

English Lockdown II

With the announcement last week of a second, month-long lockdown in England, a number of members have raised questions as to how this will affect their business. With the Regulations now being passed, and the extension of the Furlough scheme, we have taken the opportunity to provide answers to a number of common questions regarding employment, sales and aftersales.

These answers apply to the lockdown in England only, and are subject to a caveat that we are awaiting more detailed Guidance on the CJRS, this is expected around 10 November.

Employment

"What is the interaction between furlough and remaining holiday days, can we request/require employees take annual leave, can we buy back any annual leave, and are employees able to carry over any holiday into next year?"

Annual leave continues to accrue during furlough. Employers can still give notice under Regulation 15 of the Working Time Regulations and require employees to take their leave during furlough. We would advise that any request is proportionate to the amount of furlough, so as not to be too unreasonable.

Legally, you are not allowed to 'buy back' unused holiday except on termination of employment. Arguably, that could be different with contractual holiday entitlements over and above the 28 days UK/EU leave, but we would not advise this distinction is made unless it is necessary.

Holiday can be carried into the next two leave years if it is not reasonably practicable and agreed by employees and employers because of the coronavirus, etc.

"Can I hold back sales staff commissions in order to evenly spread over the furlough period and December when salespeople come back to work?"

It seems to be the case that sales staff were worried about December because they would have normally earned commissions in November. It must be remembered that most furlough claims will include a proportion of regularly earned commission (calculated at 80%). As such, whilst sales staff are not at work they have 'earned' and been paid commission proportionately during the period.

Employees must earn at least the minimum wage and deductions cannot take them below the appropriate hourly rate for any period worked (see previous guidance regarding the distinction between furlough and 'work' for the purpose of the NMW). Provided there are no minimum wage issues, then this will be a question of contract. There is no obligation on an employer or employee to agree any change to their normal arrangement regarding commission. If on commercial grounds, or for business reasons, it is not a good idea for the company to change its normal policy, then there is no obligation on an employer to do so.

"Can you provide clarity around the minimum period of "7 consecutive days?"

The position regarding the 7 consecutive days required for flexible furlough remains unclear and we are awaiting further guidance.

We generally advise members to maintain a 7-day pattern for the purposes of furlough, as this will assist in managing staff availability and expectations, and is required by HMRC during any claims, but it is not necessary for any one employee to be either at work or furloughed for the full 7 days.

"Can I maintain a zero hours agreement with my staff during furlough in order to respond to daily demand?"

Flexible furlough is designed to allow employers to respond flexibly to demand. It is more than possible to bring different staff in for different days in different weeks, and each claim period for 7 consecutive days can be different. However, this must be in-line with the contractual arrangements between you and your staff, and staff will be entitled to reasonable notice.

If members maintain a zero hours, very flexible arrangement in the agreement to furlough letter, then the challenge for members will be maintaining and retaining a sufficiently clear written record of the agreements with staff and the hours worked or not worked in any 7-day period, in order to be able to process furlough.

Sales

"What are the rules regarding vehicle sales, can I continue to sell "essential" vehicles such as HGVs etc...?"

The Regulations require the closure of Restricted businesses and that the provision of restricted services cease. Whilst the Regulations apply to a number of industries, for the motor industry a restricted business includes... *"Showrooms and other premises, including outdoor areas, used for the sale or hire of caravans, boats or any vehicle which can be propelled by mechanical means, and car washes."* There is no exemption for 'essential' vehicle sales.

That said, members may continue to offer goods and services; including essential vehicles, through a website, or otherwise by on-line communication, by telephone, including orders by text message, or by post; provided that where a Purchaser collects any goods they do not enter inside any business premises to do so.

"Can I continue to sell vehicles through click and collect, etc...? use of outside space, finance rules (signing of documents for pay-outs)"

As stated above, members may continue to offer goods and services; including essential vehicles, through a website, or otherwise by on-line communication, by telephone, including orders by text message, or by post; provided that where a Purchaser collects any goods they do not enter inside any business premises to do so.

Whilst Schedule 2 refers to *Showrooms and other premises, including outdoor areas..."*, when defining the businesses required to close, the Regulations allowing for the collection of goods ordered online refer to 'inside' business premises. It is therefore currently unclear

whether the collection of a vehicle from an outdoor area would breach the Regulations. No collection could be undertaken inside business premises.

If there is a part exchange vehicle involved in the transaction, then it should be ok for the customer to drop this off at the same time as collecting the new vehicle.

Where members provide a click and collect service either from external forecourts, or from areas of the business that can legally continue to trade such as car repair and MOT service areas, we strongly advise,

- a written risk assessment be undertaken and recorded that would satisfy the requirements of Regulation 3 of the Management of Health and Safety at Work Regulations 1999,
- that members record the steps taken to limit the risks of transmission, and
- that the situation is regularly monitored and reviewed and the same recorded.

Where these areas are usually used for vehicle sales, we would also advise that members take steps to cordon off or remove any sales vehicles so as to demonstrate that the sales part of the business is closed

"Do I need to treat vehicles ordered before lockdown, due for collection at dealership in a way which is no longer possible differently?"

During the lockdown period you are required to cease using any showrooms and other premises, including outdoor areas for the sale or hire of caravans, boats or any vehicle which can be propelled by mechanical means. This will include processing of vehicles sold before the lockdown. You can continue to deliver goods ordered online or arrange for collection as the goods have been pre-ordered, but the Purchaser must not enter inside the premises.

"Can I still provide test drives?"

This is a difficult question. The Regulations require anyone offering goods for sale or services for hire to cease unless they are making deliveries or otherwise providing services in response to orders received through a website, or otherwise by on-line communication, by telephone, including orders by text message, or by post.

Where a vehicle is ordered and being delivered, the customer will have a 14-day cooling off period in which to try any goods, during which they can cancel if they are not satisfactory, and could conceivably test drive and reject on the same day, and even within minutes.

However, if there is no purchase contract then the only circumstances under which a member would be able to provide a service such as a vehicle trial, would be under a hire agreement. 'Taxi or vehicle hire businesses' are permitted to remain open, and the Regulations do not provide any definition other than the 5 words above. There is no requirement that the hire be for a particular purpose or period.

There will be practical considerations. Whilst your staff can travel to deliver any hired vehicle the customer can only leave the place where they are living for a reasonable excuse. It is unlikely that a test drive or trial alone will be sufficient.

We would advise against test drives given the potential risk and the difficulties posed by the Regulations. Where members decide to provide a test drive on the basis of vehicle hire, we strongly advise,

- a written vehicle hire agreement be entered into in advance of the delivery of the vehicle clearly stating the terms of the hire,
- a written risk assessment be undertaken and recorded that would satisfy the requirements of Regulation 3 of the Management of Health and Safety at Work Regulations 1999,
- that members record the steps taken to limit the risks of transmission during the handover and return of the vehicle, and
- that the situation is regularly monitored and reviewed and the same recorded.

Aftersales

"Can I Service vehicles during lockdown as the law currently refers only to repair and MOT?"

The current lockdown continues to acknowledge that 'car repair and MOT services' are essential and so are entitled to continue to trade during the lockdown. The Regulations do not provide any further definition than the above 5 words. However, given that servicing of a vehicle is an essential part of preventative maintenance, as well as a way to ensure a vehicle is and remains roadworthy, it remains our opinion that servicing is permitted under the current lockdown

"Can Customers collect parts where this might require entry into premises/service area?"

The Regulations are very clear on this. Where businesses are entitled to continue to trade under the Regulations, and where purchasers are collecting goods that have been pre-ordered, any purchaser must not enter inside the premises.

"Can customers wait for vehicle repairs anywhere within the indoor or outdoor areas?"

If members are providing car repair and MOT services, and whilst it may be beneficial and advisable, the requirement for any 'purchaser' to stay outside does not apply. However, members will have to comply with the Regulations regarding gatherings contained at part 3 (Regulations 7-14).

Where the customer is waiting indoors, all reasonable steps should be taken to establish a COVID-19 secure waiting area. Furthermore, steps should be taken to ensure sufficient social distancing such that 2 or more persons are not present together and interacting with each other (unless they are in the same household).

Where members provide an indoor waiting area, we strongly advise

- a written risk assessment be undertaken and recorded that would satisfy the requirements of Regulation 3 of the Management of Health and Safety at Work Regulations 1999,
- that members record the steps taken to limit the risks of transmission, and
- that the situation is regularly monitored and reviewed and the same recorded.

Further Information

The Government has provided further guidance as well as the Regulations themselves, which can be found at:-

[The Health Protection \(Coronavirus, Restrictions\) \(England\) \(No. 4\) Regulations 2020](#)

Don't forget, this advice is general in nature and will need to be tailored to any particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.