be furloughed.

The member’s reference salary for the purposes of the CJRS is stated to be the member’s profit allocation, excluding “any amounts which are determined by the LLP member’s performance, or the overall performance of the LLP”.
Agency workers

Agency workers who are employees were covered by the Original Guidance. However, the Updated Guidance states that any agency worker who is paid through PAYE is eligible to be furloughed and supported under the CJRS, including where they are employed by an umbrella company.

An agency worker who has been furloughed is not permitted to any work for, through or on behalf of the agency that has furloughed them, including for the agency’s clients. By inference, the agency worker would be free to carry out work for a different agency.

Limb (b) workers

The Updated Guidance states that limb (b) workers who are paid through PAYE are within the scope of the CJRS. By contrast, those who pay tax on their trading profits through Income Tax Self-Assessment can only claim support under the SEISS.

Precarious work: a gap that has not been filled

The Updated Guidance confirms that employees and workers in precarious employment, such as agency workers and those on zero hours contracts, are eligible to be furloughed. But as Professor Michael Ford QC and Professor Alan Bogg have pointed out, employers and agencies which have no contractual obligation to provide workers with work, and no correlative duty to pay, may have little economic incentive to furlough them and plenty of reasons not to, including their potential future liability to pay redundancy pay after undertaking a fair redundancy procedure. This problem is not addressed by the Updated Guidance, which means that precarious workers will continue to be reliant on the altruism of their employer to be furloughed under the CJRS.

Working for the employer during furlough

Both iterations of the Guidance make it abundantly clear that an employee is not permitted to work for an employer by whom they have been furloughed. But what constitutes “work” for these purposes has been made no clearer by the Updated Guidance, which repeats the statement that work “includes providing services or generating revenue” (emphasis added). It would have been helpful for HMRC to provide a more comprehensive definition of the activities that will be regarded as constituting work for the purposes of the CJRS. In the absence of more detailed guidance, it remains unclear whether the principles that have been developed in deciding what constitutes “work” for the purposes of the Working Time Regulations 1998 (‘WTR’) and the minimum wage legislation would also apply in the context of the CJRS.

One question that is causing particular concern to employers is whether a furloughed employee who is (i) an employee representative elected for the purposes of consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 or (ii) a trade union representative will be regarded as working when they carry out representative functions or trade union activities. In Edwards and another v ENCIRC Ltd [2015] IRLR 528 the Employment Appeal Tribunal held that attendance at health and safety and/or trade union meetings constituted “working time” within the meaning of the WTR. It would, however, make no sense for a similar approach to be adopted in a context where it may be necessary for the employer to inform and consult the representatives of furloughed employees about matters affecting their employment.
Employers have also expressed concern that employees who are asked to deal with queries arising from the handover of their duties or to participate in team meetings held during the furlough period might be regarded as undertaking work within the meaning of the CJRS. The Updated Guidance provides no clarity on this point, observing only that “Employers are free to consider allocating any critical business tasks to employees that are not furloughed”.

HMRC could usefully confirm that modest participation in activities of this kind, which may be essential in maintaining business continuity and alleviating the feelings of isolation that furloughed employees are bound to experience, will not jeopardise the employer’s ability to claim support under the CJRS.

**Volunteer work**

The Updated Guidance repeats previous advice that an employee can take part in volunteer work so long as they do not provide services to or generate revenue for or on behalf of the organisation. It now goes on to say that the organisation can “agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is line with public health guidance”.

**Training**

In similar vein, the Updated Guidance confirms that employees are permitted to engage in training that does not involve providing services to or generating revenue for the employer. adding that “Furloughed employees should be encouraged to undertake training”.

**Employees on maternity leave, adoption leave, paternity leave or shared parental leave**

The Original Guidance set out that if an employee was eligible for Statutory Maternity Pay (or equivalent), the normal rules applied and they would continue to receive up to 39 weeks of statutory pay when furloughed.

The Updated Guidance simply reiterates that employers may claim enhanced contractual pay for furloughed employees who qualify for maternity pay, adoption pay, paternity pay or shared parental pay.

In practice, this provides an incentive for furloughed employees on these types of leave who are paid less than they would otherwise receive under the employer’s furlough arrangements to curtail their leave.

**Employees who are sick or self-isolating**

A similar incentive exists in respect of sick leave and self-isolation. The Original and Updated Guidance set out that employees who are on sick leave or self-isolating should receive Statutory Sick Pay (SSP) but can be furloughed thereafter. A sick or self-isolating employee, who would otherwise be furloughed, therefore has an incentive to report as fit even when they are not.

Neither the Updated nor Original Guidance expressly deals with the position where a furloughed employee becomes sick or self-isolates during a period of furlough. It would seem that the Government may expect the employee to be on SSP and not eligible for the 80% salary subsidy. In practice, employees who appreciate that this will be the financial consequence of reporting their sickness or self-isolation during a period of furlough will be disincentivised from doing so.
What can be claimed

The Original Guidance stated that the employer could claim a grant covering 80% of the employee’s “regular wages”, up to a maximum of £2,500. Fees, commission and bonus were expressly excluded.

Regular pay

Under the Updated Guidance, the employer can claim for any “regular payments” it is obliged to pay to its employees. These are stated to include “wages, past overtime, fees and compulsory commission payments” but to exclude “discretionary bonus (including tips) and commission payments and non-cash payments”.

Although the language is clumsy, it is reasonable to infer that pay in respect of guaranteed overtime and commission payments to which the employee is contractually entitled can be treated as part of the employee’s regular pay for the purposes of the CJRS. The decision to include contractual commission payments in the remuneration for which a claim can be made will obviously be welcomed by employees and workers who receive all, or a substantial proportion of, their remuneration in the form of commission.

The reference to “fees” is unlikely to have any relevance to most employees but may have been included in the light of the extension of the CJRS to office holders.

The Updated Guidance confirms that the employer will be able to claim for the minimum automatic enrolment employer pension contributions on the employee’s subsidised pay plus the associated employer National Insurance Contributions.

Benefits in kind and salary sacrifice schemes

The Updated Guidance also includes a new section covering benefits in kind and salary sacrifice CJRSs. It states that the reference salary should not include the cost of non-monetary benefits provided to employees, including taxable benefits in kind, or benefits provided through salary sacrifice schemes.

Agreeing to furlough employees

The Updated Guidance echoes the advice given in the Original Guidance concerning the need to make any changes to the employment contract by agreement.

A stipulation that, to be eligible to claim the grant, employers should write to their employees confirming that they have been furloughed and keep a record of this communication is also repeated, but is made subject to an additional requirement that the record be kept for five years.

The Updated Guidance also points out that if sufficient numbers of staff are involved it may be necessary to engage collective consultation processes.

Anomalous differences between the CJRS and the SEISS

The CJRS and the SEISS share the same essential purpose i.e. to support members of the working population whose livelihoods have been put in peril by the collapse in economic activity caused by the coronavirus pandemic. Viewed from that perspective, three key differences between the schemes are particularly difficult to justify.
Mixed sources of income

As has been explained, an employee with two separate employers, if furloughed by both, is entitled to receive two sets of furlough pay i.e. the Government will pay up to £2,500 per month in respect of each employment. In addition, an employee who has been placed on furlough is in principle free to obtain employment elsewhere (provided doing so is not prohibited by their contract of employment), even though they are already being supported under the CJRS by one or more employers.

By contrast, an individual who is self-employed is only eligible to claim a grant under the SEISS if more than half of their income comes from self-employment. This will cause hardship to many self-employed individuals whose income derives partly from employment and partly from self-employment. Those adversely affected are likely to include many low paid workers e.g. cleaners who are employed to clean offices and schools but also make ends meet by cleaning private homes on a self-employed basis.

It is difficult to see what policy justification there can be for the “more than 50%” rule when employees and workers paid via PAYE are eligible to be furloughed by more than one employer. Individuals whose income derives from a combination of employment and self-employment may be no more able to cope with a significant drop in income than employed people.

When it is rightly considered fair, and in the public interest, that employees and workers taxed through PAYE should be eligible for support in relation to multiple employments, why should the same principle not apply to those who earn their living through a mixture of employment and self-employment?

The £50,000 cut-off for self-employed individuals

There is no cap on earnings in the eligibility criteria for the CJRS. So a salaried company director, or any other employee, earning £100,000 per annum, or indeed £200,000, is eligible to receive a salary of £2,500 a month if furloughed under the CJRS. By contrast, an individual who is self-employed is not eligible to apply for support under the SEISS unless their trading profits are less than £50,000.

This striking difference in treatment between the employed and the self-employed has not been satisfactorily explained by the Government. It has been said by the Chancellor that even with the £50,000 cut-off the SEISS captures 95% of the self-employed. But if the rationale for the cut-off is that higher rate tax payers either do not or should not require support for their incomes during the pandemic, this fails to explain why there is no earnings cap under the CJRS.

The self-employed have by definition paid their taxes through self-assessment and their need for financial support during the pandemic will be no different from that of employees who earn a similar income from employment. It cannot fairly be assumed that self-employed people would have anticipated and saved for the eventuality of a pandemic when no similar assumption is made for earners taxed via PAYE, or indeed for businesses wishing to avail themselves of the COVID-19 related schemes.

The newly self-employed

Under the CJRS any individual who was on the employer’s payroll on or before 28 February 2020 is eligible to be furloughed. By contrast, a self-employed individual cannot claim a
grant under the SEISS unless they have submitted an Income Tax Self-Assessment tax return for the tax year 2018-19, and continued to trade in the tax year 2019-20. This means that the latest date a self-employed person can have started working to be eligible for the scheme would be 5 April 2019, as those who commenced self-employment in the tax year 2019-20 are not eligible to claim support under the SEISS.

In the course of his Twitter Q&A on 3 April 2020 the Chancellor said that submission of a tax return for 2018-19 has been made a condition of access to the SEISS because tax returns for 2019-20 are not due to be submitted until January 2021 and because the Government is concerned about the risk of fraud.

Whilst it is appreciated that HMRC may have no capacity to handle a deluge of self-assessment tax returns for 2019-20 within the next few months, it is not clear why special provision could not be made for those who commenced self-employment during that tax year. As to the risk of fraud, the Government has not explained how significant a risk they consider that to be, given that any person who submits a fictitious tax return for 2019-20 will thereby become liable to pay tax on their fictitious income and indeed faces the potential to be investigated and prosecuted if they have made false declarations to HMRC. Further, it is unclear whether the risk of fraud is of sufficient magnitude to make it proportionate to deny income protection to a significant group of self-employed earners.

Conclusion

Although the Government’s decision to extend and clarify the CJRS is to be welcomed, some important questions have been left unanswered and there remain significant gaps in the support provided by both the CJRS and the SEISS. It is hoped that the Chancellor will keep both schemes under review, and that the Updated Guidance will be but the first of a number of updates responding to the concerns of employers and workers affected by the current crisis.

This article does not constitute legal advice. Legal advice should be sought to address specific circumstances. Information on COVID-19 is changing on a daily basis and the first port of call for public health guidance should be Public Health England.

For legal advice or media enquiries from Melanie Tether, Nadia Motraghi or any of the barristers at Old Square Chambers, please call the Old Square clerks team on 0207 269 0300.