GOWLING WLG

COVID-19: REVISED TREASURY DIRECTION AMENDS CJRS

27 May 2020

Another Friday before a bank holiday weekend and another update on the rules applying to the Coronavirus Job Retention Scheme (CJRS). On Friday, 22 May, the Chancellor of the Exchequer published a revised Treasury Direction dated 20 May 2020 modifying the earlier Treasury Direction of 15 April 2020.

Perhaps confusingly, the 20 May Treasury Direction does not deal with the Chancellor's extension of the CJRS in its current form until 31 July nor to the further extension to the end of October (subject to modifications from August such as furloughed workers being permitted to work part-time and employers being asked to pay an as yet unspecified percentage towards the salaries of their furloughed staff), which were both announced on 12 May.

The 20 May Treasury Direction provides the legal mechanism for the extension of the CJRS to 30 June 2020 only, as well as making some significant changes. The changes largely reconcile some of the inconsistencies between the earlier 15 April Treasury Direction and HMRC's published Guidance or clarify areas of uncertainty.

Claims for payment under the CJRS made after 22 May will have to comply with the new, amended version of the 20 May Treasury Direction. Claims made on or before 22 May should comply with either the original Treasury Direction published on 15 April or the new Treasury Direction.

Here we set out the key changes.

Key changes

Placing an employee on furlough - "the agreement requirement"

The HMRC Guidance has always been and remains that while the employee's agreement is needed, this can be evidenced simply by a confirmation email from the employer. However, the 15 April Treasury Direction caused much concern as it indicated that employers would need to ensure employees confirm their agreement to the furlough in writing. This could be done by a simple email, but nevertheless needed to be done.

In what is arguably the most significant and welcomed change in the 20 May Treasury Direction, the new wording on the form of agreement removes the requirement that the employee's agreement must be in writing.

Now, for the purposes of eligibility to make a claim, the required instruction to cease work is satisfied if:

- The employer and employee have agreed that the employee will cease all work in relation to their employment (this includes by a collective agreement between employer and trade union).
- the agreement/collective agreement includes "the main terms and conditions upon which the employee will cease all work" (so the extent to which the pre-furlough terms and conditions have been varied).
- the agreement is "incorporated (expressly or impliedly) in the employee's contract"; and
- the agreement is "made in writing or is confirmed in writing by the employer" (in writing includes an electronic form such as an e-mail); and
- the agreement (including a collective agreement) or confirmation is retained by the employer until at least 30 June 2025.

This brings the Treasury Direction in line with the HMRC Guidance. Employers should note that while employees do not need to provide written agreement to being furloughed, some form of agreement is still required. Employers should ensure that written confirmation of agreement to being furloughed is sent to all furloughed employees.

Training

There is now more guidance on the kinds of study and training that an employee can do while on furlough without breaching the requirement that a furloughed employee does no work for the employer.

Furloughed employees can now study or do training if its purpose is to generally improve "an employee's effectiveness in the employer's business or the performance of the employer's business", provided it does not contribute to business activities, generate income or profit, or significantly contribute to the production of goods or services for sale.

Pay

We now have clearer guidance on the meaning of "regular pay". "Regular" in relation to salary and wages is defined as pay that "cannot vary according to a relevant matter" (e.g. company or personal performance) unless the variation in the amount arises from a "non-discretionary payment".

Non-discretionary payment are essentially variable payments for:

- Overtime, fees, commission or piece rates;
- additional or exceptional responsibilities;
- timing of shifts;
- payments made in recognition of similar matters.

These do count as regular pay provided there is no discretion about how the amount is to be calculated.

In line with HMRC Guidance the 20 May Treasury Direction also makes it clear that, when calculating the reference salary, benefits provided through salary sacrifice are not included.

The new Treasury Direction now also provides that the reference salary for those being furloughed after a period of unpaid leave, paid statutory family-related or sick leave, or other reduced rate paid leave immediately after statutory leave, should be calculated as if the employee had been on paid annual leave receiving normal pay required under the Working Time Regulations during those periods. It does not shed any further light on what normal pay is in these circumstances.

Statutory Sick Pay (SSP)

The Treasury Direction provides that where SSP is in payment or due to be paid, furlough cannot begin until immediately after the end of the 'period of incapacity for work' for which the SSP is being paid or due to be paid.

The HMRC Guidance suggests employers can furlough employees already on sick leave, but this was inconsistent with the 15 April Treasury Direction which made it clear that employees entitled to sick leave could only be furloughed once that period of sick leave has ended, even where SSP was not claimed.

However, the new 20 May Treasury Direction has removed the words "whether or not a claim to SSP is made" and added the words "the end of that period of incapacity for work is determined by an agreement between the employer and employee". As such, the employer and employee can now apparently agree to end a period of SSP in order to start furlough (notwithstanding continuing SSP eligibility) although we suggest advice is taken before this option is exercised.

Unpaid leave

It remains the case that, a claim under the CJRS cannot be made for a period of unpaid leave. If an employee went on unpaid leave on or before 28 February, you cannot furlough them until the date on which it was agreed they would return from unpaid leave. However, the 20 May Treasury Direction now allows that where a period of unpaid leave started before 1 March 2020, and the employer and employee reached an agreement before 20 March to end it earlier than originally planned, the employee can be put on furlough after the revised end-date for the leave.

Company directors/Pensions Trustees

A company director will not be treated as doing work (and therefore outside the CJRS) where they are simply making a CJRS claim for, or paying wages to, an employee of the company. Fulfilling duties as a trustee or manager of an occupational pension scheme is also permitted (except where the employer's business is the provision of occupational pension scheme independent trustee services)

TUPE

The 20 May Treasury Direction:

- Specifies the relevant date for TUPE transfers to be 28 February (not 19 March) in line with the current HMRC Guidance.

- Aligns the Direction with the Guidance to clarify that the CJRS applies to TUPE business transfers from an insolvent transferor.
- Clarifies that transferors are able to claim for employees whose furlough periods did not last 21 days because of a TUPE transfer.

Also see our updated Coronavirus Job Retention Scheme (CJRS) - FAQs

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