

Can you furlough as an employee of your own limited company?

On 20 March 2020, the government announced the Coronavirus Job Retention Scheme (JRS) and then on 26 March 2020, the government announced the Self-employed Income Support Scheme (SISS). As a result of this, two questions have been asked repeatedly on social media. 1) What am I entitled to as a director of a limited company and; 2) if JRS applies, how can a director of a limited company furlough themselves.

Firstly, the government have stated that if you are a director of a limited company for example, a limited company contractor, you are not entitled to SISS. SISS applies only to those who are unincorporated self-employed sole traders and those in a partnership. The government have stated, however, that if you're a director of your own company and paid through PAYE you may be able to get support using the Job Retention Scheme. This would, however, only be based on salary not on dividends. Incidentally, the guidance changed overnight from the government saying that you 'could' claim under the JRS to now saying that you 'may' be able to claim.

Coronavirus Job Retention Scheme (JRS)

The scheme is available to all UK businesses so, all UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off [made redundant] during this crisis.

The essential question here is whether a director of a limited company can be an employee for the purposes of the furlough. Another question that has been asked is how a sole director of a limited company can furlough themselves, effectively leaving no-one running the company. The two questions are inter-linked but, distinct from each other. Firstly, it depends on whether there is an employment relationship between the company and the individual and secondly, the distinction between the director's role as an officeholder and that of the employee.

Director as an officeholder

A director's role as an officeholder is separate and distinct to the role as an employee, even if the individual fulfils both roles. So, if the individual is an employee of their own limited company, then they would be furloughed as an employee, not as a director. The director continues to run the affairs of the company, while the employee is furloughed. The more important question, however, is whether the individual, who is the director of a limited company, can be an employee of their own limited company in the first place.

Unfortunately, it is not an automatic assumption that you are an employee of your own limited company, in case law. I first wrote about this 20 years ago (on Contractor UK <http://bit.ly/ContractorUKJRS>) and the subject is still as valid today. There were a number of cases 20 years ago which defined the subject and there have been no relevant cases since, as far as I am aware.

Case law

In *Secretary of State for Trade and Industry v. Bottrill* [1999] EWCA in the Court of Appeal, the court held that Mr Bottrill was an employee of the limited company on the facts. Mr Bottrill was the sole shareholder but, the court held that any control he had over the company was merely theoretical,

apart from the main fact being that Mr Bottrill had signed a contract of employment with the company.

A year later, however, in *Farleigh v. Secretary of State for Trade and Industry* [2000] EAT in the Employment Appeal Tribunal, it was decided that a sole shareholder could not be an employee of his own limited company for the purposes of a redundancy payment from the National Insurance Fund.

Are you an employee?

The main point of these cases was that the controlling mind of the company could not also be an employee, if they were one and the same person. So, it very much depends on the facts of the case and whether there is evidence of an employment relationship.

There is some guidance, however, on establishing your employment status:

- Is there a genuine contract of employment between the director and the limited company?
- Was a 'statement of written particulars' issued?
- What did each party do in pursuance of the contract?
- Does the contract actually give rise to an employment relationship?
- How was remuneration accounted for as fees or wages?
- How and for what reasons did the contract come into existence (for example, was the contract made at a time when insolvency was foreseeable)?

Furlough

A furlough is a temporary break with a 'no work rule'. It is not to supplement income you have lost if you are still working, even if in frequently. It is likely that there will be stringent anti-fraud measures so business owners should be warned not to abuse the system, as this would be profiteering from a national crisis. It is likely that there will be heavy penalties for those that are found out.

A caveat

The government have apparently stated that a director/employee may be able to claim JRS regardless of the case law but, there has still not been an official announcement, as at 31 March 2020. If the government do allow the director/employee to claim, it will only be on the PAYE salary element of the income not on the dividends.

A caveat, however, if you are asking for help from the government by claiming through the JRS Scheme, this may and I say may, provide evidence of your status for other areas of legislation such as the off payroll reforms (IR35) at a later date.

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