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## Employment – 20:20 vision

Providing clarity and insight on employment law matters

### Furlough fraud: Key points for employers



HMRC will have the power to recover payments made under the Coronavirus Job Retention Scheme (the “**Scheme**”) and to impose penalties, under draft legislation which has recently been published.

Whilst the proposals cover several different Covid-19 support packages, in this briefing we are focusing on “furlough fraud”, what employers should be aware of and proposed next steps to ensure you are on the front foot when dealing with any issues in the short time available. HMRC has been very clear from the outset on how it would address any fraud or false claims under the Scheme, so these proposals build on that message.

#### What are the current proposals under the draft legislation?

- Grants made to employers under the Scheme will be taxed as income where the business is either within the scope of income tax or corporation tax.
- Where a recipient has received a grant under the Scheme but was not entitled to it (e.g. because of a change of circumstances) or where a Scheme payment has not been used to pay furloughed employee costs within a reasonable period, HMRC will have the power to make the grant subject to income tax at 100% - effectively recovering the whole grant via the tax system.
- HMRC will also be able to charge a penalty in cases of deliberate non-compliance.

#### What are some of the key points for employers to consider?

With HMRC having received approximately 1,900 reports from the public of alleged furlough fraud by the end of May 2020, employers should be on notice about the possibility of such reports being made. Employers would be well advised to review their use of the Scheme and to consider the following.

- Disgruntled employees who are going through a redundancy process may be quick to try to raise allegations about any company misuse of the Scheme. This could include allegations that

Scheme funds were not used to pay employees or that employees were required to work during furlough. Such allegations could arise in the form of grievances or whistleblowing claims and companies are advised to review such policies to ensure they have adequate procedures in place.

- We have advised on cases where employees on furlough have ignored the instruction not to work and on exit have revealed they have been working. Employers discovering that employees were working during furlough of their own volition need to deal with these issues proactively with HMRC.
- With respect to employers who have weathered the Covid-19 storm better than expected and are in a strong financial position – will it harm their reputation to have participated in (or even made a profit from) the Scheme? Should they be repaying the grants, such as the Telegraph Media Group and The Spectator magazine have announced they will do? If senior executives have still taken material bonuses whilst the company has been benefiting from the Scheme – how will this be viewed? Have dividends been paid by such Companies? Employers should be conscious of the reputational repercussions at home or abroad if they are have an overseas HQ.
- Employers need to consider their business plans and strategy documents - were redundancies already planned prior to the pandemic (i.e. for a

non Covid-19 related reason) but employers decided to furlough employees to take advantage of the Scheme before making the redundancies?

- If employees were made redundant whilst on furlough and their notice pay was covered by the Scheme but the business could have afforded to pay their notice – whilst the Scheme doesn't prohibit this, what would be the public perception?

### Personal liability of directors

The draft proposals give HMRC powers to make directors jointly and severally liable for the 100% income tax charge raised in relation to the recovery of grants under the Scheme. This is where a deliberate claim was made at a time when the company was not entitled to make a claim under the Scheme and the company was insolvent. These powers also apply where HMRC can show that there is a serious risk that the company will not be able to pay the income tax assessment for recovery.

### Next steps

Whilst still in draft form, it is anticipated that when these proposals are approved (expected to be in July or August) there will be a 30 day window in which companies will be obliged to declare any mistakes or errors. Employers should now be taking steps to try to ensure they are prepared should they be reported by a disgruntled employee or become subject to HMRC interest or need to voluntarily disclose. Such steps include:

- **Review records** – ensuring detailed decisions are documented. For example, why the decision was made that they were entitled to benefit under the Scheme. From an employment perspective it may also be helpful to have documentation surrounding the business rationale for why certain roles were furloughed – to help provide defence against possible discrimination claims.
- **Future furloughing** - make sure future furlough plans follow the approach above, for example ensuring that strict guidance is issued about not being able to work on days when you are furloughed and steps taken to ensure this is being adhered to and you have a clear audit trail for utilising the Scheme.
- **Workforce communication** - ensure managers are clear and well briefed on the Scheme including the restrictions on involving furloughed

colleagues in work to try and avoid employees claiming they were pressured to work whilst furloughed.

- **Policies** - Review and update whistleblowing and grievance procedures to be ready to deal with employees who try to claim the company abused the Scheme. This should include being able to deal with multiple complaints from staff.
- **Reputational risk** – assess the financial position of the company and its use of the Scheme, considering whether voluntarily repaying money to HMRC would be a sensible way forward.

If you have any questions or would like to discuss any issues raised in this alert, please do get in touch with the authors below or with your usual Stephenson Harwood contact.

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