



Questions and Answers

HOSPA Legal Update with Emma O'Connor, Boyes Turner

3rd June 2020

Please listen to the webinar for the detail. Below is some additional feedback to questions that we were not able to answer during the live event.

THE ANSWERS BELOW ARE GENERIC AND ARE BASED ON THE QUESTIONS ASKED WITHOUT KNOWING ALL OF THE SPECIFIC DETAILS. THEY ARE ALSO BASED ON GUIDANCE AS AT 3RD JUNE 2020. SPECIFIC ADVICE SHOULD ALWAYS BE TAKEN.

Q. Can changes be made to employment contracts with agreement that holidays will not accrue during furlough?

Employers should be careful when it comes to holiday as “holiday” comes in many different forms – basic entitlement (20 days), the additional UK entitlement of 1.6 weeks, plus any contractual holiday offered in addition to this. Employees are able to carry forward the basic entitlement if prevented from taking this holiday due to Covid-19 for up to 2 holiday years in new legislation. Employers can also stipulate that holiday is to be taken during furlough by giving twice the amount of notice for the holiday they wish to be taken. Changing contractual holiday entitlement is not without risk and is not something which ACAS have recommended. If you want to change your holiday arrangements as described, you should take advice.

Q. Can we furlough an employee in say August who has not previously been furloughed (was on payroll at 28th Feb)?

No, the new changes make clear that employers cannot furlough new entrants to the scheme after 30 June 2020 as the JRS is closing to new entrants. Special rules have been announced for those returning from family leave - <https://www.gov.uk/government/news/parents-returning-to-work-after-extended-leave-eligible-for-furlough>

Q. We have workers who have been on and off of furlough from March through May and will continue to rotate. Take it this is ok?

Yes, provided they work 3 weeks on/3 weeks off. Things will change from 1 July with Flexi-Furlough being introduced but as yet we do not know how this will change.

Q. If you have made someone redundant and they are on furlough do they have to come off furlough for their notice period or can they serve notice on furlough?

They can serve notice and still be on furlough leave; provided they still meet the criteria for the JRS e.g. there is no work for them to do because of COVID-19.

Q. Can you rotate employees on furlough? For example, if you have joined employees that have not yet been on the scheme on the 1st June 2020, and they come back on 22nd June, then furlough?

Just watch the dates as to place new entrants on the scheme; they need to be placed on furlough by June 10 so they are on furlough for the required minimum period of 3 weeks. Also, note that employers also seemed barred from adding new employees to the scheme which is more than the numbers they have already claimed for. Unclear at present what this means, guidance is expected but something to note. Also, the same conditions for joining furlough still apply (e.g. date employment started etc.).

Q. With the 3 week furlough rule just mentioned, does that mean that one week on and one week off on furlough would not be allowed?

No, furlough has to be for a minimum of 3 weeks, although this appears to be changing from July 1 if employers are using flexi-furlough. We await guidance.

Q. What about staff members who were on probation at the time of lockdown. Does the probation period have to be automatically extended or can it be brought to an end one way or the other?

Not necessarily, although I would recommend employers have an objective reason which can be supported with evidence if they are bringing employment to an end in this way. It will depend on the facts as to whether the employee has been able to properly complete their probation. Risks here would be discrimination as this is a day-one right. May be best to extend to allow them to complete tasks set; but every business is different. Evidence will be key.

Q. In the first section Emma said by mistake that employers would need to give 10 days "holiday" rather than "notice" for an employee to take 5 days holiday - just in case anyone is confused.

Just to confirm, if employers want to designate holiday they have to give twice the amount of NOTICE as they are requiring as holiday. So 5 days holiday would require 10 days' notice.

Q. Do employees have to agree to the request for taking holiday, or can the employer just make this request directly without need for employee acceptance?

Provided the correct notice has been given, yes holiday will be taken. Just be careful not to abuse the power to designate holiday remembering that holiday is there is a health and safety requirement. Be cautious here. Employees are also entitled to full pre-furlough pay for holiday.

Q. Is it a mandatory requirement for the employers to top up the difference in furlough pay in September & October?

Yes, from August employers have to start contributing to the costs of their staff on the JRS. This is not the same as "topping up" to 100% which is still discretionary.

Q. Will the NLW kick in when the staff are brought back for the time they are working for the employer?

I would expect so as the employee is working, although we do not have guidance. The NLW/NMW also applies when the employee on JRS is undertaking training.

Q. I am still working but my employer asked me to take holiday but still work during those days. Is this allowed?

No, holiday is holiday, work is work. If you are working then you would not meet the criteria for the JRS.

Q. Can we refurlough employees (who have previously been furloughed for 3 weeks) that are back at work at the moment after the 1st July?

Yes, you can re-furlough someone provided they have been furlough for a minimum of 3-weeks prior to 30 June 2020. Refurlough before 30 June so they do not miss the cut off.

Q. Is the limit on claimants from the 1st July?

The Government Factsheet suggests there being a maximum number of employees an employer can claim for although we do not have the Government's official guidance yet but something to watch out for.

Q. We have 93 employees over our 25 sites who are in their probation period, what would be the risk in exiting them in regard to failed probation?

It would depend on the reason they are exiting - there is a risk here so I would take specific advice.

Q. What do we class as one establishment?

It would depend the circumstances and the way your specific business was set up in terms of various sites - one to take advice on as there isn't a definitive definition of "establishment" under the legislation I'm afraid. Very fact specific.

Q. If an employee, who is furloughed, decides to resign while furloughed, would the notice period payable be at the furlough amount (capped @ 80 % up to 2.5 K) or the actual Contracted amount (potentially much higher)?

Notice pay is tricky as there is nothing in the Guidance to date as to how notice pay is paid for those employees who are furloughed - as you say do we pay the 80% under the JRS or do we have to "top up" to 100%? With regards to notice pay for furloughed employees it depends on many different factors such as how long their notice period is when compared to the statutory minimum notice period, whether they have a fixed wage/hours, whether they are "ready, willing and able" to work.

Whilst in some cases 80% is payable, also consider whether this is a breach of contract as there may be restrictions in the employees contract of employment you want to preserve. Lots of factors to consider when it comes to notice pay and risks to weigh up.

Q. Can we bring back a part time worker from June 13 and claim for the JRS for the hours not worked?

No - at present only those for whom there is no work can use the JRS. This will change from 1 July with the introduction of "flexi-furlough" so might be best to wait before making any changes to their furloughed status.

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