

Furlough Leave and Employment Tribunals

For businesses dealing with an ongoing Employment Tribunal claim, there may be implications of utilising the Coronavirus Job Retention Scheme.

Businesses will no doubt have heard of or even utilised the Coronavirus Job Retention Scheme which has introduced the concept of furlough leave to UK employment law. However there may be implications of utilising this scheme when the business is dealing with an ongoing Employment Tribunal claim. This article considers these implications and how to deal with this.

The President of the Employment Tribunals has issued various pieces of guidance as to the effect of Coronavirus on the business of the Employment Tribunals. Any 'in-person' hearings in the Employment Tribunal before 26th June 2020 have been postponed and subsequently any case management directions and orders relating to those hearings have also been set aside. However, any Final Hearing from 29th June 2020 onwards remains listed so case management directions relating to that hearing must be complied with, as must any case management order that has been issued after 23rd March 2020.

Accordingly where there are case management orders to comply with, these may include:

- **Disclosure of documents**

You are obliged to disclose any documents in the possession of the business that relate to issues in the case. This may mean you need staff members to search for documents they hold, or to conduct keyword searches in their email inboxes or search for messages on their mobile devices.

- **Exchange of witness statements**

Any person giving evidence at the Final Hearing is required to prepare a written statement of their evidence. This will involve writing their statement and reviewing any relevant documents or liaising with the business' legal representatives in order to allow the preparation of their statement.

Further, key personnel may need to remain in contact with legal representatives to ensure that instructions are given, and the Employment Tribunal process continues to run smoothly.

Problems can arise where the employer seeks to utilise the Coronavirus Job Retention Scheme and place staff members on furlough leave.

When on furlough leave, it is a condition that the staff member does not work for the employer. If they are doing any work, then they cannot be on furlough leave and must be paid for the work done by their employer rather than by the government through the Coronavirus Job Retention Scheme.

If a business is asking a staff member to find documents for disclosure, search their email inboxes or mobile devices for relevant messages for disclosure, to write prepare or liaise with legal representatives on preparing a witness statement or even to liaise with legal representatives for general progress of their Tribunal case, then this is likely to be seen as something that is in the course of their employment and thus considered to be work. Accordingly by doing this they would potentially be in breach of the conditions for being on furlough leave.

It is important for businesses to carefully think about the effect of furlough leave on existing Employment Tribunal claims and how to manage this before utilising the Coronavirus Job Retention Scheme.



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