SQUIRE PATTON BOGGS

UK FAQs: Furloughing and Administration

Key Considerations for Administrators

EMEA – UK – 12 May 2020

The Coronavirus Job Retention Scheme (JRS) was announced on 20 March 2020, and went "live" on 20 April 2020.

Although the government has published various drafts of online guidance, the latest of which was published on 1 May 2020 (Guidance), we have not yet seen any legislation on this scheme. In addition, there are no details about how the scheme is intended to operate in line with current insolvency legislation.

The purpose of this alert is to assist administrators in (a) making the decision to furlough employees; (b) dealing with employees who have already been furloughed; and (c) understanding their responsibilities and obligations.

This alert is not intended to be legal advice, and the approach taken to furloughing should be considered on a case-by-case basis, taking appropriate advice as required.

Can administrators furlough employees? What happens if employees are already furloughed, prior to the administrators' appointment?

Administrators can furlough employees where "there is a reasonable likelihood of rehiring the workers". This is likely to include situations where the administrators have concluded that there is a reasonable prospect of selling the business. Genuine expressions of interest in the business may help support that conclusion.

For most appointments taken from now, employees are likely to be furloughed already. The administrators should, therefore, consider whether keeping employees furloughed is likely to assist the purpose of the administration. For example, certain employees may have a particular skillset or expertise and it would devalue the business if they were made redundant, which would justify retaining but furloughing those employees.

If employees are already furloughed, the position for administrators is no different from if the administrators furloughed the employees themselves. As discussed in more detail below, adoption of the contracts will likely occur at the point the administrators make an application to the JRS or pay the employees, whether or not the administrators were the ones to put the employees on furlough.

Administrators should also be aware that only one JRS application can be made per company and issues may, therefore, arise if companies operate multiple payrolls (e.g. a weekly and monthly payroll).

Do employees need to consent to being furloughed?

There has been a lot of uncertainty surrounding whether an employee must consent in writing to being furloughed. The latest Guidance seems to be clear that there is no requirement for employees to provide a written response, provided the employee's consent is consistent with employment law (please see our employment alerts for more information).

However, administrators may wish to obtain employee consent to variations to their employment contracts and could obtain consent to furloughing as part of this, to avoid any doubt. Where employees are already on furlough, the administrators may still wish to send letters upon appointment to confirm any variations to employment contracts (and to help guide whether certain contracts should be adopted).

Should administrators seek to vary the terms of an employee's contract of employment?

It may be sensible to obtain consent to vary the terms of an employee's contract to:

a. Enable the payment date to be amended, so that the administrators will only be obliged to pay when money is received under the JRS

b. Make necessary changes to levels of remuneration and salary (i.e. so that the administrators do not need to "top up" the furlough money)

c. Make it clear that employees should not come into work (and ensure that the administrators are not under an obligation to provide work to the employee)

d. Address holiday pay (see further below)

How is a contract of employment varied?

An employment contract cannot (ordinarily) be varied unilaterally. Employees must, therefore, consent to any variations in terms, by express or implied means. Express variation is clear: the employee consents to the varied terms (preferably in writing).

Consent to a variation may be inferred by conduct. However, any such inference must be "unequivocal", and the COVID-19 framework creates a very different set of circumstances to usual. As employees are not working, there may be limited conduct from which inferences can be drawn. There is also the added difficulty that responses are required in a short time period; one challenge at the moment is contacting employees in a timely manner at home – obtaining their contact details, delays in employees reading post, delays in returning post, etc.

It would, therefore, be sensible for administrators to obtain express consent, in writing, to any variation in employment contracts.

When is an employment contract adopted where employees are furloughed?

Administrators adopt a contract by conduct "that can only be consistent with a wish to adopt the contract", but administrators will not adopt contracts within the first 14 days of their appointment.

Ordinarily, such conduct could be a communication that the business is still open and that the employees should continue to report to work, but this may not be possible in the COVID-19 world. In the COVID-19 context, conduct giving rise to adoption is likely to be when the administrators apply to the JRS or pay the employees (either from the government grant or elsewhere).

What is the position where employees do not engage with the administrators?

If there is no response within the 14-day window, the contracts of the non-responding employees will not be adopted by failing to terminate the contract.

Administrators are not under a duty to apply to the scheme in respect of non-responding employees and would, therefore, be justified in waiting until a response is received (and the contract varied and furloughing consented to) before making such an application.

If employees are already on furlough and do not respond to a letter requesting a variation in their terms and conditions of employment, the administrators would need to carefully consider whether to continue furloughing these employees. For these employees, the contracts would continue with the company (albeit unvaried) and the administrators may risk adopting the contract if they act in a way that is consistent with a wish to adopt the contract (i.e. applying to the JRS on behalf of that employee or paying that employee). By doing so, the sums due under the employment contract may be payable on a super-priority basis.

If non-responding employees accept the terms after the 14-day period, they will then be in the same position as consenting employees and the contract will be adopted when the requisite action is taken and not when the relevant employee consents.

How should administrators distribute moneys paid under the JRS?

Payments under the JRS are made to the employer, not directly to employees. This means that monies paid under the JRS are treated as income and, therefore, an asset of the company. This presents a problem to administrators who can only deal with assets of the company in accordance with the statutory priority, yet the JRS requires the money to be paid to employees.

If the employees' contracts of employment are adopted, then the grant monies can be paid to employees under paragraph 99 of Schedule B1 of the Insolvency Act 1986 (Act). However, the position is less clear if the administrators receive payment under the scheme on an application made by the company prior to their appointment.

If the administrators have not adopted the contracts, but the company is already in receipt of grant money or receives grant money, what should the administrators do with the cash?

Whilst the grant money belongs to the company, given HMRC will audit grant applications and the purpose of the scheme is to pay employee wages, it would be extremely unwise to treat the money as a company asset.

It might be possible for the administrators to rely on paragraph 66 of Schedule B1 of the act to authorise payment to the employees, but if uncertain what to do, the administrators could apply to court for directions.

Beware of holiday pay!

The Guidance states that employees are entitled to take holiday whilst on furlough and should be paid their normal rate of pay for holidays. If an employee is furloughed and their contract has been adopted by the administrator, that employee is entitled to be paid holiday pay at 100% (not 80%) if they take holiday during the period of furlough, which would be payable on a super-priority basis under paragraph 99 (unless the contract has been varied).

An employer is entitled to refuse a request for annual leave, but employees must be given sufficient notice. However, employers cannot prevent a worker from taking their statutory annual leave entitlement within a holiday year (usually 28 days, including bank holidays).

This issue could be addressed in any letter requiring employees to consent to vary their contracts of employment (see above.)

Should furloughed employees be made redundant if the position changes and there is no longer a reasonable likelihood of rehiring workers?

This should be assessed on a case-by-case basis.

Given that the JRS is only available to administrators where "there is a reasonable likelihood of rehiring the workers", this should be kept under review and if, for example, it becomes clear that a sale will not happen, the administrators should consider whether it is appropriate to then make employees redundant.

The Guidance is clear that HMRC will retain the right to retrospectively audit claims and monitor the business after the scheme has closed, which could result in a repayment if the JRS has been mis-used.

When will administrators have to pay wages?

Wages will be payable when due, unless the employees have consented to only be paid when the grant monies are received from HMRC.

Dealing with expected changes to the JRS – what should administrators do?

We expect that in the forthcoming days and weeks the scheme will be changed, possibly reducing the percentage grant available and tapering the relief on offer. Administrators should continually review changes to the scheme, whether they need further consent from employees to vary the terms of their employment contacts, whether and should they continue to furlough staff or whether employees should be made redundant in light of any changes to the scheme.

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