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BACKGROUND

HM Government has announced a package of £330bn in loan guarantees and a £20bn fiscal intervention including further business rate relief for companies to support businesses affected by the novel coronavirus, COVID-19. These measures, which are unprecedented in scale, includes the Coronavirus Job Retention Scheme ("Scheme").

On 24 March 2020, we held a Q&A session with clients where the Scheme was discussed. This Client Briefing is based on some of the key discussion topics of the meeting. Please also see our Client Briefing on the Scheme and the SSP Relief which can be found on our website.

THE CORONAVIRUS JOB RETENTION SCHEME

The Scheme is a temporary scheme open to all UK employers for at least three months starting from 1 March 2020. HM Government expect the scheme to be up and running by the end of April. It is designed to support employers whose operations have been severely affected by COVID-19. There is no limit on the amount of funding available for the scheme.

Under the Scheme, UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis. HMRC will reimburse 80% of regular wage costs of "furloughed workers", up to a cap of £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage, provided that the individual employee remains employed by the employer. Fees, commission and bonuses should not be included in the calculation of the regular wage costs of the furloughed workers.

As such, at a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. An employer can also choose to top up an employee's salary beyond this but is not obliged to under this scheme.

The scheme is open to all UK employers that had created and started a PAYE payroll scheme before or on 28 February 2020 and have a UK bank account. This includes:

- a) businesses;
- b) charities;
- c) recruitment agencies (agency workers paid through PAYE); and
- d) public authorities.

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme.

For full-time and part-time salaried employees this will mean the employee's actual salary before tax, as of 28 February should be used to calculate the 80%. Fees, commission and bonuses should not be included. If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, an employer can claim for the higher of either:

- a) the same month's earning from the previous year; or
- b) average monthly earnings from the 2019-20 tax year

If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work. If the employee only started in February 2020, the employer should use a pro-rata calculation for their earnings so far to claim.

In addition, once the claimable amount in relation to the employee's salary has been calculated, the employer must then work out the claimable amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions.

The employers can use this scheme anytime during this period, and HMRC is currently working on setting up a system for reimbursement, as existing systems are not set up to facilitate payments to employers. HM Government is expected to issue more guidance on how employers should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions, before the scheme becomes live.

"HMRC will reimburse 80% of wage costs of "furloughed workers", up to a cap of £2,500 per month"

Q&A DISCUSSION

Q1. What are the limits to work conducted by “furloughed workers”?

To be eligible for the subsidy, a furloughed employee cannot undertake work for or on behalf of the organisation. This includes providing services or generating revenue. While on furlough, the employee's wage will generally be subject to usual income tax and other deductions.

A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of your organisation. However, if workers are required, for example, to complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

Please note that if a pattern arises showing that an employee's duties under the employment contract are carried out by the employee while being furloughed, then there could be risks and liabilities for the employer in terms of the worker not having been furloughed. Instead, the employee could perhaps, for example, be deemed to have been working part-time.

Zero-hour and flexible contracts, which can cover a whole range of working arrangements, are generally covered by the Scheme. Specifically, it is our understanding that the 80% grant is applied to the higher of:

- a) the earnings in the same pay period in the previous year; or
- b) the average earnings in the whole previous 12 months (or fewer if they have worked for less time than this, including a part month calculation if they were taken in February).

If your employee has more than one employer, they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

Q2. What does the 3-month furlough period mean if employees are designated as such in the second month?

In our view, it is unlikely that anyone not made redundant between 1st and 19th March (and thereafter reinstated as a result of the Scheme) will benefit from the subsidy during that period, given the requirement that an employee cannot work during the period of furlough. As such, most businesses will only benefit from the Scheme for a 2-month+ period as currently established, although HM Government has made it clear that the Scheme may be continued beyond the initial 3-month period.

Furthermore, please note that to be eligible for furloughing, the employee must have been on your PAYE payroll on 28 February 2020. Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme. However, the scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.

Employers should discuss with their staff and make any variations (changes) to the employment contract by agreement. Please note that when employers are making decisions in relation to the process, including deciding who to offer furlough leave to, equality and discrimination laws will apply in the usual way.

To be eligible for the subsidy employers should write to their employee confirming that they have been furloughed and keep a record of this communication and the employee's written acceptance of the position. An employer will not need to place all its employees on furlough. However, those employees who are placed on furlough leave cannot undertake work for the employer. If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment.

Q3. Are there any material changes to the redundancy/furloughed process for pregnant staff?

Individuals who are on or plan to take Maternity Leave must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth.

Pregnant members of staff can be furloughed and made redundant in line with other staff, however, careful consideration should be given to this before making any such decision. Justification for the change will be critical. If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and the employee will be entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

If an employee offers enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs that the employee can claim through the Scheme. The same principles apply where the employee qualifies for contractual adoption, paternity or shared parental pay.

Q4. What if we have a new employee due to begin but no work for them to do?

As noted under Q2 above, only employees included within the PAYE payroll on or before 28 February 2020 can be furloughed. It is possible that the business can argue that the contract of employment has been frustrated but this should only be used as a last resort and, more likely, it may be necessary to dismiss on the grounds of redundancy, albeit that there will be no entitlement to a statutory redundancy payment. Consideration can be given to furloughing employees who are eligible under the Scheme while not furloughing those that are not but, as noted above, careful consideration of the entire facts and circumstances should be undertaken in such circumstances.

Q5. Can employees be partially furloughed?

If an employee is expected to work at all during furlough leave, even if on reduced hours or for reduced pay, they will not be eligible for the Scheme.

Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February. Employees on sick leave or self-isolating should receive Statutory Sick Pay ("SSP") but can be furloughed after this. Employees who are shielding in line with public health guidance can be placed on furlough.

A worker must be furloughed for a minimum of 3 weeks for their employer to be eligible to claim under the Scheme. As such, it is not possible to furlough for 1 week only and then re-activate an employee. However, it is our understanding that an employee may be furloughed more than once under the Scheme, which means that an employee could potentially be furloughed for 3 weeks at a time with a review of the status at the end of each three-week period.

Q6. What if we furlough staff but there is no market recovery and the 3-month period ends?

In our view, it is likely that the Scheme will be extended beyond the initial 3-month period, perhaps for another 1 or 2 months. However, if the Scheme ends and there is no immediate market recovery, it would be possible to seek a variation of the current contractual agreements, either by agreeing reduced hours or reduced pay with all or specific sections of staff.

Furthermore, it is clear from the further guidance that an employer will be able to make an employee redundant while that employee is on furlough or immediately after the furlough period.

Q7. Can the furlough support package help pay for a notice period?

This *may* be possible if the employer is keeping the employee on the payroll for the notice period, however, it is not clear whether the employer will be required to pay the employee's pay in full for this period. The situation is likely to be more difficult if the employer seeks to make a payment in lieu of notice.

An employer can claim a grant from HMRC to cover wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on paying those wages.

The employer can choose (but is under no obligation) to provide top-up salary in addition to the grant. Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through the Scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for the hours they are working. This means that furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW. However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

Q8. What considerations are there for probation periods or continued employment in this context?

As long as they were listed on the PAYE payroll on 28 February 2020, individuals currently in a probationary period are eligible to be furloughed.

Q9. If there must be a reduction in salaries across the board, how may this be done?

Implementing a reduction in salaries is only possible with the agreement of each individual affected by the implementation. Should a worker not agree, then the employer cannot put into effect a reduction in their salary unless the employer undertakes a consultation process with a view to bringing existing contracts to an end and immediately offering to re-engage staff on the new terms. We would strongly recommend seeking legal advice before undertaking a consultation process.

Q10. Is there an optimal process for furloughing staff?

So long as the employer gets agreement from the staff in writing that agrees a date to begin the furlough then this should offer some protection for the employer.

Furthermore, to apply for the Coronavirus Job Retention Scheme on HMRC's online portal (once this goes live) a submission of the following information will be needed:

- a) a list of the employees who have been designated as "furloughed workers" (the employees will need to be notified of their designation as such);
- b) a calculation of the amount you are claiming (per the minimum length of furloughing of 3 weeks);
- a) the employer's ePAYE reference number;
- b) the claim period (start and end date);
- c) a UK bank account number and sort code; and
- d) the name and phone number of the employer's contact person.

An employer can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1 March if applicable. HMRC will retain the right to retrospectively audit all aspects of a claim. Once HMRC have received the claim, and provided that the employer is eligible for the grant, HMRC will pay the grant via BACS payment to the employer's designated UK bank account.

The employer must pay the employees all the grant the employer receives for the employees' gross pay, no fees can be charged from the money that is granted. The employer should make its claim in accordance with actual payroll amounts at the point at which the employer runs its payroll or in advance of an imminent payroll. HMRC is expected to set out further details on the specific information required when applying for the Scheme.

Q11. On the 1 March backdating deadline, can you argue that things were slowing down at this date even though people were still working?

Please see the answer to Q2 above.

Q12. When do I have to pay Statutory Sick Pay ("SSP")?

If an employee cannot work due to the individual is self-isolating because of COVID-19, the employee could get SSP for every day the employee is in isolation, up to 28 weeks. The employee must self-isolate for at least 4 days to be eligible.

If an employee's illness is not related to COVID-19, the employee must be eligible for SSP and have been off work sick for 4 or more days in a row (including non-working days) to get SSP.

HM Government intends to bring forward legislation to allow employers that are SMEs to reclaim SSP paid for absences related to COVID-19, whether actual sickness absence or absence related to self-isolating in accordance with HM Government's guidance. The SSP refund will cover up to 2 weeks' SSP per eligible employee who has been off work because of COVID-19.

The framework for the scheme will be as follows:

- a) employers will be able to reclaim expenditure for any employee who has claimed SSP under the new eligibility criteria as a result of COVID-19;
- b) employers will be required to maintain records of staff absences and payments of SSP, but employees will not need to provide a GP fit note; and
- c) the eligible period for the scheme will commence the day after the regulations on the extension of SSP to those staying at home comes into force.

Only employers with fewer than 250 employees will be eligible. The size of an employer will be determined by the number of people they employed as of 28 February 2020.

GET IN TOUCH

Should you have any questions to the topics covered in this Client Briefing, please get in touch with your usual Rooney Nimmo contact or any of the persons below.

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