

Note of the CLAS webinar held on Wednesday 20 May 2020 – accurate as at 20 May 2020

The webinar was held online via Zoom

1. Presentation

As acting Chairman, the Rt Revd Mgr Nicholas Rotherham took the Chair and thanked Farrer & Co for hosting the webinar. He then introduced the session's speaker, Alice Yandle, an Associate in Farrer & Co's Employment Team.

Coronavirus Job Retention Scheme (CJRS) summary

Alice began by providing a summary of the CJRS' development to date, including that the latest Government announcement extended the CJRS until the end of October 2020. The current scheme will not change until 1 August 2020, after which organisations will have more flexibility in allowing their employees to return to part-time work, for which the costs of furloughing will be shared between the Government and employer (though it will remain that the furloughed employee receives 80% of the furloughed employee's normal salary up to the £2,500 cap as a combined total from the Government and the employer). Alice advised that the Government was due to announce the specifics of this at the end of May.

Alice noted that, whilst the aim is to help employers retain their staff, the Government does not expect organisations that receive public funding to help cover the cost of employment to furlough their employees. She then summarised that the CJRS provides a minimum of up to 80% of a furloughed employee's salary up to the £2,500 cap, in addition to employer minimum autoenrolment pension contributions and the associated National Insurance Contributions. An employer can choose to top up to 100% of the furloughed employee's normal salary and benefits, but there is no obligation to do so under the CJRS. If an employer decides not to top up the salary to 100%, the usual employment law requirements relating to changing terms and conditions will apply. An employee is required to agree to being furloughed.

In a scenario where wages fluctuate, the guidance states that the furloughed employee should be paid either the higher of: the amount paid in the same month of the previous year or an average of the last 12 months/the period for which they have worked prior to the scheme's cut-off date for eligibility (more below). This only covers payments where the employer has a contractual obligation to pay and/or to which the employee has an enforceable right (e.g. benefit-in kind-are not deemed payable or discretionary bonuses etc).

Scheme eligibility

For employees to be eligible for furlough, they must have been on the organisation's PAYE payroll on or before 19 March and have made a RTI (Real Time Information Submission) by that date. The original cut off date set was 28 February, but was expanded out as a result of significant pressure placed on the Chancellor, for example, by the Twitter #newstarterfurlough campaign.

Employees who are shielding or cannot work for other reasons (e.g. where they have primary caring responsibilities) are eligible for the scheme, though the scheme is not intended to cover short-term

absences such as sickness. An employer that decides to furlough an employee on sick leave must stop paying the individual's statutory sick pay.

Employees on maternity and paternity leave are also eligible, though particular care should be taken with regard to selection criteria when it comes to furloughing these category of staff in circumstances where an employer is not furloughing the entirety of its workforce, as it could leave the organisation open to discrimination challenges.

The legal requirement to ensure that furloughed workers receive pay in line with minimum wage laws has also been exempted, except in cases where the employee is undergoing training for the employer whilst on furlough or where the employee should receive enhanced pay (such as during maternity leave).

What furloughed employees can and cannot do

Furloughed employees cannot engage in activities that:

- Make money for their organisation or a linked organisation; and/or
- Provide services for their organisation or a linked organisation.

Furloughed employees can partake in training for their employer (as long as it does not result in a furloughed employee engaging in the above activities) or volunteer for *another* organisation. If their contract allows, they may also work with or for another organisation when on furlough.

The process

Employers must agree furloughing terms with the employee in question. Previously there was an explicit requirement for this to be confirmed by the employee in writing, but now the position has changed such that there is only an obligation for the employer to do so. The minimum period for which a person must be on furlough leave is at least three consecutive weeks. Employers may be flexible in how long they extend any furlough leave for, so long as they do so before that employee's furlough period comes to an end. If it comes to an end and the employee returns to work, the employee must be furloughed for the statutory minimum of three weeks once again.

An employer's claim begins from when the employee finishes working for the employer and they are confirmed as being furloughed, usually, has a six working day turnaround. Government has stated that a "claim period" is specific to each employer, as it depends on how frequently it pay its employees. Only one claim may be submitted to HMRC for one claim period by an employer. Those who pay their employees weekly, will have more frequent claim periods than those who pay them monthly – though employers can make a claim in anticipation of an *imminent* payroll.

HMRC will check every claim and may withhold claims or ask that they are repaid at a later date if they are found to be dishonest. The employer must keep all related records for at least six years, in case HMRC asks for them during an audit.

When the announced changes to furlough and part-time work come into effect in August, Alice suggested that it may be easier to ask employees to work in days, rather than try to work out how many individual hours they have worked in a week.

Annual leave

Furloughed employees will still accrue both statutory and contractual holiday entitlement, irrespective of whether or not the employer is topping up their furlough pay. Workers on furlough leave can take holiday without disrupting their furloughed status. Bank holidays effectively operate as usual. Annual leave should be paid at a furloughed employee's normal rate of pay (i.e. not restricted to the 80% subject to the £2,500 cap). Employers can still claim for the 80% (subject to the £2,500 cap) but the employer will be responsible for paying the top up amount.

Alice stated that the legal consensus is that employers can force employees to take annual leave as long as they follow the usual requirements under the Working Time Directive, meaning that they must give twice the amount of notice to the employee as they wish for them to take off. That being said, employers should still exercise some caution and seek to engage with employees who are refusing to voluntarily take leave to understand their reasons for it as there may still be scope for challenge on the grounds that it may conflict with the employee's right to enjoy their holiday and other factors, such as whistleblower protections. Alice cited a particular paragraph in the standalone guidance on annual leave which seems to make this point.

The Government announced that employees may carry-over up to four week of holiday entitlement across the next two holiday years. Though this will only apply where employees cannot reasonably have taken this leave. Employers must do all they can to allow employees to take leave.

Returning to work

There is both general guidance and sector-specific guidance available for members. Alice went on to say that the general principles are that the employer must plan for the minimum number of workers it needs and take measures to mitigate the virus in the workplace. Employers with more than 15 employees must also publish a risk assessment on their websites, with smaller organisations also encouraged to do so.

It is legally possible for employers to dismiss employees who refuse to return to work when asked to do so, but whether or not that dismissal will be a fair dismissal will depend on the particular circumstances and Alice strongly advised that an employer should seek legal advice before doing so because there are potential risks to the organisation, e.g. from an unfair dismissal perspective and also potentially from an uncapped claim perspective if the employee has protected characteristics.

Questions and Answers

- Are parish priests and other office holders eligible for the scheme?
 - Yes, they are if they are on a PAYE payroll. If they are not, then they are not eligible for the scheme. Alice pointed members to recent Government guidance on office holders for more information.
- Is there a specific risk assessment templates/guidance?
 - The Government has published guidance on its website in relation to risk assessments, though Alice had not seen a Government template. She suggested that the best thing to do was to go through the guidance and make it tailored to your organisation, using the guidance as a checklist to make sure you have ticked all boxes. She suggested that it may also be a useful exercise to read other organisations' templates.

- If employees are also trustees at the organisation at which they are furloughed from, is there any problems in terms of their trustee duties?
 - Though not a charity lawyer, Alice noted that there is guidance for sole directors who if furloughed may be in breach of some of their duties. The guidance details how far they can go in discharging their obligations as directors – and there may be some read across to charity trustees. She suggested checking with the Charity Commission for more tailored guidance.
- Is the return to work guidance also applicable to the devolved administrations?
 - CLAS would like to point out that it is not. The guidance is only applicable to England and Wales. The Scottish and Northern Irish authorities have separate advice available on their websites.
- Most ministers of religion will continue to perform services of one kind or another: are they therefore unable to be furloughed?
 - The guidance has recently been tightened to make it clear that furloughed employees can only volunteer for “another” employer. There is therefore a serious risk for an organisation if a furloughed employee continues to provide services for it.

CLAS Secretariat

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