Covid-19:
Furlough and Annual Leave

An update from Jasmine Sudworth, Solicitor in the employment department.

Furlough and Annual Leave

As of 4 April, the Government issued some further guidance regarding the Job Retention Scheme and whilst it has provided welcome clarification on a number of matters, it has still not addressed the issue of how annual leave will be treated in respect of those employees on furlough leave. As we approach Easter, where holiday is regularly taken (including 2 bank holidays), the need for confirmation is becoming more pressing.

We consider the main queries being raised below.

Does annual leave entitlement continue to accrue during furlough leave?
Furlough leave is an entirely new concept to UK employment law. However, the prevailing view appears to be that it is highly likely that annual leave will continue to accrue during any period of furlough leave. This makes a lot of sense, since the Government guidance is that an employee on furlough leave remains employed and the contract of employment remains in force.

Can an employee actually be on annual leave during a period of furlough?
Currently it is unclear from Government guidance whether an employee can be on both annual leave and furlough leave simultaneously. If furlough leave was viewed in the same way as statutory maternity leave, for example, then the answer would be no! However, whilst the Government have clarified certain other matters relating to the correlation between furlough leave and other statutory leave, they have not explicitly indicated that annual leave cannot be taken during a period of furlough.

If employees can be both furloughed and on annual leave at the same time, the next question for employers will be, what rate of pay will apply during this period of leave? Is it 80% of an employee’s earnings (subject to the cap applicable under the furlough scheme) or is the employer required to top this up to 100%? Further, can the employer still claim 80% under the retention scheme for any period of annual leave taken during furlough leave, or does it have to account for the full amount?

The answer is that we just don’t know, but we do expect the Government to confirm this shortly.

If an employee can be on annual leave during a period of furlough, can an employer force an employee to take annual leave during this period?
Technically, it is open to an employer to give notice to an employee requiring them to take statutory holiday on specified dates under the Working Time Regulations 1998. However, an employer should be aware that any such notice must be at least twice the length of the period of leave that the employee is being ordered to take i.e. if an employer would like their employee to take 2 weeks annual leave, they would need to give them at least 4 weeks’ notice.
Despite the above, there is also the ethical issue associated with forcing an employee to take annual leave during a period of furlough. Furloughed employees are prohibited from working anyway, and given the current lockdown restrictions, few employees will be enamoured about being forced to take annual leave from their entitlement and this may cause unrest.

What happens if the employee asks to take annual leave during a period of furlough leave?
It is difficult to imagine why a furloughed employee would want to take annual leave during the furlough given they are not working anyway and cannot travel. However, it is possible that some employees will seek to use annual leave as a basis to increase their income for the period of annual leave, on the assumption that they would be entitled to full pay for this period.

Interestingly, Acas guidance published on 2 April 2020 suggests that furloughed employees can still request and take holiday in the usual way but does not state whether they should be paid their normal remuneration or the furlough rate.

Recent legislative developments
The Government have clearly recognised the practical impact that annual leave accrual will have on a business once we come through this crisis. If an employee continues to accrue their annual leave entitlement during any period of furlough leave, and annual leave is not being taken during a period of furlough (or by employees who are still working for their employer), the likelihood is that employers will be inundated with holiday requests from employees who are all seeking to take their unused holiday entitlement before the end of the holiday year. In these circumstances, it is easy to see how this could cause serious concerns for an employer, who is trying to kick-start its operations post the COVID-19 pandemic.

The Government has attempted to deal with some of these concerns already by passing emergency legislation, which relaxes the current restriction on carrying over annual leave into the next leave year, with immediate effect.

The Working Time (Coronavirus) Amendment Regulations 2020 permit the carry-over of up to four weeks untaken statutory leave where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)". Such leave may now be carried over into the next two leave years.

This legislative change should provide reassurance to employers that they will not be inundated with holiday requests once any period of furlough leave comes to an end. It should also allow employers to feel slightly more relaxed about employees continuing to accrue holiday entitlement during furlough leave, as employees will now be able to spread this entitlement over the next two leave years.

However, some uncertainty remains and further clarity from the Government is currently awaited in respect of whether employees can be both furloughed and on annual leave at the same time and if so, what rate of pay will apply.

If you have any questions in relation to this article or Employment law generally, please do not hesitate to contact a member of the Employment team at Sherrards Solicitors, who will be happy to assist you.