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**‘A guide to COVID-19 legislation, Supplement 4’**

**By:**

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Well we are now into Week 2 of the ability to make claims to HMRC for payments relating to the unpaid leave scheme (Furlough). By Wednesday last week some £1.5 billion had been claimed-overall, the scheme is likely to cost over £50 billion! We have also had some clarification of some issues where we have had controversy or uncertainty.

**Clarifications**

* The scheme is now set to last until the end of June 2020, though of course employers are free to themselves end it before (Though there is little advice/debate on how this is done, especially if it is done with variations across jobs/departments etc.).
* There appears no likelihood of legislation to clarify areas of confusion.
* HMRC has stated that employers should follow the Guidance, rather than Directions for information. This is despite the fact that there are still some differences and legal orthodoxy suggests that Directions normally take priority. (One of the strange features of the this scheme is the fact that key information is often provided by email/Twitter etc., often at strange times of the day and night! Legal purists wonder about the legality of such practices).
* One area we touched on in Supplement 3(a) is that of the ‘agreement’ between the employer and employee to the scheme. Does it have to indicate employee signed agreement? It appears that HMRC is not taking this too literally and will not penalise an employer who has not got express agreement to the leave from an employee. However, as I reminded you in the first version of the Guide, the leave represents a major variation of the contract, i.e. relieving the employee of the obligation to work. If an employer wanted to add further requirements, they would have, usually, to be in a contractually binding written and signed agreement.
* Although still not entirely clear, it appears employees on sick leave cannot be furloughed until they are fit to ‘work’ again.
* It has become clear that working time provisions about paid holidays should be applied fully in terms of pay and what can also be included in ‘pay’. There appears some consensus on the fact that employers cannot force furloughed employees to take holidays during the leave, though employees can choose to do so. Remember, the right to paid holidays is a part of the EU’s Social Charter and is the subject of some very fierce case law from the ECJ and is a health and safety protection. (However, if you are not required to work why do you need a holiday to aid your health and wellbeing?)
* There has been some clarification that the scheme applies to ZHCs, gig workers, agency temps etc., though not ‘limb (b) ‘workers’-here seen as self-employed despite machinations over IR 35!
* There has also been some clarification of ‘family rights’, e.g. maternity, adoption, shared parental leave in that these continue as before and appear unaffected by furloughing.

**What is still unclear?**

* There are aspects of ‘pay’, especially where pay is variable, such as commission-based, that remain unclear. Some have suggested averaging, but over what period, and overtime payments. If overtime is compulsory, then it is likely included but it is left open otherwise. Probably it is best to include it.
* The role of the implied term of trust and confidence is still much debated. If it is alleged that the employer’s conduct in some way undermined trust, can an employee bring a claim for, say, unfair dismissal. Most experts think not, as common law rules from contracts should not be used to impact on statutory issues.
* A recent issue is that of the rate of pay if an employee gives notice during the furlough period. What should they be paid during the notice period? Should it be 80% or 100%? Many argue it should be 80%. I disagree. I think all furlough does is to vary a key term of work and other terms remain in place. Therefore, I think 100%.
* An important now coming into view is what happens after the end of furlough? Is there nothing to prevent an employer selecting and making staff redundant before the end of the scheme, accepting that the usual selection methods may be more difficult to apply. The scheme seems to be based on the hypothesis that work will again be available after June, but this may well not be the case. If you have some staff working from home and some furloughed (Who may have got other work during the continuance of the scheme) how might this impact on the selection process? Some experts have argued that furlough is a ‘right’ so it would be very risky to interfere with it. Overall, this is now becoming a key area. For example, the scheme assumes three continuous weeks of furloughing so as to entitle payment from government. How might problems arise about giving notice and at what rate?

**Other confusing areas?**