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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, include the Coronavirus Job Retention Scheme (“Scheme”).

This is the information we have as of 16 April 2020 and is our interpretation of the newly issued direction by HM Treasury on the Coronavirus Job Retention Scheme and its impact on employers and employees.

Coinciding with the publication of the fourth version of the Coronavirus Job Retention Scheme, HM Treasury has now issued its direction to HMRC regarding the Scheme. Here is what it means for employers and employees.

### TREASURY DIRECTION

The Treasury Direction extends twelve pages. The main points are as follows:

- Employees who were employed on **19 March 2020** (previously 28 February 2020) are eligible for furlough, provided the employer has submitted real-time information payroll data by that date.
- The Scheme applies to any workers who are furloughed **“by reason of circumstances as a result of coronavirus or coronavirus disease.”**
- Furloughed workers cannot undertake work for the employer, however, for the purposes of ceasing all work **the following are disregarded:**
  - undertaking statutory duties as a director of the company provided these relate to the filing of the company’s accounts or the provision of other information relating to the administration of the director’s company; and
  - undertaking relevant pre-agreed training connected to employment.
- To claim furlough, the employer and employee **must have agreed in writing** that the employee will cease all work.
- The amount of salary for the employee **must disregard anything which is not “regular salary or wages”**. It is clear that this means disregarding any performance related bonus or discretionary payments (including tips), any conditional payments and any non-financial benefits. It is not clear, however, as to whether contractual commission payments are covered.
- The employer cannot claim for any salary which is **“conditional on any matter.”**
- The employer can claim for earnings which it **“reasonably expects to be paid”** to the employee.

### WHAT THIS MEANS

One of the major difficulties with the original Scheme was the fact that new starters (i.e. employees who joined their employer after 28 February) could not be furloughed by their employer. This meant that employers were faced with the difficult situation of either keeping them on and accepting that they could not receive the grant in respect of those employees, or terminating their employment knowing that it was unlikely that the employee, through no fault of their own, would be unlikely to secure alternative employment in the short term and would be reliant on jobseekers’ allowance or similar for any form of income. Changing the qualifying date for eligibility under the Scheme will therefore be welcomed by employers and employees alike.

The HMRC guidance has made it clear in more recent iterations that:

- Shielding employees can be furloughed;
- employees who need to stay at home with someone who is shielding can be furloughed; and
- employees with caring responsibilities can be furloughed.

There was, however, some concern that the ability to furlough would be limited by the ability of the employer to demonstrate why furloughing had taken place. The Direction makes it clear that the Scheme applies to any workers who are furloughed for a reason directly connected with coronavirus or coronavirus disease, meaning that it will be easier for employers to justify furloughing generally and/or for furloughing a specific employee or specific group of employees. Again, this will be welcomed by employers and employees alike.

The Direction goes into a considerable amount of detail about what will and will not qualify as ‘wages’ for the purposes of recovering monies paid out to furloughed employees. Suffice to say, there is no substitute for reading the Direction in this regard and accountants will be poring over the specifics and associated Scheme guidance between now and the launching of the **online portal on 20 April 2020.**

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## ANNUAL LEAVE

One of the issues which has been vexing commentators and clients in the last few weeks has been the interaction between annual leave and 'furlough leave'. In spite of this, the Direction is silent on annual leave.

ACAS provided some helpful [guidance](#) in this regard and currently states that annual leave and furloughed status are not incompatible. In other words, an employee can take annual leave during furlough leave without bringing the furlough leave to an end.

It also seems relatively clear (for now at least) that:

- if an employee is deemed to be taking annual leave while furloughed, they should be paid at their full salary level, not their furloughed salary level, for the duration of their annual leave;
- where an employee is furloughed on a day or days that are identified in advance by the employer as bank holidays, they should be paid at their full salary level, not their furloughed salary level; and
- the Working Time rules relating to the giving and receiving of notice regarding annual leave by employers and employees continue to apply and are not disapplied because an employee has been furloughed.

## SICKNESS ABSENCE AND FURLOUGHING

Another issue which has vexed commentators in relation to the Scheme is the interaction between Statutory Sick Pay and furlough leave. You may recall that when COVID-19 first arrived, the government passed emergency legislation extending the right to claim Statutory Sick Pay in the event that an employee was self-isolating and by reason of that self-isolation was unable to work, regardless of whether they, in fact, had coronavirus or coronavirus symptoms. The Scheme guidance makes it clear that an employee cannot commence furlough leave while absent from work for a reason that would make them eligible for Statutory Sick Pay. However, it is now clear that once the original period of sickness absence has ended, an employer can furlough the employee and keep them furloughed, whether or not they subsequently become ill. In other words, it is up to the employer to decide whether to move these employees onto Statutory Sick Pay or to keep them furloughed (at their furloughed rate).

## WORK VISAS

Another issue which has cropped up since the introduction of the Scheme is whether foreign nationals in the United Kingdom on work visas can be furloughed under the Scheme. The reason for the concern was because one of the conditions for such visas is the requirement that employers do not use public funds to employ such workers.

The issue was dealt with initially under [separate guidance](#). The updated HMRC guidance now makes it clear that grants under the Scheme are not counted as 'access to public funds' and therefore employers can furlough employees on all categories of visa. Again, welcome news to many employers and employees.

## ADDITIONAL POINTS

Just a couple of further points to note from the updated guidance:

- Employers of newly TUPE'd (transferred) employees can be put on furlough leave.
- Furloughed employees cannot do any work for their employer or for any organisation linked or associated with their employer, even if that work is viewed as voluntary work.

## GET IN TOUCH

If you would like help with any of the above, please email Dawn Robertson or call 0131 220 9579.

## CONTACT



### John Nimmo

Founding Partner  
Tel: +44 (0)7811 458 506  
[john.nimmo@rooneynimmo.co.uk](mailto:john.nimmo@rooneynimmo.co.uk)



### Dawn Robertson

Partner  
Tel: +44 (0)7779 939 665  
[dawn.robertson@rooneynimmo.co.uk](mailto:dawn.robertson@rooneynimmo.co.uk)



### Edward Sloan

Founding Partner  
Tel: +44 (0)7715 380 367  
[edward.sloan@rooneynimmo.co.uk](mailto:edward.sloan@rooneynimmo.co.uk)



### Grant Docherty

Partner  
Tel: +44 (0)7877 283 645  
[grant.docherty@rooneynimmo.co.uk](mailto:grant.docherty@rooneynimmo.co.uk)



### Max Scharbert

Managing Partner  
Tel: +44 (0)7803 817 451  
[max.scharbert@rooneynimmo.co.uk](mailto:max.scharbert@rooneynimmo.co.uk)



### Scott Nelson

Partner  
+44 (0)7926 198 527  
[scott.nelson@rooneynimmo.co.uk](mailto:scott.nelson@rooneynimmo.co.uk)

[rooneynimmo.com](http://rooneynimmo.com)

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