

# THE JOB RETENTION SCHEME - HOW DOES THE UPDATED GUIDANCE CHANGE THE POSITION?

16 April 2020

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The Government has issued new guidance for employers looking to place staff on furlough and claim money back through HMRC. Join Siobhan Bishop from our employment team and Richard Lee from our Combined HR Solutions / Pensions teams as they discuss the changes and answer your HR benefits questions.

Please note that since this webinar was recorded on 8 April 2020 there have been further updates to HMRC's guidance on the Job Retention Scheme, read our [Employment team's article](#) for the most up-to-date information.

**Jonathan Chamberlain**: Well good afternoon, thank you very much for joining us. I am Jonathan Chamberlain, a partner here in the Employment, Labour and Equalities Team at Gowling and I am joined by my colleagues Siobhan Bishop.

**Siobhan Bishop**: Good afternoon everyone.

**Jonathan**: And Richard Lee who perhaps has not unmuted his microphone yet, but that could only be a matter of time.

It seems like only a few days since we were here and that is only a few days since we were here. This is a very fast moving area. The government issued new guidance on Saturday night and as recently as this morning, were making important clarifications and statements about the scheme. However, different agencies of government are not quite singing off the hymn sheet as we shall see later. So we will try and navigate a way through that for you. It is however definitely worth updating you since our last webinar, so thank you very much for joining.

What we are going to do is, I am going to briefly run through what we already know. I am then going to summarise just who this scheme applies to. Siobhan is going to take you through the changes to employment issues. Richard will then pick up on the pension side and they will come back together for some of the really tricky issues which still remain. One of which is holiday. I expect that a number of you have questions about holiday, indeed many of you will have questions about lots of this.

Now what I would like to do if I may, is start off by doing the same thing which we did last time, which is running a poll as to how many of you are putting people on furlough at the moment, and we can just see the impact of the scheme and perhaps contrast it from a week ago. While that poll is running I will take you through what we already know.

This is a temporary scheme open to all UK employers. That is to say everyone with a payroll and we will see the significance of that in a moment. It is going to run for at least three months, starting on 1 March 2020. I think if I was a betting person then I would say that it is likely to carry on until June at the least, but we will see.

Employers can claim up to 80 percent of furloughed employee's usual wage costs, we will come on to what usual wage costs are, plus the associated employer mix and the minimal automatic enrolment employer contribution on that wage. There is a cap on the wage of £2,500.

Now, here is a new point that came out this morning. OK, a question that we have been asked is when will we get our money, as employers? HMRC said this morning in evidence

to the House of Commons Select Committee that the portal will be open on 20 April this year. They are testing it with some employers at the moment. You will be able to claim in advance of payroll, up to 14 days in advance of payroll and the money should be with you some four to six days after you have made your claim.

That is what they are saying, let us see what happens. That is new information as of this morning.

We had the original guidance on 26 March, that was updated as of the 4<sup>th</sup> April.

So, let us now move on to the next slide and look at who it is who is covered. Employees must have been enrolled for PAYE online by 28 February. Now, what has been emphasised in the recent guidance, the effect of the recent guidance, is this is a payroll scheme. We said last time that it is important to think of this in terms of a scheme between employer and the Revenue. It is about what you can claim back which is why there are so many difficult employment and pensions questions left unanswered. This is about a money flow, not really about employment rights. We are dealing with the accidental consequences if you like of that.

Payroll is crucial. That means apprentices are covered, they can be furloughed, they can continue to train, that is an important concession by the Revenue, and employers though must make up their pay to the otherwise statutory minimum national living wage, national minimum wage etc. There is a whole section of extra guidance on apprentices, so we are not going to go into any more detail on them today, the detail in relation to apprentices is much more set out than it is in relation to other employees and can be found on the government website.

Some of you will be pleased to know that you furlough your nanny. Perhaps more significantly you can furlough agency workers and the so called limb b workers, that is the people who identify as self-employed, if I can put it that way, but provide services exclusively to you.

What we are seeing with some employers is they are saying actually now we have looked at these employment classifications, these are probably employees. I would not bother sorting out their employment status right now, park that one until later. You can furlough them if they are on your PAYE payroll.

So, that is where we are at the moment, I am now going to hand over to Siobhan to pick up some of the key issues which have changed.

**Siobhan:** Thank you Jonathan, and there are plenty of changes in the new updated

guidance. There are two sets which is an employer's version and an employee's version. So there are slight differences between those but I will pick them all up in the round. In terms of the main changes, I will run through those at some speed, but I first want to identify three particular areas where we are interested in the practicalities of it and the ones that employers have been particularly interested to hear.

So if we move on to that. The first is rehiring employees. So this is interesting because employees who left their employment on or after 28 February whether for redundancy or any other any reason, including resignation, can now be rehired by the original employer, because of course they would not be eligible to be furloughed by their new employer if they have started a new position and that is covered in both the employer's guidance and the employee's guidance, so it encourages perhaps people to ask for this as well. I certainly have seen a number of social media tweets and so on encouraging employers to accept people and encouraging employees to ask for that to be done.

Of course the point to note is employers are still not required to reemploy their former employees or place them on furlough and the guidance is not quite clear on how this reemployment might work. So, are they on a new contract, starting at the point that they are reemployed or does somehow the original termination disappear and they are taken as having been employed for the whole of that period.

So the new guidance suggests, and it is probably right, that they can be reemployed so that continuity of employment, so that is the period that they have been employed which attracts certain employment rights to it, would be broken and they would have new terms and conditions. So if this is something you are considering doing, also note that from now, from 6 April, there is the new Section 1 Statement of Employment Particulars, which you need to comply with, that is a day one requirement, but if you do not have time because there is quite a lot of extra practicalities that need to be added in, a lot of information that needs to be added into that compared to the old statement that was required, you should do that as soon as possible.

The other thing is that it is important that the employer remembers there are employment law implications of rehiring someone. So, particularly if they have been made redundant, what is going to happen to any redundancy payment that has been made, any notice monies that have been paid, are these going to be repaid, perhaps they are even promised under a settlement agreement. Settlement agreements are not always used for employees that have caused a problem, they can be used in other circumstances as well.

Of course employers may well have sympathy for some employees who have genuinely left after many years of good service and who are on good terms with their former

employer and they would really like to help them out. Equally there may be requests from employees that are less in favour, those employees perhaps who have resigned under a cloud or were in fact dismissed for another reason, even a disciplinary reason. Employers need would need to be very careful about thinking whether they would reemploy those people.

Also consider whether the effect on continuity of employment, like I said that is not 100 percent clear, and there is also some risks about employees having then accrued two years of service if they have not yet got it.

Of course of the issue of getting the money back, which Jonathan talked about, there may be a delay on that, and who is going to pay for that, and also what the likelihood of this role continuing is. So there is some of the kind of issues. But, you should be aware that if you refuse to rehire someone there is a theoretical risk around that, perhaps if they had been, could argue that they have been subject to a detriment. For example, because they had a whistle blowing claim, and if there is any element of selecting employees to be reemployed but not reemploying anyone who left since then, think carefully about the selection criteria and any discrimination angles in respect of that.

So quickly moving on to rotating furlough. The good news is that this is much more clear now that this is possible. So employees can be rotated on chunks of furlough leave provided that that is for a minimum of three weeks, and that is what we indicated last week in our webinar and that is more confirmed now and that will help address those employee issues perhaps where there is relations between the employees are strained, if some groups are at home, particularly if their wages are being made up to 100 percent doing nothing and others are bearing the brunt of it in the office, or working at home, and of course that will not work for employers but it is an important thing that employers have been keen for clarity on, so think about that really carefully as to whether or not you may take advantage of that possibility.

The one thing to be clear is though that those who are at home or those that are on furlough must not do any work at all.

The third area is shielding employees and the updated guidance clarifies that employers can use the scheme for shielding employees and those are the employees who are in the most vulnerable groups who have been advised to work from home for 12 weeks, or stay at home for 12 weeks, in accordance with the public health guidance. It also covers those who need to stay at home with them and shield with them, perhaps such as their carers. If they cannot work from home and you would otherwise have made them redundant.

Now that is really interesting wording because nowhere else is there a requirement that the employee should cover, meet this test of having otherwise been made redundant, so it is not clear if that is an oversight or an error that it is snuck in there relating to shielding employees or whether that actually is a much higher test in relation to them, so we have not got extra guidance on that.

So I will just quickly run through the extra changes that have been made as well and we will pick up some of these later in the seminar.

So that is anyone who is on PAYE including the agency workers and if you are employed by your own umbrella company, you can claim back through furlough. Also nonemployees such as directors and LLP members as well. Foreign nationals are eligible to be furloughed and if you are on SSP as soon as that ends you can go on furlough afterwards. Employees on fixed term contracts can be furloughed, those contracts can be renewed or extended during the furlough period without breaking the terms of the furlough scheme. Payments can be backdated to 1 March where employees have already been furloughed and administrators can access the scheme, we highlighted this last week, but there is a new requirement and that is if it is a reasonable likelihood of rehiring the workers, though that would be as a result of the administrator aiming for the sale of the business as a going concern.

Now there was a treasury select committee virtual evidence session this morning and there are some nuggets out of that. So the committee were asking, I am trying to push to understand why this scheme could not be extended to allow for short term working because they are not eligible to be furloughed, and the very clear answer from HMRC was that that was no and the second point the committee wanted to raise was that those that had job offers with start dates post 28 February should be included and again the response was clearly no, 28 February is a hard cut-off date necessary policy decision to get the scheme in place quickly, but the select committee did say that they would be taking up these points with the ministers as policy decisions. So potentially there may be some movement on there before the scheme is up and running and we will be watching out for that.

Final word of caution which we did highlight last week, was that there is some wording in both of the guidances which talk about maintaining your current work force because your operation has been severely affected by COVID-19 or, and the purpose being to retain employees and protect the economy. There is also possibilities of auditing and monitoring the business even after the schemes close, so there is the risk that if there are any errors that these will be retrospectively picked up by HMRC, subject of course to their resources

that they have available to do that.**Jonathan:** OK, Richard, are you now in a position to take us through some of the pension issues?

**Siobhan:**Sorry, shall I just go onto my next point on the ....

**Jonathan:**Sorry, yes.

**Siobhan:**OK, so that was, so can furloughed employees work for another employer? Again that is another question that we have seen been asked a lot. So we already knew that they can take part in volunteer work, as long as you were not providing services to or generate revenue for the organisation, that was allowed already, but the employee's guide has now confirmed that you cannot do any volunteer work for a company that is linked or associated with your employer.

So what about somebody else, somebody not related to the employer. It is possible as set out in the new guidance but you can because it allows the organisation that has furloughed employees to actually assist in finding new work or volunteering opportunities whilst that employee is on furlough as long as that is in line with public health guidance, and you could allow, perhaps your business is closed for example and it would be a good opportunity to allow your workforce to fill areas where there are shortages such as food or care. The key of course is to look at your contract as well because many contracts will exclude employees working for anybody else. So, that might need to be waived in the meantime or you might want to say that they can only do it with agreement, even if you are generally supportive of that approach.

Some people might find this surprising because somebody who is on furlough could be being paid up to 100 percent of their salary under a furlough scheme and also be earning the equal amount in another job at the same time which is an unexpected windfall, but obviously the government has taken it as a priority to allow employees to fill some of these sectors where there is a labour shortage and to keep the country running essentially.

So that is another one that you need to think about. There is also indicators in the guidance a starter check list perhaps if you are the employer looking to recruit some of these employees who are on furlough.

There is also one extra thing if you are in the position of recruiting people to fill shortages that you have in your business, whether or not they are on furlough and that was the temporary adjustment to the right to work checks because of COVID-19 and that was announced by the Home Office on 30 March and there is a limited right to work check in

place to enable social distancing to take place whilst carrying out that check and that is a temporary one in place just for this period.

Move on now to those employees who have caring responsibilities and of course some parents and carers can work from home, even though it may prove challenging in some cases, but they can effectively combine work and care. But clearly some groups are just not able to do that. So the updated guidance confirms that employees who are unable to work because they have these caring responsibilities resulting from COVID-19 but can be furloughed and that is irrespective, we think, of the position regarding the impact on the particular business.

So that means that employees who need to look after children or other dependants can be furloughed instead of taking annual leave or parental leave or some other kind of unpaid leave and we know that there have been reports of employees, especially women, but also single parents, parents of very young children and parents of children with special needs or disabilities who may be particularly affected by this and really welcome the opportunity to be furloughed.

But, there is still no right for an employee to be furloughed, they can ask, but the employer does not have to furlough any employee on their workforce. It is still an option for the employer to consider reducing their hours or pay or look at other employment law options around them as well. But it is really important to consider individual circumstances of employees particularly at this time and comply with the general provisions under employment law such as preserving trust and confidence and avoiding any risks that any of your decisions may impact on a potential disability claim as well.

Very quickly, on apprentices. The apprenticeship levy and student loans should continue to be paid as usual and there is also updated guidance on that, talking about if there is a break in learning and if that is greater than four weeks the employer should notify the training provider about that. I will not go through all of those but there is also separate guidance which I do want to just flag for apprentices, employers, training providers, end point assessment organisations and external quality assurance providers and I would refer you to that file for more details.

Now directors, so I mentioned that these are included in the group of nonemployees who can be furloughed. So if you are a salaried director and often directors are employed under service contracts, they are also an employee as well as a director. But, the guidance does point out of course you have to comply with normal company law provisions so the fact that they are going on furlough should be formally adopted as a decision of the company, noted in the company records and communicated in writing to

the directors concerned.

There is a slight exception in relation to directors on what work they can do. They must not generally do work as all employees must not do work other than potentially training, but if they have statutory obligations that they owe to the company, they can do that as long as they do no more than would be reasonably judged as necessary for that purpose.

So it is not entirely clear what reasonably necessary is, but it would probably be the minimum, the absolute minimum and it is really important particularly with directors and also other senior employees to make it really clear that they are not to do other work because if they are doing other work the risk to the employers is that the scheme would not reimburse them in respect of that, so even picking up the odd email and directors may be more tempted to do that than other employees.

So we think the kind of things that the minimum requirement will be including filing an annual return to Companies House, maintaining the company's statutory books or preparing statutory accounts, it is clear that talking to customers and suppliers or promoting the business in any way even on social media, will be going over and above that.

The public sector, now the scheme is available to public sector organisations and the guidance only changed in a very small respect in respect of those. Of course the government expects that the scheme will not be used by many public sector employees because they are generally continuing to provide essential public services or to contribute to the response to the coronavirus outbreak and the minor changes are that they expect most employers rather than the majority of them will be providing essential services. So that means that they cannot really be furloughed in any event. But it is still possible. For example, some bodies will receive both public and private funding for some of their functions, for example in the care sector and it would be quite difficult to separate out those people.

The question is where does the money come from? So it might be really hard in the care sector, but there are other public sector organisations which are funded by the public sector, where it might be easier to separate out those duties between some employees who are providing publicly funded roles and privately funded roles. So it is still possible, and of course some publicly funded organisations will not have work to do, perhaps in the arts sector.

There is also separate guidance on how payments to suppliers of contingent workers impacted by COVID-19 are to be made and dealt with and I refer you to that as well.

So that is my section done, and I think it is over to Richard now.

**Richard Lee:** Yes, thank you very much Siobhan. Good afternoon everyone, we have got a real treat for you now, furlough pensions and benefits. So this will be a fascinating next 10 minutes or so. Jonathan asked me to do one minute, but I am now on the mic so I think 10 minutes will be quite useful for everyone.

We also did a webinar last week on furloughed pensions and benefits so I am just going to summarise the main points coming out of that and then just look at anything that is useful from the most recent guidance.

In summary, the pensions and benefits aspect of the guidance are very very brief indeed. So that is the headline, we are just having to read between the lines and there are very few lines.

So number 1, you can see on your screens, the mismatch between the amount that employers will be able to claim under the ARS and the normal pension contributions that they make.

Second, it is clear and it has been stated that the duties under the Pensions Act, so automatic enrolment and all of its provisions continue to apply during this period that has not been suspended.

Third, we are having a lot of employers asking us about making changes to their schemes to deal with cash flow protection in particular. You have to remember on the pension side there is usually a minimum 60 day consultation for listed changes, that is including if you are going to close down an arrangement or if you are planning to reduce employer contribution rates, but we will come back to both of those.

Finally, do not forget that if you are making changes on a pensions side that you need to check the employment contract and handbooks as well because separate consultation and agreement may well be required in addition to the pensions consultation.

So those are the first issues, just moving on to the next slide.

So these are the five, six things that came out of the first webinar, just key points on pensions, what to look out for. So member status, in other words, whether you have active members, so employees who are paying into the scheme or whether they become deferred, in other words they are treated as having left the scheme. Furlough as we have heard involves continuation of employment so it is not a change to the employment relationship and so that would indicate usually that employees would remain within the

pension scheme and pensionable service as active members. But, it is very important to check the rules themselves because there are rules that we have already seen which can make individuals automatically deferred in other words, they would automatically be treated as having left the scheme under an absence rule, for example, or an eligibility rule.

So very important to check and in particular on the defined benefit side, or final salary cash balance and career average, because it changes the calculation of the benefit at the point at which someone moves from being active to deferred that will affect the level of calculation the benefits so important to check.

Consultation during lockdown, the pensions side, yes we can is I think what we need to say on that and provided all relevant and affected members have got access to IT systems to allow exchange of information in consultation online, that is acceptable on the pension side.

TUPE, we are not going to go into detail very complex area already for the interaction of occupation personal pension schemes on TUPE transfers, but what we would say is that if there are redundancies in particular, if there are other dismissals and it might be difficult to manage the movement of people from furlough to redundancy or reemploying as Siobhan has mentioned. The crucial point particularly where you have final salary benefits is that you need to check again the status of individuals. Once someone is dismissed they might be entitled to early retirement benefits or redundancy benefits under the scheme. Generally those are expensive and they would need to be funded for in the short term so be careful when there are TUPE transfers involved and in particular where furlough is concerned.

Salary sacrifice, we have got some more points coming up on that, just to confirm we are looking at the base pay analysis for achieving a refund of costs, so it is gross pay after sacrifice and I think one of the attendees has asked the question. So you only get the minimum automatic enrolment contributions. So three percent of qualifying earnings on salary sacrifice.

Finally, furlough trustees, so employees can be trustees, either company appointed or member nominated and to the extent that they are put on furloughed leave our view is that it is permissible for furlough trustees to continue during furlough period because duties as trustees are entirely separate and generally are unpaid and so would not fall within the scheme.

So that is the second lot of pensions issues, just moving onto the next slide.

So, scheme rules, each of your arrangements will have rules. You need to check where furlough leave fits in, does it fit in the absence rule, does it fit into the eligibility rule, is there just a gap and it is not clear, but because of the point that I mentioned at the start it is important to understand exactly what furlough does to a members category and status, active or deferred.

Second bullet and extremely important as well, what is or how is pensionable pay defined. Some schemes it will just be basic pay or wages or total earnings, total earnings but excluding overtime and commission, so all schemes have different definitions, so you need to examine what the definition says both in terms of calculation of benefits but also how contributions work. So, what will the contribution structure be if you have got people on furlough?

Now sometimes it will mean that you are paying contributions on the furlough leave, but not always, again it depends on the rules for the specific scheme. Finally, just picking up a bullet I mentioned again employer if they are seeking contractual changes alongside the pensions changes, then some of the pension provisions might be contractual, then you need to build in time or negotiation and agreement as we have mentioned before. On a collective basis the time periods are shorter than pension so we are looking at 30 days or 45 days, but you must make sure that you do not forget about the additional potential consultation and agreement provisions.

Finally, once you have got all that in place you need to make sure that administration of the new provisions is correct and accurate, so for those of you who have schemes of trustees, that will need to be given to them as soon as possible so they can set up the correct changes to the administration system. If you use contractual arrangements with the insurance providers and other pensions providers, again you will need to tell them what you are doing so they understand what will be coming into their arrangements.

So just moving on to the next slide. Nearing the end of your pensions session, but just carry on with the next one.

So, the Pensions Regulator, what have they said? Pretty straight forward, benefits need to be paid as usual. We need to be very careful at the moment of scams, there are I am sure many of you are aware, billions of pounds worth of benefits exiting UK schemes into arrangements which are unlawful and funds tend to disappear overseas so there is obviously a lot of change at the moment and the risks are fairly high of people falling foul of those scams. Employers need to keep contributing and they need to be helping individuals decide whether to continue saving or not in these difficult circumstances, many

people's pay will be lower for a temporary period which may mean that they would like to adjust the amount they are saving.

The Regulator recognises that it is a difficult time for everyone, the huge scale of this means that they understand that there will be technical breaches here and there and I think they are basically indicating that they will not hold employers to the letter during this difficult time.

So just moving on to the next slide. Tricky issues, this is just an update, Siobhan and Jonathan have been mentioning on the employment side. Again, just to reiterate, very very little detail on pensions. All we have really had are the three points here, just for some clarification. So on salary sacrifice, HMRC have confirmed that COVID-19 would be classed as a life event which would mean that existing arrangements can be varied to meet individual's personal circumstances. Clearly employers need to be careful not to advise their workforce on the tax consequences and unravelling a salary sacrifice arrangement will have tax consequences which individuals need to be aware of and take care with.

Regular payments, this was already in the guidance. So the employer can claim for any regular payments they are obliged to make again, so a bit like salary sacrifice, where there is a legal obligation to the employee, wages, past overtime fees, compulsory commission, but excluding discretionary bonuses tips, commission payments and non-cash benefits. So that is important again on the pension side, essentially employers can only claim for that minimum three percent of qualifying earnings. The monetary amount per month and that is it. The non-cash benefits are not included within their ability to reclaim.

Benefits in kind. That again we are just emphasising that those cannot be included, so salary sacrifice, pension contributions which reduce pay, and that does mean that were there is an obligation for an employer to keep paying, that looks like an additional cost.

In terms of the pensions elements of the repayment scheme, although there is no guidance, and so employers who have defined benefit schemes and employers who are using money purchase or defined contribution but on a different basis to qualifying earnings, so they have certified one of the three tiers, those are all alternatives, and it looks to us as though the HMRC are basically saying all you are going to be able to retrieve are the minimum amounts, which are stated as being monthly, in relation to the qualifying earnings band.

So although we would expect further guidance, at the moment that seems to be the position. So if you are an employer that pays higher contribution rates, or you pension

total pay without limits those additional enhancements are not going to be something that you can recover under this arrangement.

I think that is pretty much the end of the pensions piece.

**Jonathan:** Well not perhaps quite Richard, because you mentioned that you would be coming back to consultation, so you might just want to add something in a moment because Siobhan is going to pick up on what is still problematic which are the consultation obligations with employees. Given the time available and given the issues around of holiday, we have a lot of question on holiday in the Q&A panel, if you could canter through this, indeed gallop through this consultation piece Siobhan and Richard and then give Siobhan a chance to do the holidays and we can perhaps pick up some of the questions at the end.

**Siobhan:** OK, so you have to discuss with your staff and agree any furlough with them. You have to keep a record of that for five years. Generally of course employees are consenting quickly provided that the tone of communications and the right reassurance is given to them that they are still employed and their furlough is to protect their role or to keep them employed for a further period of time. The potential difficulty is when you get into this collective consultation because the guidance does indicate that there is no exception for furlough in terms of whether or not you may need to collectively consult with your employee representatives or trade union, if you have one, and what we are seeing is that if there was a recognition agreement in place that can be done quickly. Generally there is a lot of understanding and appreciation of the situation and the trade union representatives there are being very pragmatic and it can be done in a very short period of time.

If there are not any employee reps available who are suitable, who have been elected for this purpose or you think they would qualify as being elected for this purpose, it becomes a little bit more tricky depending on what you are proposing. I think that is the key is to consider what you are proposing really, is the alternative strategy that the employer will be definitely dismissing these employees, or is it that you have not yet decided. Because of course many employees will agree and it may be that you do not need to get the stage where no proposals are actually being made to dismiss employees.

However, if you are at the point where collective consultation is triggered, do not forget to submit the HR1 form, because that is a criminal offence if you fail to do that.

I will leave it there.

**Richard:** Thanks Siobhan. Just to comment on the pensions very briefly, I mentioned, a pensions consultation is less legally demanding than the employment side of things. Where there are listed changes proposed, so where an employer is on a shutdown arrangement or reduce contributions or suspend contributions which is the most relevant for the purposes of employers at the moment. There is usually a minimum 60 day consultation period. Clearly at the moment that looks to be a very long period and you would not be able to introduce the changes usually. The Regulator has not issued any communication about suspending that or relaxing that, but it is possible to apply for a waiver and in addition even if you do not comply with these provisions, it does not invalidate the changes. What it does is give the Regulator a right to levy a fine of up to £50,000. I have to say that in these circumstances I would think that the risk of the Regulator levying a fine would be pretty low.

The other consideration for employers is possibly to go through a less formal and shorter process, still exchanging information asking for views, but possibly cutting down the length of time to adjust it for introducing these changes more quickly. It is also possible that if you are going to lower the contribution rates, say for three months, but then when this has past and trading is good again, you can reinstate them and backdate them, that may mean that you would not need to go through the formal 60 day consultation because there has not been an actual lasting change to the benefits.

So that is all I am going to say on the pension consultation. Thank you.

**Jonathan:** Thanks, Richard. Siobhan can I leave you to pick up the issue of holidays and in particular the fact that HMRC and ACAS appear to be saying different things.

**Siobhan:** Yes, this is a really tricky area because we having conflicting advice, I would not put it any higher than advice, or suggestions being made, but the actual guidance and these are the employers or employee guidance covers this issue at all, even the updated version.

Just going back to basic principles and I think a lot of what I am going to say now will address a number of questions I have seen coming through, so hopefully a lot of questions will be dealt with in the next section.

So if you are an employee or worker who is on furlough because there is no work and you are under the COVID scheme, you can still request and take holiday in the usual way, including bank holidays and employees and workers must get their usual pay in full. We will come on to what usual pay might mean in a minute.

So the bank holidays obviously, a very timely issue, we have got a number of bank holidays coming up pretty shortly. Usually these are part of the legal minimum of 5.6 weeks paid holiday and employees would get their usual pay in full for bank holidays and employees and workers may still be required to use a day's paid holiday for bank holidays including if they are furloughed. Now if in your contract your bank holidays are given on top of the 5.6 weeks paid holiday, employees and workers they should check their contract and talk to the employer, this is what it says in the guidance, about taking this holiday, and also maybe ask whether if you usually work on a bank holiday but you are currently on furlough, can you defer that and take it another time at a later date.

If employees and workers cannot take the bank holiday because they are actually sick, or the new Working Time Regulations guidance actually say if it is due to coronavirus or it is something wider than just being sick. They are able to defer it and use it at a later date if it falls within those first four weeks of statutory paid holiday, that can be carried over now for a further period of two years because of the coronavirus situation.

What about previously booked holidays. Now an employee may well no longer want to take time off because their holiday plans have fallen through and there is limited opportunity to enjoy an holiday even though you could have a rest. The employer can still insist that they take the time that they have already booked off, although it is clearly best practice to agree that with the employer explaining why, which is usually the reason why you cannot accrue a whole chunk of holiday because the business is going to need people in once this pandemic has plateaued and people can come back to work.

If the employee wants to change the time that they are taking off, they will need to get agreement about that from the employer.

So there are particular points to note here. There is no particular provision in the guidance preventing taking holiday leave during furlough. I have already mentioned the changes to the Working Time Regulations which will help employers manage their holiday leave going forward, so where holidays cannot be taken in the current holiday year because of the effects of coronavirus on the worker, the employer, the wider economy or society that can be deferred up to two years or carried over for up to two years.

However, if the employee is not on sick leave or statutory family related leave, they can be instructed to take their leave at a particular time and the notice that is required to take leave will be either in the contract and if that is silent the default position is that it is twice as much notice to be given as the period of holiday leave which is to be taken and that notice is given by the employer.

Now coming back to the difficult question of the amount to be paid, this is an area where we are lacking clarity at the moment. With regard to the amount to be paid, an employee taking leave during a period of furlough should be paid the usual pay in full. Now the revised ACAS guidance says that that would probably mean if the salary regardless of any contractual variation agreed. However, if the employee agrees furlough of 80 percent it could be argued that leave should be taken on their usual pay. If somebody is based on, if somebody is therefore not paid their full amount and is only paid the 80 percent the problem would be that they would have an unlawful deduction of wages.

Of course this, whilst it is a risk at the moment it is unlikely to be something that is particularly going to come up straight away and of course if there were any claims and you were paying less than the full amount, these could be settled in the future, or when we have clearer guidance as to what the amount might actually be.

**Jonathan:** And of course Siobhan, we should point out that the August Authority, this is HMRC's twitter account, has said that holiday pay should be based on furlough pay which of course place them in conflict with what ACAS says which it should be usual pay.

**Siobhan:** That is right and this is a bit of a problem because there is such an iterated process that we are getting bits here and there, none of which are necessarily authoritative, even the ACAS guidance is not binding on a tribunal it is only guidance they will refer to, but it is not the law.

**Jonathan:** So I suspect in terms of claiming money back from the Treasury that what HMRC has chosen to say on its Twitter account will be jolly useful to have, however employment tribunals have traditionally taken more notice of ACAS. We are really hoping that this one is going to be sorted soon and watch for an announcement from us and we will let you know as soon as it does.

Now, I am very conscious that we are already running sort of seven minutes over time, but I do want to try if I may, just rattle through some of the other questions that we have had.

So it has been asked, who said that the portal is going to be up and running by April 20<sup>th</sup>, well that would be Jim Harra, the chief executive of HMRC and he said it to the treasury select committee this morning, so that is straight from the tax man's/horse's mouth.

We have had a question that says can somebody come in on furlough, for example, to respond to a fire alarm, would that break the furlough. Answer, as the guidance is written at the moment, yes it would.

Similarly we have had a number of questions from people about directors, some of them

directors themselves, asking what it is that they can do as directors, can they keep, whilst on furlough, can they take steps to keep the business going to develop new work for when the whole business can come out of furlough, fearing otherwise of course they might not otherwise have a business at all. Again, the guidance seems to be quite strict, you can perform your statutory director's duties but no more than that, which I can appreciate is a bit of a blow and is going to make things very difficult.

There is a huge grey area here that are people are going to have to take a view on risk. Clearly the more you do the less likely it is that HMRC will ultimately pay out.

One question which I would like to answer because it has actually come up from a client to us in practice. An employee who resigns prior to a disciplinary hearing where they were probably going to fire them, now wants to be reemployed and immediately furloughed. Is it reasonable to say no, to which the answer is yes. The government say you can take employees back and perhaps there is can pick up the questions that we have had from some people, what about people already working out their notice, it would have expired after February 28<sup>th</sup> so they are on payroll on the relevant day, can we just extend their notice. I think the answer to is that is yes you can.

However, for returning to this miscreant individual do you have to take him back, no, and Siobhan made the point earlier about there are issues around refusing to take people back, you need to be careful about things like protected disclosures and discrimination. But, on the face of it you have got a pretty good defence to any claims if somebody resigned rather than faced disciplinary proceedings. They could of course wrap up refusal to take them back on as part of compensation whilst there any existing discrimination claims but you have those anyway, the furloughing situation does not make any difference.

One thing I would like to ask Siobhan if you can pick up on because we have had two or three questions on this, what happens if you have had people TUPE in so they become your employees under TUPE after 28 February, can you put them on furlough as things stand?

**Siobhan:** The current guidance does not address this at all and the answer would appear to be no, because the key determining factor is are you on your employer's, as in your current employer's payroll on 28 February. Now there has been a lot of discussion and this issue has been raised a lot, there have been even some letters to members of parliament indicating that they would be covered, but this has not made its way into the guidance. So currently no, it may or may not come in a later version.

**Jonathan:** Again, what this space, we will be the first to let you know.

Right, thank you very much everybody we probably ought to close now, apologies if we had any sound issues, we are of course only working from the microphones we have with our computer. Those of you who follow me on Twitter will be able to see the somewhat Heath Robinson contraption that I am using. We will keep you posted, please sign up for our alerts and we will let you know of any changes. If you have any questions please do get in touch with Siobhan, with Richard, with me or your usual contact at Gowling.

Thank you very much for attending.

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