

Covid-19 legislation: recruitment, staffing and consultancy companies

Webinar 31 March 2020



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- 02 The Job Retention Scheme (JRS) – the basics

- 03 JRS and other Covid-19 issues for your own employees

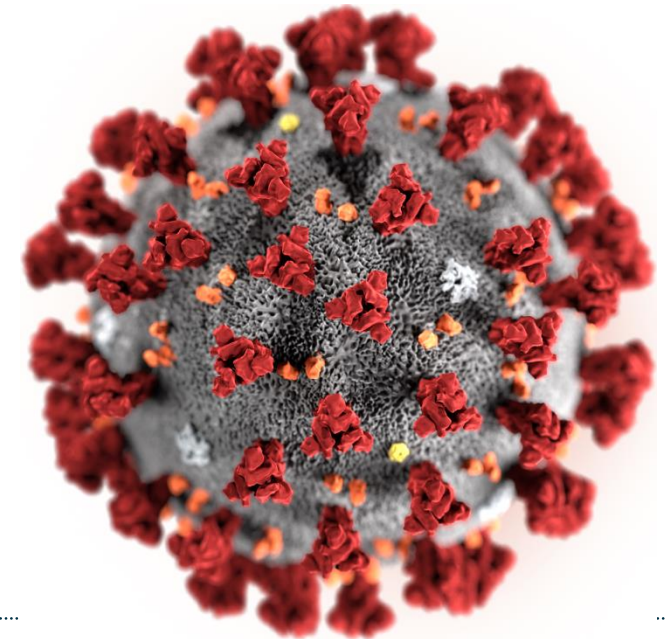
- 04 JRS and Statutory Self-Empl Pay, and your contractors

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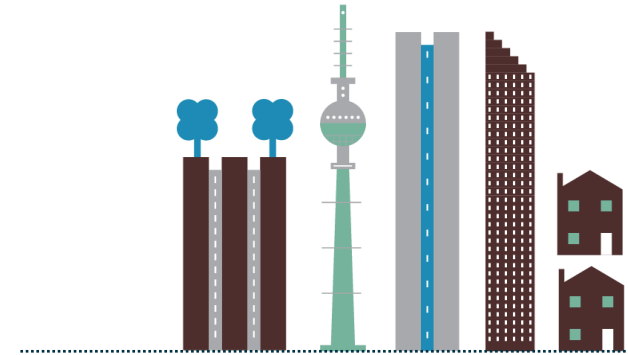
01

About Osborne Clarke



About Osborne Clarke

- International law firm
- Advice on consultancy/staffing programmes in 45 countries since 2012
- Have advised 180 UK staffing recruitment and consultancy companies in last three years incl IR35, SOW and digital transformation
- All major HMRC, BEIS and Cabinet Office consultations 1999 -2019 including the original IR35
- Matthew Taylor meetings at OC on Good Work
- 10-20 M&A transactions per annum for recruitment staffing and consultancy companies



"The acknowledged experts [in the world of contingent workforces]"

Legal 500

02

JRS - the basics



JRS – the basics

- Guidance published evening of 26 March
- Further details awaited
- Organisations are obviously already moving to take advantage of JRS to help keep their businesses afloat
- '*...designed to support employers whose operations have been severely affected by coronavirus*' - but currently no statutory test yet as to how bad things need to be for you to qualify (unlike Republic of Ireland 25% rule)
- HMRC's business support website indicates that HMRC will have right retrospectively to claw back fraudulent or erroneous claims
- HMRC may allow all claims at first but beware a change of culture during audits in in 2021-2023 when:
 - government finances will come under extreme pressure and
 - the media may go on crusades against what some companies do now to stay alive



JRS – the basics - who

- The HMRC guidance simply refers to 'furloughed employees'. Pending clarification in regulations, these appear to be staff identified in earlier guidance who '*would otherwise have been laid off during this crisis*' and where an '*employer cannot cover staff costs due to COVID-19*'
- Furloughed employee:
 - must have been on the PAYE payroll on 28 February 2020. They can be on any type of contract: full time, part time, employees on agency contracts, and flexible/zero hours contracts [See later re PAYE temps etc.]
 - cannot currently be on SSP etc - essentially those on statutory pay should remain on those arrangements but those on enhanced arrangements may be furloughed
- Employees made redundant since 28 February 2020 and rehired under JRS are covered (n.b. redundancy payment and continuity of employment issues?)



JRS – the basics - what

- Funding backdated to 1st March
- Employers can claim for *'80% of furloughed employees' usual monthly wage costs up to £2,500 a month plus the associated employer national insurance contributions and minimum automatic employer pension contributions on that wage'*
- *"Fees, commission and bonuses should not be included"*
- Employers can top up if they want
- Does not matter if the 80% takes workers below NMW/NLW
- No work to be done while on JRS (except certain training)
- In most situations a variation to the employment contract will need to be agreed
- Employers should ensure that they have clear business reasons for designating a particular individual for furlough/top up and ensure that any decision is untainted by discrimination



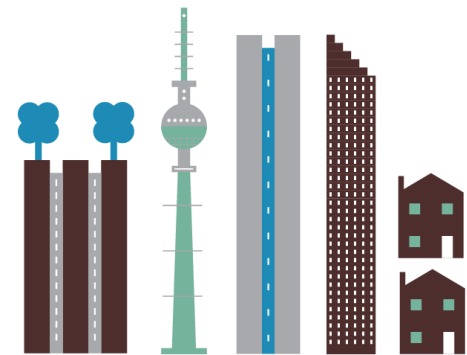
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JRS and other Covid-19 issues for your own employees



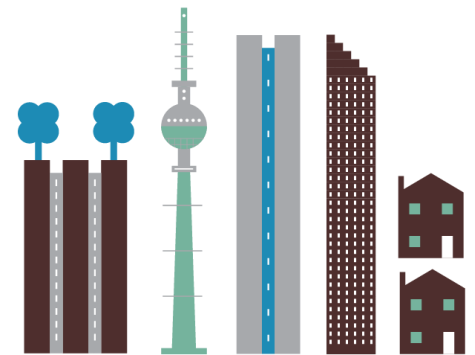
JRS for your own employees

- Be clear on when employees will be paid:
 - access to the Scheme through the HMRC portal still being set up
 - not clear when the first claims can be made
 - previous guidance stressed that employers would need to seek reimbursement under the scheme, relying on other emergency support the government has put in place to access funds in the interim
 - latest HMRC guidance provides that a claim should be made 'in accordance with actual payroll amounts at the point at which you run your payroll or in advance of an imminent payroll'. Employers may therefore be able to make a claim through the HMRC portal sooner rather than later. Employers should be careful though before giving any commitments in this regard where funding is short



JRS for your own employees

- Employers must give careful consideration now and throughout the coming weeks to their staffing requirements.
- The Scheme is back-dated to 1 March 2020 and is set to run for three months. It may be extended.
- However, at the end of this period, paying furloughed employees will become once again an employer's full responsibility. Employers should consider now whether it may be prudent to understand where longer term changes to working arrangements or redundancies in the business may be required and start any discussions in tandem with the furlough period. These discussions should obviously take into consideration the wider workforce and not just those on furlough.

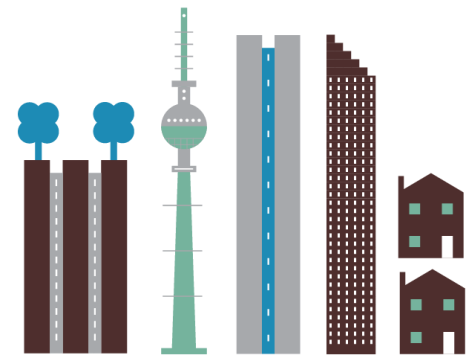


Alternatives to JRS for your own employees

- 'Lay-off' - employer provides an employee with no work and no pay for a period, whilst retaining them as an employee. Employee can trigger redundancy pay
- 'Short time working' - employer substantially reduces the amount of work given to the employee, and therefore reduces the pay, again whilst retaining them as an employee
- In the absence of a contractual right, an employer cannot impose 'lay off' or 'short time working' unilaterally. Employees' options are:
 - Accept the breach of contract and treat the contract as continuing, while claiming a statutory guarantee payment (2 years' service)*
 - Sue for damages for breach of contract
 - Claim unlawful deduction of wages under Part II of the ERA 1996
 - Claim (constructive) unfair dismissal and/or redundancy pay

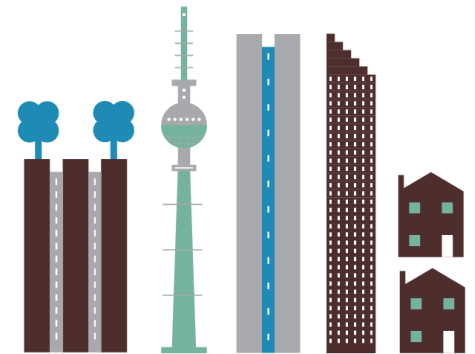
*must also be laid off or on short time working for :

- 4 or more consecutive weeks; or
- a total of 6 weeks (or which no more than three are consecutive) in any period of 13 weeks



Alternatives to JRS for your own employees

- **If dismissals are unavoidable** – redundancy is a potentially fair reason if caused by:
 - the closure of a business
 - the closure of a particular workplace, or
 - a diminished need for employees to carry out work of a particular kind
- Need objective and fair rationale for the redundancies and follow a fair process (risk of unfair dismissal and discrimination claims)
- If more than 20 employees impacted, consider electing employee representatives who can be informed and consulted with about alternative actions now, but who can also be used for statutory consultation should that be necessary. Special circumstances defence?



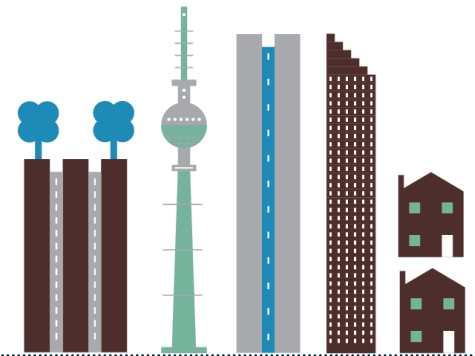
Other Covid-19 issues for your own employees

- **Employees with Coronavirus**
 - current entitlements and policies apply
 - current Government guidance is to self-isolate for 14 days
- **Statutory sick pay (SSP) regulations** – extension to explicitly include employees who are self-isolating or socially distancing following Government guidance
- **Further expected changes:**
 - SSP from day 1 (instead of day 3)
 - Reimburse SSP for small employers (with fewer than 250 employees) for first 14 days of sickness related to COVID-19
 - Variation to sick notes (via 111)
 - If on SSP, can be furloughed afterwards



Alternatives to JRS for your own employees

- **Holiday** – Yes, subject to any implied or express terms in the employment contract. Notice - twice as long as the holiday you want them to take (potential flexibility)
- **Unpaid leave** – Not unilaterally (breach of contract risk, constructive dismissal)
- **Sabbaticals / career breaks** – Not unilaterally (breach of contract risk, constructive dismissal)

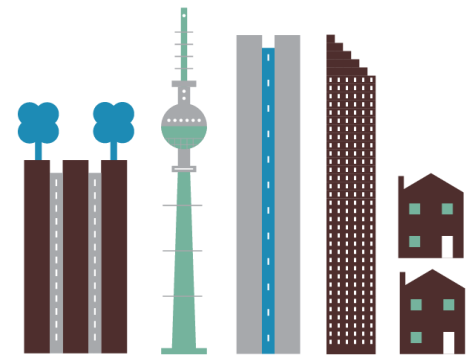


04 JRS and SSEP, and your contractors



JRS and SSEP, and your contractors

- SSEP supports self-employed individuals incl CIS workers (provided they are not PSCs)
 - Pays 80% of average profits (but not tax free expenses) up to £2500 pcm
 - Chancellor clearly feels this crisis makes necessary and possible a change to the differential tax and NICs status of self-employed (and PSC?) workers
 - First payments June/July – HMRC will contact qualifying individuals
- SSEP not applicable to PSCs
- Intermediary and end user have no role or duties in the SSEP process
 - ...and, sadly, to "help" PSCs claim under SSEP (or JRS) might create tax problems for them and everyone else – take advice



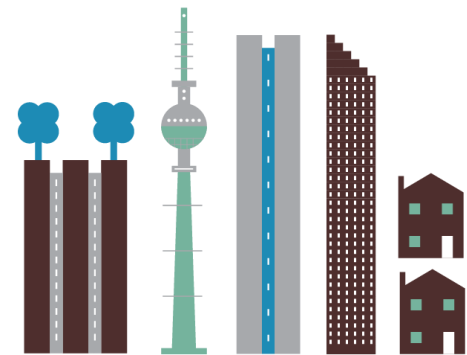
JRS and SSEP, and your contractors

- JRS supports PAYE temps and other individuals paid under PAYE
 - 80% based on annual pay (excl tax free expenses, bonus and commission etc)
 - For PAYE workers engaged via staffing companies and paid under the PAYE regime there will be a mechanism looking at a percentage of amounts received in February
 - If they did not work in February such that they were on payroll on 28 February suggestions are, regrettably, that they should claim universal credit. Some may not have been at work that week because of half term = lottery losers



JRS and SSEP, and your contractors

- Possible challenges for staffing companies, consultancies (and umbrellas)
 - The payment includes no allowance for the administrative expenses of the payroll operator: 100% of the JRS grant has to be paid to the furloughed worker. How will staffing companies and umbrellas etc. (who operate on low margins at the best of times) cover their administrative costs?
 - Worker must not work elsewhere – how will the payroll operator know? It will be a major temptation for affected lower-paid workers to get [agricultural/logistics] work to supplement their income.
 - Potentially serious cashflow problems relating to weekly paid workers – agency can only claim every 3 weeks, and CBILS cashflow support is not available for mid-size and larger agencies. Will VAT deferral fill the cashflow gap?
- More lobbying needed, and let's see the detail of the legislation asap



JRS and SSEP, and your contractors

- PSCs may be able to claim JRS from their limited companies to the extent they paid themselves salary subject to PAYE in period up to 28 Feb
 - PSCs paid on an inside IR35 basis may benefit up to the £2500 pcm
 - However probably negligible for most PSCs who have treated themselves as outside IR35 – most of their income is not PAYE income but dividend (i.e. investment income to which employers NICs does not apply) and tax free expenses
- End user and intermediary have no role or duties in the JRS process re PSCs
- "Pay back time" for a group of individuals who, in the view of HM Treasury, do not pay their fair share of tax and NICs?
- Might some disgruntled PSCs try to argue that "really" they were employees all along and bring employment claims?

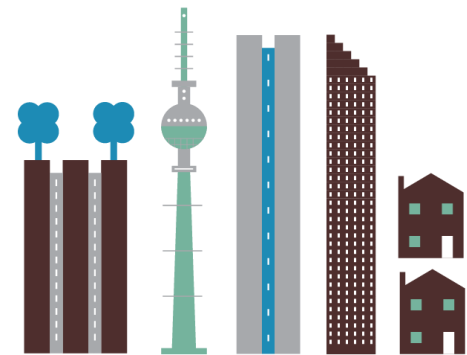


05 Emergency Government funding proposals



Government loan arrangements

- CBILS for British companies with turnover under £45M, available now
- CCFF 1 year commercial paper purchase prog for companies that make a material contribution to economic activities in the UK and prior to the outbreak of coronavirus had a short or long-term credit rating of investment grade (or were internally rated by all their banks equivalent to investment grade rating).
- Relevant factors include whether the company:
 - is a significant employer in the UK
 - is headquartered in the UK
 - is incorporated in the UK (including those with foreign-incorporated parent companies and with a genuine business in the UK)
 - generates significant revenue in the UK
 - serves a large number of customers in the UK
 - has a number of operating sites in the UK
- **However, gap in emergency provision for companies whose turnover is over £45M but which do not qualify for CCFF: large section of UK PLC**



06 Contractual obligations – does Covid-19 release you?



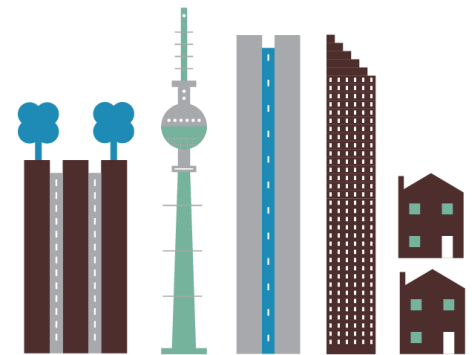
Contractual obligations – does Covid-19 release you?

Force Majeure – the little used 'superior powers' clause

- An unforeseeable or uncontrollable event that can suspend performance, excuse liability or terminate the contract.
- Is it going to apply to my contract?
 - The FM clause must be included in the contract.
 - Every FM clause will be interpreted with great care – does Covid-19 come under one of the terms?
 - Covid-19 must be the only cause of the non-performance or delay.
 - Notice provisions.

Frustration – the fall back option

- Where it is impossible to perform or performance is radically different a party may be able to rely on frustration. If it is more expensive or harder to perform this will not be enough.
- The remedy for the frustrated party is that it does not have to perform the contract.
- No contractual terms or notice.

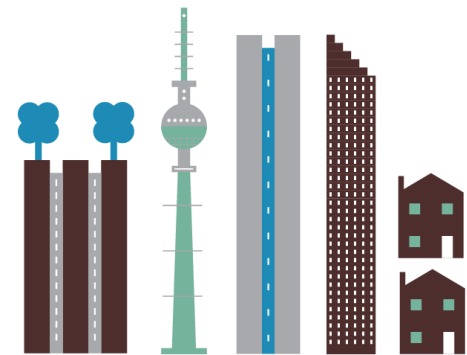


07 The future of contingent workforces and recruitment



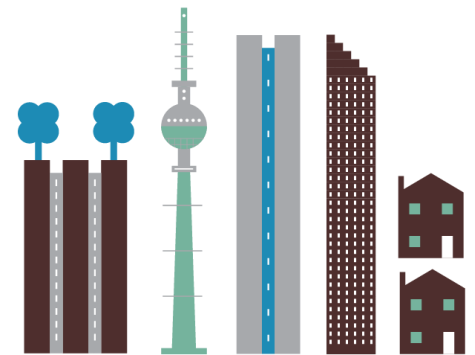
The future of contingent workforces and recruitment

- Any new regime relating to self-employed workers (and PAYE temps and PSCs?) may take make end users liable for PAYE unless (i) they can prove there is no supervision direction of control or (ii) they engage the worker via some sort of accredited operator of PAYE
- This should successfully eradicate more aggressive tax avoidance schemes ensuring that staffing companies operate on a level-playing field and do not face the constant worry of being undercut by a "cowboy" competitor
- And it may be simpler and fairer than the intermediaries legislation (and IR35?)
- But it is more likely that, for PSCs, HMRC will just press on with IR35 now – end users have done a lot of prep and HMRC thinks it works
- Genuine output based SOW arrangements would be outside such regimes



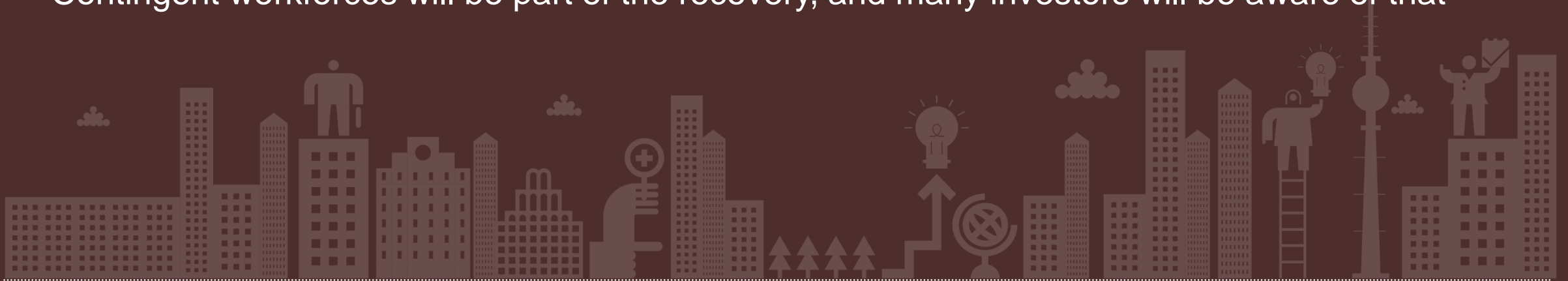
The future of contingent workforces and recruitment

- Clearly some subsectors have been busy during the crisis and otherwise skill shortages will persist and activity will pick up quickly in various areas (including public sector and infrastructure incl tech related projects assuming the government tries to kick start any recovery with 1930's style public projects)
- The recovery from this recession will be bumpy. History suggests that hiring organisations will be reluctant to engage perm staff before it is clear any recovery is firm and so contingent workers will be attractive
- Any new tax regime will not destroy the value of good staffing companies or materially reduce end user wish for flexible resource (except perhaps in a few industry sectors)
- Inflation is a risk given the likely need for the government to print money, and cash-rich investors such as private equity companies will be eager to spend their funds before inflation takes off, and so will be looking for good value, currently undervalued, investments sooner rather than later (once some stability returns)



Final word

- JRS may work well for your in-house employees (but commission and bonus is excluded)
- Staffing companies want the best for their temps but face cashflow etc. challenges using JRS (as currently constituted) to help those temps
- There is not much in these proposals for PSCs who are outside IR35
- IR35 reforms will probably proceed
- There may be other tax changes in the next year re other contingent workers. These will not destroy the attractiveness of flexible workforces in many subsectors
- Contingent workforces will be part of the recovery, and many investors will be aware of that



Thank you and stay safe, and questions



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About Osborne Clarke

The acknowledged experts

Advice on consultancy/staffing programmes in 45 countries since 2012

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Advice on 10-20 M&A deals in the UK staffing sector per annum

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