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LEGAL UPDATE

July 2020

EMPLOYMENT LAW AND COVID-19 – WHAT'S NEW?

Third Treasury Direction issued on the Coronavirus Job Retention Scheme (CJRS)

Further to the government's announcement on 29 May that the CJRS would be extended until 31 October, the Chancellor issued a third Treasury Direction (the "Direction") on 26 June. The Direction establishes the legal basis for the operation of the CJRS as now amended.

The key change is to enable "flexible furlough", which permits employers to furlough employees for a proportion of their working hours. Employers will pay in full for days worked and claim under the CJRS for days not worked, subject to the relevant caps. In accordance with the terms of the Direction, only employees who have already been furloughed for 3 weeks before 1 July can benefit from the extended furlough period. However, those returning from statutory family leave can be furloughed after the 10 June cut-off date, provided that they have been on the employer's payroll prior to 19 March, their relevant period of leave commenced before 10 June, and where their employer has made a claim under the CJRS in respect of other employees in the period preceding 30 June.

The Direction provides that for an employee to be flexibly furloughed the employer and employee must have agreed that the employee will either do no work in relation to their employment or will not work for the full amount of their usual hours.

The agreement (including any collective agreement) must:

- Specify the main terms and conditions on which the employee will either do no work or not work for the full amount of the their usual hours (e.g. shift patterns or details relating to training).
- Be made before the beginning of the period to which the CJRS claim relates (but may subsequently be varied to reflect any variation agreed between the employer and the employee during the claim period).
- Be incorporated (expressly or impliedly) in the employee's contract.
- Be made in writing or confirmed in writing by the employer (which can be by email).
- Be retained by the employer until at least 30 June 2025.

The Direction also provides various examples of how to calculate employee wages based on usual hours and hours worked, to determine how much can be claimed under the CJRS. The requirements are not straightforward and will have to be worked through carefully especially if the claim period does not align with a calendar month.

Crucially, the Direction states that a claim should only be made where the payment will be used to continue employment. This appears to suggest that if funds claimed will be used in circumstances where an employee's employment has been terminated and they are working under notice, the purpose of the scheme is not met.

Easing of lockdown restrictions from a workplace perspective

On 23 June, the Prime Minister announced further easing of lockdown measures to take effect from 4 July in England. Pubs and restaurants will be permitted to re-open despite being limited to indoor table service and being encouraged to deploy minimal staff. Hairdressers may also re-open with restrictions including the use of visors. Provided that social distancing measures are adhered to, self-contained accommodation such as hotels, B&Bs and campsites are also permitted to open, along with a number of other leisure and tourist facilities.

The government has published 12 sets of guidance to help employers and employees working within different sectors understand how to work safely during the coronavirus pandemic, ahead of a return to work for a significant proportion of the UK work force on 4 July.

Workplace Testing and Monitoring

In anticipation of an increased return to the workplace, the Information Commissioner's Office (ICO) has published guidance for organisations on COVID-19 testing and monitoring, in an attempt to clarify what may and may not be permissible in respect of collecting and processing personal data when testing and screening for COVID-19.

From a data protection perspective, health data of employees (such as test results) is classified as special category data under the GDPR, meaning that there must be both a lawful basis for processing the data – such as pursuing legitimate interests and a separate condition for processing, such as it is necessary in order to comply with employment obligations.

Employers must only retain the minimum amount of information required, bearing in mind the adequacy, relevance and necessity of introducing such measures. These will depend on a number of factors, such as the type of work carried out – for example, if the nature of the work requires staff to be on site, then testing and screening is likely to be more necessary than it is in a workplace where staff are able to work remotely. Other considerations may include the type and size of premises occupied and the possibility of reasonable alternative (and perhaps less intrusive) measures such as strict social distancing.

On-site temperature checks and thermal cameras are not encouraged by the ICO, highlighting that less intrusive means should be utilised where possible, and as with any forms of surveillance in the workplace, organisations should bear in mind its employees' legitimate expectations of privacy whilst at work. An employee's temperature cannot be taken unless they agree, either at the time the employer asks or unless an express clause in the employment contract can be relied on. An employer should not suspend, discipline or dismiss an employee who refuses to be tested.

Review of employment rights for survivors of domestic abuse

Since lockdown was first introduced it is believed that cases of domestic violence have seen a worldwide increase of around 20%. With a significant proportion of the UK work force set to continue working from home for the time being, the government has launched a review of employment rights for survivors of domestic abuse. The review is set to consider the options as to how to improve the workplace for those affected, such as methods for employers to pay wages to a different bank account or otherwise to make emergency payments to those suffering financially. It is also set to consider the availability of flexible working and unplanned leave. Written evidence is currently being sought from stakeholders on employment needs of sufferers, and how well these are currently being met. Written submissions are set to be accepted up until 9 September.

Shielding Employees set to return to work from 1 August

The government has released details of its plans for the two million people currently shielding from COVID-19 in England to gradually return to normal life. From 1 August, those who are shielding and unable to work from home can return to work provided that certain protective measures are in place.

Emphasis has been placed on the importance of employers complying with guidance to make the workplace 'COVID secure' before shielding employees can return to work. Where staff feel uncomfortable about returning to work even once protective measures and adjustments have been explained, employers should adopt a reasonable and supportive approach. Depending on the circumstances, it may be appropriate to agree a period of unpaid leave if staff do not wish to return to work. Where employers wish to explore unpaid leave, care should be taken not to position such leave as a sanction or penalty for non-attendance. Otherwise, eligible staff can continue to be furloughed under the new flexible furlough scheme between 1 July and the scheme end date of 31 October 2020.

For more information on any of the items discussed in this article please contact either Nick Hall or a member of the Employment Law team.