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Job Retention Scheme heads in wrong Direction, with respect (UK)

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It is very hard to criticise the conception of the Coronavirus Job Retention Scheme, but it is unfortunately becoming increasingly easy to take objection to the manner of its implementation. HMRC Chief Executive Jim Harra told the BBC last week that in the preparation of the Scheme, "*time, in some senses, has been the enemy of perfection*". While that was probably a legitimate position when the Scheme was launched on 20 March, however, a month later it really is not.

Yesterday we saw both a fourth version of the Guidance for employers and employees (v.3 only came out a week ago – will it never stop?), plus a Treasury Direction which has Rishi Sunak's signature on it and so must be intended as the definitive statement of how the Scheme will work. Neither document really covers itself in glory and we are left again with the impression that not all those involved are speaking to each other, reading what has already been issued or considering how it might actually all work in practice. This is most regrettable and in one or two respects poses a serious threat to the political legacy the government surely intends for the Scheme.

Biggest point first – the Treasury Direction says at paragraph 6.1 that the employee being furloughed must be instructed not to do any work for the employer. Fair enough, but paragraph 6.7 then defines "instruction" as where the employee and employer have agreed in writing (including email) that he/she won't do so. Let us leave aside for the moment the obvious point that "instruction" and "agreement" are clearly wholly different things. Let us ignore also that the written agreement required seems to relate to not working rather than being furloughed or having one's pay reduced, in some cases very materially. This is, a month in and after hundreds of thousands, perhaps millions, of employees have already been furloughed, the first official suggestion that those employees' written agreement is required to *anything,* let alone their not working. It is also flatly contradicted by the Guidance to both employers and employees issued on the very same day, which says only that the employer must "confirm" the furlough in writing to the employee and makes no reference at all to any obligation on the part of the employee to agree to it (or specifically, to the obligation not to work) in writing.

Then you are left with the sheer practical difficulties in obtaining written consents from all your employees at potentially very short notice if trying to do this in advance of furloughing them. That could mean that your claim for the grant would be based not on when the employee was furloughed but when he/she indicated his/her individual consent to not working, an administrative nightmare not

just for the employer but HMRC too. It has been suggested that the requirement to obtain written consent not to work is not time-limited, and therefore that you can still claim for furlough support even if that written agreement is received well after the furlough starts. This seems to overlook the fundamental artificiality of seeking consent for something which is potentially a *fait accompli* of a month's vintage by the time you even ask. We are also left considering the realistic likelihood that an employee could (let alone would) work in circumstances where the employer is telling them not to do so or where the workplace is closed anyway. What is the realistic point in asking someone to confirm in writing that they will not do something they haven't done and in most cases can't do anyway? Still more so, what is the probability that HMRC will demand a repayment of furlough support in any case where the employee hadn't in fact worked but had not agreed in writing that he wouldn't? The whole CJRS system (and with it, HMRC and the government) would descend into public disrepute straight away. Sadly, the requirement for written agreement not to work is therefore not just impracticable but also (perhaps worse) completely pointless. The only sensible approach would surely have been to proceed on the basis that the employee effectively consents to the written confirmation of the furlough (and instruction not to work) by not resigning (and not working). That could easily be reconciled with the latest guidance so why the Direction heads off elsewhere at the eleventh hour in this respect is a mystery.

Second point. At its fourth attempt HMRC has revised yet again the information which the employer will be required to submit in support of its claim next week. Now it includes the names and NI/payroll numbers of the individual employees being claimed for. It is unclear why this could not have been said at the start. However, though the Guidance states the payroll number to be necessary, the very next page confirms that information to be optional only. So which is it, please?

Despite last week's promise of more information on the point, neither the Guidance v.4 nor the Treasury Direction address the still-outstanding question of how holidays and furlough inter-relate. As a result, assuming that the portal once opened does not ask about it (there is no sign thus far that it will do so), employers could not be blamed for ignoring the holiday issue when claiming furlough support, and then arguing later if need be that the guidance should have said so if the intention were anything else. Where a legitimate expectation is clearly created by HMRC's own deliberate silence on the point, it is hard to see that they would want a fight on such morally and politically shaky grounds.

Next, the Treasury Direction refers to the allowance as claimable only on "*regular wages or salary*". There is no mention of the "past overtime" or "compulsory commission" expressly included as claimable in the preceding version of the Guidance. So which is it? Similarly, by the Treasury Direction, claimable wages or salary exclude any sums "*conditional on any matter*". This must mean something, though no-one yet seems entirely sure what. It has been suggested that this even includes circumstances where the employer makes the payment of wages in furlough conditional upon its subsequent receipt of the grant from HMRC. However, this cannot be right in circumstances where unless the employer gets the money from HMRC it won't or can't afford to pay the wages. Any unnecessary suggestion that the grant might not be received would push employers towards redundancy dismissals instead of furlough, the very opposite of what the Scheme is designed to achieve.

Last, much political capital is also being sought through the "extension" of the Scheme to cover those on payroll as at 19th March (the day before the Scheme was announced), rather than 28th February. Now lots more people can claim, hooray! Unfortunately, the Guidance and the Direction both now say that it is not just an issue of being employed at or before 19th March, but also of the employer having submitted an RTI (real-time information) return to HMRC in respect of that

employee. The RTI normally goes in with the payroll returns, and so where the employee joined after February's payroll run but before 28th, or in March but hadn't been paid by 19th, he/she would be disqualified in any case. So potentially this makes things worse, not better. This is either a particularly cheap trick by HMRC or (far more likely) the unintended product of a simple lack of thought about how the thing would work in practice – a triumph of politics over reality.

Quite aside from the holiday pay question, the new Guidance and Direction together leave employers again with more questions than answers. Even if the Direction is intended to be HMRC's final say on the point, it must surely now be supplemented by further guidance to address these points. If it is not, the admirable aims of the Scheme will certainly be overshadowed in the public eye by its shoddy execution.

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