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Dear Colleagues

COVID-19 BRIEFING UPDATES 3 AND 4 FROM THOMPSONS SOLICITORS

Please find enclosed updates from Thompsons Solicitors regarding COVID-19. Please ensure your members are updated accordingly and have access to the briefings.

Yours Sincerely

STEVE GILLAN
General Secretary

Yours Sincerely

MARK FAIRHURST
National Chair

ENCLOSURE

Briefing on employer and employees responsibilities in the wake of coronavirus (COVID-19) No. 3

The coronavirus (COVID-19) job retention scheme

The impact of coronavirus (COVID-19) for workers and the self-employed is developing apace. Following on from our previous briefing, in this issue we attempt to answer some of the key questions on the coronavirus (COVID-19) job retention scheme now that the government has published further [guidance](#).

What is a furloughed worker?

Furlough is not a legal term and it's not defined. However, the latest guidance indicates a furloughed worker is a worker who will remain on his or her employer's payroll but will not be provided with work as a consequence of the coronavirus (COVID-19) outbreak as opposed to a worker who has his or her contract terminated.

What is the coronavirus (COVID-19) job retention scheme?

The coronavirus (COVID-19) job retention scheme provides a grant to reimburse employers for 80 per cent of an employee's wage of up to £2,500 per month for those designated as "furloughed". Employees will have to pay income tax and national insurance contributions on the amount paid. The guidance states that an employer can then choose to top-up that pay for its employees who earn more than this amount although there is no obligation to do this to access the scheme. The Chancellor has stated any employer will be eligible to access the scheme on behalf of its employees who are paid through PAYE. The scheme is intended to apply to employers who cannot cover staff costs due to coronavirus (COVID-19). We do not yet know whether there will be any further eligibility criteria to determine whether a decision to furlough an employee has been taken because they were unable to continue to employ them as a consequence of coronavirus (COVID-19), although employers will not need to show they were suffering a specific financial hardship. The scheme is initially open for a three-month period. The latest government guidance also states that where employers receive public funding for staff costs and that funding is continuing, they expect employers to use that money in the normal way to meet staffing costs.

How will the coronavirus (COVID-19) job retention scheme work in practice?

There are still unanswered questions around this. In short, as described above, employers who access the scheme will be provided with a government grant to reimburse them for 80 per cent of the furloughed employee's wage costs, plus the

associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers will claim this money back through an online portal. An employer could choose to fund the differences between this payment and the full salary but does not have to. The scheme is not intended to override the contract of employment and therefore basic contractual principles still apply. Furthermore, there will be no statutory right to require that an individual must be “furloughed”.

It is not common for employment contracts to contain a lay off clause and therefore, in the majority of cases where the furloughing of workers would require a variation of terms and conditions of employment, the furloughing of workers should be done by agreement between the employer and affected staff. The alternative would be that workers might be laid off or made redundant, so our advice would be to reach agreement, where possible, taking all relevant factors into account, including long-term job security.

In those circumstances where a collective agreement is required where employers are seeking a reduction in pay, contractual paid hours or in other terms and conditions, the following considerations apply:

- In workplaces where an employer is unable to provide all of its employees with work as a result of coronavirus (COVID-19) and a trade union is recognised, employers should agree a collective agreement with that union where variations to contracts are needed to furlough employees, with a view to that agreement being incorporated into their individual contracts of employment.
- A collective agreement negotiated with the recognised trade union in these circumstances should also set out the factors to be taken into account in the selection process when determining which employees should be furloughed, if it is envisaged that some employees will remain in work. It may in some cases be appropriate in the first instance to invite volunteers in the workforce who are willing to be designated as “furloughed” and only revert to a further selection process if there are not enough volunteers or indeed too many.
- In the absence of a recognised trade union, employers should consult with employees to seek their agreement to any necessary variations to their contract to provide an employer with the ability to furlough them if the employer is unable to provide them with work as a result of coronavirus (COVID-19). The employer should set out the factors to be taken into account in the selection process.
- If contracts of employment already provide provisions that entitle an employer to lay off an employee without pay or on reduced pay, it will be important for unions and workers to persuade employers to use the scheme rather than lay

employees off. Although there is no legal mechanism to force an employer to do this, the provisions on furlough leave have been specifically introduced in order to deter employers to lay-off staff without pay or make redundancies.

What about workers who have already agreed with an employer to reduce hours or pay in response to the crisis?

Unfortunately the latest guidance makes clear that the scheme does not provide assistance with regard to arrangements of this nature which have already been made.

Does the coronavirus (COVID-19) job retention scheme apply to those who are off sick?

The latest government guidance makes clear furlough leave will not apply to those who are sick or self-isolating. Those individuals may be entitled to contractual sick pay if the contract provides for this or statutory sick pay (SSP) (currently £94.25 per week and £95.85 from 6 April 2020) if it doesn't. These individuals will be eligible for furlough leave once they are fit and able to return to work. Employees who are shielding in line with public health guidance because they are at a very high risk of severe illness from coronavirus (COVID-19) can be placed on furlough leave.

Are workers covered by the coronavirus (COVID-19) job retention scheme?

In the UK there is a distinction between “employees” and “workers”; the latter have fewer rights, which are limited to things such as holiday pay. The government guidance does suggest everyone covered by a PAYE arrangement would be included, the intention being to apply the scheme to as broad a range of individuals as possible. On this basis, workers (including agency workers and those on zero hour contracts) paid through PAYE will be covered. Those however genuinely self-employed or on bogus self-employment engagements will only get assistance through the separate self-employment scheme we address below.

How will earnings be calculated under the coronavirus (COVID-19) job retention scheme?

For full-time and part-time salaried employees, the employee's actual salary before tax, as of 28 February 2020, should be used to calculate the 80 per cent. Fees, bonuses and commissions should not be included.

In respect of employees whose pay varies, an employer can claim 80 per cent of the higher of either the same month's earning from the previous year or average monthly earnings from the 2019-20 year, or if they have been employed less than a year, an average of their monthly earnings since they started work.

What if paying 80 per cent puts workers below the National Minimum Wage?

The latest government guidance states that furloughed workers must be paid the lower of 80 per cent of their salary or £2,500 even if, based on their usual working hours, this would be below the National Living Wage or National Minimum Wage.

However, if workers on furlough leave are required to undergo online training, then they must be paid at least the National Minimum Wage for the time spent training, even if this is more than the 80 per cent of their wage.

What is the position if I have already been laid-off without pay?

The scheme is open to employees who have been made redundant since 28 February 2020 if they are re-hired by their employer. It is therefore worth workers and unions approaching employers about the scheme in respect of decisions to make employees redundant or lay them off in that time frame. Only employees employed on or before 28 February will be covered by the scheme.

Is there a minimum period an employee can be furloughed for?

The minimum period an employee can be furloughed is three weeks. This means employers cannot rotate those on furlough leave over short periods.

I am on maternity leave, can I still be furloughed?

The government's guidance is not clear but it does seem to suggest that women can be on both maternity leave and furloughed at the same time. Employers will need to ensure that they do not discriminate when considering which staff are on furlough leave.

How will maternity pay be calculated for those on furlough leave?

Statutory maternity pay is calculated on the woman's earnings in the eight-week period before the 15th week before the expected week of birth. The level of pay may be affected if a woman starts furlough leave in the eight-week qualifying period before the

15th week before the expected week of birth. If furlough leave starts after the eight-week period, then maternity pay should be based on her normal eight weeks earnings.

If a woman is eligible for contractual maternity pay she should still receive this as an employer can claim this as wages costs under the scheme.

Are the self-employed covered by the coronavirus (COVID-19) job retention scheme?

No they are not, but a separate scheme has been introduced to assist those who are self-employed. They will be entitled to apply for a taxable grant worth 80 per cent of their average monthly income over the last three years. The maximum amount that can be claimed is £2,500 a month for a period of at least three months. The scheme will then be reviewed. The first payments will not however be made until the beginning of June.

What can a self-employed person who currently has no income do until June?

Those who have no income now can apply for Universal Credit but that can take at least five weeks to process. Unfortunately, even although the government has suspended the Minimum Income Floor (an assumed level of income) when working out the Universal Credit Payment for the self-employed, it will nevertheless still be some time before any financial support is forthcoming.

Who is covered by the self-employment scheme?

The scheme is only open to those who have submitted a tax return for 2019, although anyone who did not do this at the end of January 2020 when it was due and who has not done in the intervening period will be given a further four weeks to do so. Individuals who have only just become self-employed and have not filed any returns are therefore excluded. Also excluded are those who have average annual trading profits of more than £50,000, those who earn less than half their total income from self-employment and those who have set themselves up to operate through a limited company.

Q and A briefing on employer and employees responsibilities in the wake of Coronavirus

On 23 March 2020 the Foreign and Commonwealth Office (FCO) updated its advice for travellers to return to the UK where they can do so through commercial flights. On Monday 30 March 2020 the Government then announced a repatriation package to rescue those stranded around the world. As part of our ongoing briefings for trade unions and workers we address the employment rights of those who are stranded abroad as a consequence of the outbreak of Coronavirus and consider the new legislation dealing with carrying over statutory annual leave.

What pay is an employee entitled to if they are abroad on holiday and are trying to return to the UK?

Assuming the worker is well and that they are still on annual leave they continue to be entitled to be paid holiday pay for the full period of their annual leave.

What about employees on holiday abroad who are well but have not been able to get a commercial flight home and whose leave has expired. Are they still entitled to be paid?

The starting point is that employers are only obliged to pay employees when they are working or on authorised leave such as holiday or sickness absence. However, this is subject to the employee's contract of employment. Therefore it will be necessary to check the contract of employment or where a trade union is recognised, any relevant collective agreement, to see if it provides for paid time off where an employee is unable to get to work due to travel disruption. This could include a right to take compassionate leave or emergency leave. In the absence of any contractual right to be paid in these circumstances the general rule is that there is no obligation on an employer to pay an employee who is unable to work. These though are highly unusual circumstances and where there would still be work for the employee to do when they return, it would be good industrial practice to continue to pay the employee given the reason for their absence is outside of their control. This could include a mixture of normal pay as a goodwill gesture, allowing the employee to treat any further absence as paid annual leave or where the employee has exhausted their annual leave a period of unpaid leave. However where the employer refuses to pay the employee, in the absence of a clear right to be paid under the terms of the contract of employment or collective agreement, there is unlikely to be a legal remedy.

Where an employee was advised to go into self-quarantine for 14 days when they arrived abroad to start their holiday, what should they be paid?

Although, there are no specific provisions covering the situation of individuals who are detained abroad they could argue that they should be treated in the same way as those who self-isolate and as such be entitled to sick pay. In particular, government [guidance](#) for British people returning from abroad, states that individuals should follow the local authority advice of the Country they are based at the time if they are advised to go into quarantine.

However, if an employee is not entitled to contractual sick pay or if a further period of sickness absence would mean that they would hit triggers in a sickness absence policy, they may decide to remain on paid annual leave.

Can an employee who is in quarantine request that their annual leave be treated as sickness absence?

As stated above, an employee who is in quarantine in accordance with the local authority advice of the Country they are based should be treated as being on sick leave. A worker can request that the period of statutory annual leave which coincides with the period of quarantine, be treated as sick leave rather than holiday. Whether a worker wishes to request that the employer treat the period of annual leave as sick leave will very much depend on the amount of sick pay they are entitled to and whether they have exhausted their contractual sick pay entitlement. Workers will also wish to take into account previous periods of sickness absence in case they are approaching any triggers in a sickness absence policy.

If a worker is on sick leave what happens to the annual leave they have not been able to take before the end of the leave year?

The Working Time (Coronavirus) (Amendment) Regulations 2020 which came into force on 26 March 2020 provide for some or all of the four weeks statutory annual leave to be carried over for a period of two years where it was not reasonably practicable to take some or all of the statutory leave as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society). While it is unclear what circumstances are covered by the term “not reasonably practicable” it is widely drafted. ACAS suggests that the following should mean that it was not reasonably practicable for the worker to take the leave:

- where they are self-isolating and too sick to take holiday before the end of their leave year.
- where they are laid off or are on furlough leave.
- where they have been required to continue working and could not take paid holiday.

Where a worker is entitled to additional contractual leave the employer may argue that as the annual leave is contractual they do not have a right to carry this over. There is case law which has held that an individual's holiday entitlement must be considered a "composite whole", with

each day's leave consisting of entitlement under all sources taken together. The worker should therefore assert that the holiday leave they were unable to take is the statutory four weeks leave and that they should be allowed to carry it over for a period of two years on the basis that the reason they were not able to take it was because they took sickness absence as a result of the effects of coronavirus. If the employer does not agree the worker should lodge a grievance. Where the union is recognised it may be possible to negotiate a collective resolution on how leave may be carried forward.

What can a worker do if the employer refuses to allow them to take sick leave while they are self-isolating and insists that they take holiday?

The courts have held that workers are allowed to take annual leave in situations where they would otherwise be on sick leave and on reduced sick pay. It is for the worker to choose whether to take sick leave during a period of the statutory annual leave. However employers cannot make a worker to take annual leave when they are absent on sick leave.

What happens if a worker is stranded abroad while on holiday and who has been advised to quarantine, but the employer refuses to allow them to treat the holiday period as sick leave?

Where the employer rejects a request to treat the holiday period as sick leave as a result of the worker being advised to quarantine while abroad they should lodge a letter of protest confirming that they do not accept that the leave should be treated as holiday and request that it should be carried over into the next annual leave year. They should also lodge a grievance on the ground that the employer has acted in breach of the implied term of trust and confidence. If the employer refuses to carry over the annual leave to the next leave year they may have a legal claim for a declaration as to their entitlement to annual leave.

Where a worker is sick during a period of contractual annual leave as stated above, it can be argued that there is case law which allows an employee to determine which period of leave should be carried over.

Can an employee who was required to self-quarantine be allowed to work on their return to the UK?

The general position is yes if they are fit and well to do so and they work in a business that has not been required to close. Government [guidance](#) requires workers to work from home and states that employers should take every possible step to facilitate their employees working from home. Where they work in an industry which means they cannot work from home, provided the individual is well and neither the individual nor any of their household are self-isolating they

can travel to work. In that case the employer must comply with their duty to ensure the health, safety and welfare of all workers by having safe systems in place to prevent the risks from coronavirus including ensuring that social distancing is maintained.

Can workers be required to take annual leave when they are on furlough leave?

The government's guidance on the job retention scheme does not address this directly. However, as the employer cannot claim for holiday pay which must be paid at the worker's normal salary (or an average over 12 weeks (52 weeks on or after 6 April 2020) for workers who do not have normal working hours) it seems unlikely that a worker who is on furlough leave will be able to take holiday leave during the period of furlough leave. Our initial view, (based on the governments guidance which states that those who have been furloughed have the same rights as they did previously), is that the right to holidays throughout the period of furlough leave should accrue unless and until there is further clarification.

31 March 2020