



Covid 19 - Legal Issues for Dental and Orthodontic Practice Owners

Julie Norris from Lawyers for Doctors has created this guidance to assist BOS Members with the legal issues arising from the Covid-19 pandemic. This guidance covers practice owners and separate guidance will be produced for Associates and NHS Consultants.

Please note : This guidance does not constitute legal advice and practices are encouraged to seek legal advice where appropriate. By way of reminder, BOS Members are entitled to thirty minutes free advice provided by Lawyers for Doctors Limited via the BOS Helpline on 0208 166 5829.

The Covid-19 pandemic has placed a huge amount of stress on practice owners. The following are some of the key issues that should be considered by practice owners. Please note that the Government guidance is continually being updated and this document sets out the writer's understanding of the law as at 26 June 2020. The updates to this article are at the end under "Developments"

Section A – What practices should know about Furlough Leave

An announcement was made by Rishi Sunak, the Chancellor of the Exchequer on 20 March 2020 regarding a Job Retention Scheme to attempt to avoid mass redundancies following the outbreak of the Coronavirus pandemic. The Job Retention Scheme allows employers to place certain staff members on what has become known as "Furlough Leave". The following are some of the key questions that practice owners may have in relation to Furlough Leave.

Can the practice furlough our staff?

In general terms, employers can only furlough certain members of staff where the employer cannot maintain the current workforce because the business has been severely affected by coronavirus.

On 25 March 2020, just before the end of the dental financial year when practices were desperately trying to meet targets, NHS England wrote to all NHS general dental practices to confirm that all routine, non-urgent dental care (including orthodontic treatment) should be stopped by the practices and deferred until advised otherwise.

The letter also stated that all practices should establish (independently or by collaboration with others) a remote urgent care service, providing telephone triage for patients with urgent needs during usual working hours and whenever possible treating with advice, analgesia, and antimicrobial means where appropriate. This left a number of practice owners highly concerned about how it could manage its finances and continue to employ its staff.

Whether a practice can benefit from the Government's furlough provisions, will depend on whether the practice is a purely NHS practice, private practice or mixed practice (undertaking both NHS and private work). We shall explore this in more detail below.

Can a pure NHS practice with no private work furlough members of staff?

No, a practice undertaking purely NHS work will not be able to furlough the staff because the NHS will be maintaining the contractual payments which are expected to be used to fund the salaries of NHS staff. This will be the case in England, Wales, Scotland and Northern Ireland.

In the letter to practices of 25 March 2020, NHS England has confirmed that contractual payments to practices will continue allowing NHS staff to continue to be paid during the pandemic. Monthly payments will continue at 1/12th of the current annual contract value.

In England, the continued payments, are however, said to be conditional on practices supporting the wider NHS Covid-19 response and making NHS employees available for redeployment. This will be considered in further detail below.

In terms of furlough leave, the Government is clear that an employer cannot furlough employees where it is in receipt of NHS funding. A purely NHS practice therefore cannot place its employees on furlough leave and benefit from the job retention scheme (furlough leave) as well.

Orthodontic Funding is dealt with differently in Scotland to England. On 2 April 2020, the Scottish Government Population Health Directorate wrote to all practices stating that it was putting in place financial support measures to provide contractors with 80 per cent of their NHS gross item of service income. This will equate to their average monthly NHS item of service income in the 2019/20 financial year but will include the NHS patient charge element normally paid directly to the practices. For practices with wind-down contract see the “Developments” at the end of this article”

Can a purely private practice benefit from the furlough leave scheme?

Yes, a purely private dental or orthodontic practice can benefit from the retention scheme and place its staff on furlough leave, just like any other business. For the eligibility criteria, please see the rest of this guidance below.

Can a mixed private and NHS practice furlough its staff?

Yes. When the job retention scheme was first announced, the Government stated that it was not to be used where the employer was in receipt of public funding elsewhere. This gave rise to grave concerns by mixed orthodontic and dental practices which were only part funded by their NHS income and whose NHS payments would not cover all staffing costs.

On 2 April 2020, NHS England clarified that mixed practices can make full use of the furlough scheme in proportion to their private activity. The details are still uncertain as to how this will work.

On 9 April 2020, the Scottish Government Population Health Directorate also announced that mixed practices could benefit from the furlough scheme as well as receive NHS funding for NHS work.

It was stated “NHS funding support would not be a bar for practices with mixed provision to claim financial support for private dentistry, providing the claim is proportionate to the amount of private dentistry being provided.

Private dental care, similar to any other private business may qualify for the Employee Retention Scheme and the Business Interruption Loan Scheme (recently revised). Dental practices need to explore each of these funding streams, taking cognisance of their precise circumstances”

The Scottish Government announced that it is liaising with the UK Government on the mechanism for ensuring that funding is not duplicated.

Can a mixed practice part furlough and part use NHS funds for staff pay?

No. Importantly, practices must bear in mind that in relation to each employee, the practice cannot “part” furlough and “part” utilise NHS funds.

The practice has to make a choice. Where the practice is able to benefit from the furlough scheme, it is a requirement that it designates which employees will be furloughed from the outset before lodging a claim and it is submitted that a practice cannot part furlough an employee. It is also vital to understand that whatever the practice’s potential entitlements, where an employee is not going to receive full pay, consent will be needed from the employee.

How will the practice work out which staff to furlough and which staff to fund using NHS?

This will be fraught with difficulties. Where it is possible to clearly establish whether a member of staff works in the private part of the practice or the NHS part of the practice, this decision will be more straightforward. This could arise where, for example, a dental nurse or employed therapist only comes into

work on a particular day to work with private patients. Whilst we have seen this arrangement in some practices, this situation will be rare.

Practices who consulted the BOS Helpline will recall that similar considerations had to be examined for the purposes of TUPE transfers under the recent PDS procurement exercise where it was necessary to determine whether employees were assigned to the NHS Contract. This exercise demonstrated that it was particularly difficult to work out which employees were allocated to the private part of the business and which the NHS. In most cases employees undertake a mixture of tasks and it is difficult to allocate them specifically to either private or NHS work or calculate percentages of NHS / private time.

In deciding which employees will be furloughed and which will be funded by the NHS, what must happen is that all practices should undertake an urgent consultation process with all staff remotely. Many businesses are keeping in touch with staff remotely using applications such as Skype, Zoom or Microsoft team. Zoom is a free application but practices should satisfy themselves about security.

It should be remembered that in the absence of any discussions to the contrary initiated by the practice or any specific clause in the employment contract regarding lay off, staff will expect to receive full pay.

There is no implied right for a practice owner to reduce pay due to the pandemic even if the practice owner's funding is cut. Any unilateral decision taken to simply reduce staff pay can easily lead to a claim of constructive dismissal which may well succeed if there has been little or no discussion prior to the pay cut. A reduction in payments from the NHS does not automatically mean that the practice can cut staff pay by a corresponding percentage.

What happens if the member of staff does not agree to be furloughed or with any decision made by the practice as to which staff members to furlough and which to fund under the NHS?

The same principles will apply as with the question below.

The practice should explain the reasoning behind the decision and the justification which may be for example, to avoid redundancies. If the employee refuses to accept, the practice should permit the employee to use the usual practice grievance procedure and try to resolve the issue. For situations, where an agreement cannot be reached see below.

If the practice is able to furlough an employee, will the employee's consent be needed, even if the employee is wholly undertaking private work and all employees are being furloughed?

Yes. The Government has stated that normal employment laws would apply. Our view would be that unless there is a term in the employee's employment contract entitling the practice to lay-off the employee (without any obligation to pay wages) or place on short time (reduce hours and pay), the consent of the employee will always be required, preferably in writing.

We have heard reports of dental nurses in general practice, refusing to agree to the job retention scheme due to their low incomes where the 20% loss of pay would be particularly harsh. If consent cannot be obtained, the practice should try to resolve the issue through consultation, allowing the employee to utilise the practice grievance procedure and if this is not possible, please see below.

What if despite the practice's best efforts, no agreement can be reached on which employees to furlough and / or employees do not consent to the furlough proposals?

As an absolute last resort, the practice may need to dismiss the employee and immediately offer re-engagement on terms which incorporate the job retention scheme and the ability to lay off the employee. Before doing so, the practice should take legal advice.

If the practice can benefit from the Furlough Leave scheme, must the individual in question be an employee to be entitled to take the leave?

No. The Government has stated that the rules apply not just to employees but also workers – i.e. non-employees who satisfy the definition of ‘worker’ in section 230(3)(b) of the Employment Rights Act 1996.

Depending on the terms of the contract this definition could potentially have applied to Associates, some of whom may count as workers. However, in terms of furlough leave, this will only be the case where the individual is paid through PAYE which is rare in the case of an Associate. Most Associates are responsible for their own tax and national insurance. For further information on Associates please see below.

If the practice can furlough an employee, would this apply to a fixed term employee where the fixed term is ending?

Yes. The updated Government Guidance of 4 April 2020 states that an employer (which will include a dental practice) will not breach the terms of the job retention scheme if it extends or renews a fixed-term contract during the furlough period.

If the practice can claim, must the employee stop work altogether?

Yes. As mentioned above, the furlough arrangements are intended to apply only to those who are not working at all, rather than those who are able to undertake some work. See “Developments” – at the end.

Can a furloughed employee undertake minor tasks during the furlough period?

Seemingly not. This was not considered in the updated government guidance of 4 April 2020 but it would appear that this cannot happen if the employee is furloughed. This means that furloughed employees may not be able to take

part in team meetings other than training meetings. The government had the opportunity to clarify this during the updated guidance of 4 April 2020 but did not do so. Therefore, it must be assumed that even minor work cannot be undertaken unless further clarification is given. Certainly, if a mixed or private practice is asking its receptionists or dental nurses to begin the triage process by having an actual or remote reception open, the employee helping with those reception services cannot be furloughed. See Developments section. See Developments at the end of this article.

Can an employee take part in practice training during the furlough period?

Yes. The updated government guidance of 4 April 2020 confirms that employees are permitted to engage in training that does not involve providing services to or generating revenue for the employer. In fact, employees are being positively encouraged to take part in training by the government during any furlough period. See developments at the end of this article.

What sums of money can be claimed where a practice owner is able to furlough an employee?

Where the practice is able to furlough employees using the government scheme, the practice can apply for a grant that covers 80% of the usual monthly wage costs, (up to £2,500 a month), plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions.

The Government's guidance has stated that for employees on a fixed salary, the 80 per cent amounts to 80 per cent of the employee's gross salary as at 28 February 2020 (the reference salary).

The reference salary should not include the cost of non-monetary benefits provided to employees, including taxable benefits in kind. Benefits provided through salary sacrifice, such as pension contributions, should also not be included in the reference salary.

The Government has said that where, for example, the salary was £40,000 but £5,000 was paid into the employee's pension as a salary sacrifice, the reference salary becomes £35,000.

Where the practice can claim, does the 80 per cent of wages only include basic pay?

No. Employers can claim for any regular payments they are obliged to pay employees. This includes wages, past overtime, fees and compulsory commission payments. However, the Government has stated that discretionary bonuses, non-contractual commission payments and non-cash payments should be excluded.

If the practice can furlough, how much can it claim for those on zero-hour contracts?

Under current employment law and specifically under section 224 Employment Rights Act 1996, a week's pay is calculated by the employee's past 12 weeks' average pay (excluding weeks when there was no remuneration).

Until further guidance is given, it is not certain how rates of pay are to be calculated for those with irregular working patterns when it comes to furlough leave but a good starting point is to use the past 12 weeks' average pay.

If the practice can claim for furlough leave, for what period can a claim be made?

The scheme will start in April 2020 and be backdated to 1 March 2020, to enable organisations to re-employ individuals who have already been laid off and for those workers to recoup lost income.

The scheme is stated to last at least three months but could be extended. See developments the scheme has been extended to October 2020.

For practices who can claim, does this cover every employee or worker provided they are on the payroll?

No. The practice can only claim for staff for whom the practice owner created and started a PAYE payroll scheme on or before 28 February 2020.

The practice must also have a UK bank account and must also have enrolled for PAYE online. It is not necessary for the practice to have enrolled for PAYE online before 28 February 2020, as long as this is undertaken before a claim is made.

Can I claim furlough leave for an employee whose start date was after 28 February 2020, if I put them on the payroll?

No. If the practice has recruited an employee in March 2020, the practice cannot apply for furlough leave in relation to that employee.

The Chancellor has stated that the 28 February cut off is to prevent fraud. The practice could ask the new employee to request that the employee's former employer re-engages the employee and then make a claim for furlough leave. This is entirely permissible, but the former employer is not required to agree to this.

What if the practice has already dismissed an employee before the furlough leave provisions were created?

The updated guidance, published on 4 April 2020, adds some clarification and detail to the original HMRC guidance published on 26 March.

It is made clear in the updated guidance that employees who have been dismissed for any reason since 28 February 2020 can be rehired and placed on furlough leave and the requisite claim made. The guidance in its original format stated that employees who had been made redundant since this date could be rehired and furloughed but it was previously less clear on employees

who had been dismissed for other reasons. Now it is clear that an employee can be rehired and furloughed whatever the reason for dismissal.

If the practice can claim under the furlough scheme, can we furlough an employee who is on sick leave?

No. An employee who is already receiving SSP cannot be furloughed until he or she gives notice to return to work. The effect is that employees are more likely to report fit to work in order to benefit from the more generous financial provisions of the furlough leave scheme. Arguably, it could be a disciplinary issue if an employee reported fit for work in order to benefit from higher pay. This may be difficult to prove however in practice.

Where the practice can furlough, should the practice “top” up the employee’s salary?

According to the Government’s COVID-19: guidance for employees (furloughed workers), an employer will be able to choose to fund the differences between the payment under the job retention scheme and the employee’s salary but is not obliged to do so. It is entirely a matter for the practice to decide.

If the practice can furlough, can the practice owner decide to “top up” some employees’ pay and not others?

This is a difficult issue. The practice owner should take legal advice because this could lead to employment claims against the practice namely constructive dismissal claims or even discrimination claims where the employee is able to argue that there has been a breach of the Equality Act 2010 for example, raise an argument that the employee was treated less favourably on the grounds of sex, race, disability, age or sexual orientation.

If the practice can claim and decides to “top up” pay what about those on maternity leave?

When making decisions whether to “top up” pay, consideration should be given to employees currently on maternity or other parental leave who may well be receiving pay at a lower rate than either the minimum furlough scheme rate or a ‘topped up’ rate.

In this situation, there is potential for a sex discrimination claim, e.g., where an employer chooses to ‘top up’ all of its furloughed employees but not, for example, maternity pay for those on maternity leave.

If the practice is a private practice furloughing some staff and paying others to work, how does the practice select which employees to furlough?

The practice is likely to have a number of employees carrying out similar roles such as receptionists and dental nurses. The practice may need to select which employees it will furlough.

This must be done fairly. The practice should bear in mind the risk of discrimination claims. Additionally, every employer owes its employee an implied duty of ‘mutual trust and confidence’ breach of which can lead to claims for constructive dismissal.

We would recommend that in selecting employees for furlough leave that a fair selection process will be needed similar to the way in which the practice would deal with a redundancy. We strongly recommend that every practice should first seek volunteers.

If the practice can furlough, how long must the practice furlough the staff?

According to the Government’s Employer Guidance, an employee must be furloughed for a minimum of three weeks.

Where the practice is able to claim furlough leave but is triaging calls and need reception staff, can the practice implement a ‘furlough rota’ for staff under the job retention scheme, so that there are two teams working alternate weeks in the same role, with employees placed on furlough for the non-working periods?

This would appear to be possible. The guidance is silent on this point but it would appear that this can be achieved. According to the employer guidance, an employee must be furloughed for a minimum of three weeks. The guidance also states that the employer can only submit one claim at least every three weeks.

The Government’s guidance for employees states: “...your employer can place you on furlough more than once, and one period can follow straight after an existing furlough period, while the scheme is open.”

This suggests that it would be possible for an employer to implement such a rota on the basis of alternate periods of three weeks or more.

Where a practice can furlough, what about the practice’s apprentice dental nurses?

Many practices employ apprentice dental nurses. Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed preferably remotely. However, where the practice furloughs an apprentice, the practice must pay the apprentice at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage as appropriate for all the time they spend training.

This means the practice must cover any shortfall between the amount you can claim for the apprentice’s wages through the scheme and their appropriate minimum wage. This would have a big impact on many orthodontic practices and also general practices, where dental nurse apprentices often earn much less than minimum wage and sometimes as little as £4.00 per hour.

Another option for the practice is to agree with the apprentice to initiate a break in learning. Before the pandemic, funding rules stated that a break in

learning must be initiated by the apprentice and had to last less than 4 weeks. Employers and training providers can now, temporarily, also report and initiate a break in learning where the interruption to learning is greater than 4 weeks

What is the situation where the employee has two jobs?

The Government issued updated guidance on 3 April 2020 which clarifies that employees with two jobs can still work for one employer while on furlough from the other. This would apply where for example, a dental nurse may work at a private orthodontic practice and also work in an emergency treatment centre in general practice.

When an employee is on furlough leave are, they still bound by their employment contract and staff rules?

Yes. It is clear from the government's guidance for employers: Claim for your employee's wages through the Coronavirus Job Retention Scheme that, where an employee is placed on furlough under the coronavirus job retention scheme, they are placed on a 'leave of absence', and their contract of employment continues.

If a practice has lost the NHS PDS Contract procurement exercise and staff are due to transfer to a new employer under TUPE what happens to those staff on furlough leave will they transfer to the new provider?

Yes. Where TUPE applies and unless the employee objects to the transfer, the contracts of employment of those employees employed by the transferor practice which would otherwise be terminated by the transfer, automatically transfer to the new NHS contractor and have effect after the transfer as if originally made between the employee and the new contractor. This would include an employee on Furlough Leave.

If a private or mixed practice has had staff TUPE over to it after 28 February 2020, can the new contractor practice furlough the staff even if the transfer took place after 28 February 2020?

Yes. It has been reported that HM Treasury has sent an email to David Johnston MP in reply to this exact question in relation to an commercial business, stating that employees who are TUPEd to a new employer after 28 February will be eligible for furlough

Can I furlough an employee who has been suspended?

Yes. An employee who has been suspended on full pay can still be furloughed if the practice is able to benefit from the job retention scheme.

If a practice employee whose normal rate of pay is just above the national minimum wage furloughed and the 80% of wages that will be reimbursed by HMRC under the job retention scheme is therefore less than the national minimum wage, will the practice be in breach of the national minimum wage legislation if the practice does not fund the difference between the payment under the job retention scheme and the employee's normal pay?

There is currently no guidance on this point.

Under the Job Retention scheme, the employee will be regarded as absent from work. It is therefore likely (although not certain) that the practice will not be in breach of the national minimum wage requirements by reason of its failure to 'top up' the 80% payments under the job retention scheme to a rate that would be at or above the national minimum wage.

If the practice furlough, what are the obligations on the practice owner in relation to the employees?

The practice will need to:

- begin the consultation process
- designate affected employees as 'furloughed workers'
- notify the employees of this change and seek consent
- ensure the practice is registered for online PAYE
- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal when set up

How does the practice make a claim online?

The practice will need to provide –

- the ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 consecutive weeks)
- the relevant bank account number and sort code
- the practice's contact name
- the practice owner's contact phone number

After checking the claim, HMRC will pay it by BACS to a UK bank account.

The online service to use to claim is not available yet. The Government expect it to be available by the end of April 2020.

On 8 April 2020 HMRC told a Parliamentary Select Committee that the online portal will open on 20 April, with the first reimbursements made on 30 April.

Section B – Holiday Leave Issues arising from Coronavirus Pandemic

We have above dealt with all the issues relating to Furlough Leave and in this section, we will look at other issues encountered by the practice arising from the current pandemic

Do employees accrue leave during the pandemic even if they are furloughed?

Yes. By way of reminder, all practice employees have a right under the Working Time Regulations 1998 to a total of 5.6 weeks' annual leave each 'leave year'. The position is rather complex, and the leave is made up of:

- a basic entitlement to a minimum of four weeks' annual leave (20 days for a regular full-time worker) each leave year, implementing the right to annual leave under Directive 2003/88/EC, the Working Time Directive (basic holiday entitlement)
- an additional entitlement to 1.6 weeks' annual leave (eight days for a regular full-time worker) each leave year

Can employees' carry forward holiday pay during the pandemic?

Yes. The rules have recently changed to take account of the pandemic.

In normal times, under Regulation 13(9) of the Working Time Regulations 1998, the basic holiday entitlement must, subject to certain exceptions established from case law, be taken in the leave year in respect of which it is due and may not be carried over from one leave year to the next. This means that if a worker does not take their basic holiday entitlement in the year in which it falls due, it will generally be lost.

The Working Time (Coronavirus) (Amendment) Regulations 2020 came into force on 26 March 2020. The Regulations amend the Working Time Regulations 1998 to allow holiday relating to the four weeks' basic holiday entitlement provided for by Working Time Regulations 1998, regulation 13 to be carried over into the next two leave years where it has not been taken because of the pandemic.

Can all untaken leave be carried forward by two years?

No. Importantly, practices need to be aware that these changes apply ONLY to the four weeks of holiday provided for by the Working Time Regulations 1998 regulation 13, and not the additional 1.6 weeks' holiday provided for by the Working Time Regulations section 13A, which is subject to different carrying-over rules. To be clear, the only amount that can be carried forward is the four weeks and not any additional leave or contractual leave unless the employment contract allows this.

Can I require an employee to take annual leave during the furlough period?

This is unclear but we would suggest that practices should not require employees to take annual leave during the furlough period because this decision could be challenged. Holiday Leave under the Working Time Regulations is a health and safety measure to ensure that workers are rested. Its purpose is to allow a worker both to rest from work and to enjoy a period of rest and leisure. It is submitted that in these current and stressful times, it is not possible for an employee to have a proper break from work. Accordingly, an employee may be able to challenge an employer's decision to require him or her to take annual leave during the pandemic.

Where an employee chooses to take annual leave during the furlough period, would the employee be paid full pay?

Pay should be at the normal rate of pay and not at the furloughed rate.

In April 2020, HMRC Customer Support tweeted that it is possible to take annual leave when on furlough, and it must be paid at full pay.

Section C – Sickness Leave issues that Practice Owners may need to consider

What provisions are there for employees on sick leave due to coronavirus?

Practice owners will be aware that –

Under the normal Statutory Sick Pay (“SSP”) regime:

1. an employee only becomes entitled to SSP where they have at least four consecutive days' sick absence (including Sundays and Bank holidays) during which they are too ill to work; this is referred to as a 'period of incapacity for work'
2. SSP is not payable in respect of the first three qualifying days of any period of entitlement. These are known as “waiting days”.

The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020, SI 2020/374 came into force on 28 March 2020.

The Regulations suspend the limitation that SSP is not payable for the first three qualifying days in a period of entitlement, amend the Statutory Sick Pay (General) Regulations 1982, SI 1982/894, to specify when an individual isolating by reason of coronavirus is deemed to be incapable of work, disapply the waiting days where an employee is incapable of doing the work the employee can reasonably be expected to do under the employee's contract of service, or where the employee is deemed to be incapable, because of coronavirus. This applies retrospectively from 13 March 2020.

The above, new Regulations apply retrospectively from 13 March 2020

The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 came into force on 13 March 2020. The Regulations amended the Statutory Sick Pay (General) Regulations 1982, SI 1982/894, to provide that a person who is isolating themselves from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England, NHS National Services Scotland

or Public Health Wales and effective on 12th March 2020, and by reason of that isolation is unable to work, will be deemed to be incapable of work for the purposes of claiming statutory sick pay.

Section D – Dealing with non-employees and Associates

Should the practice continue to pay its Associates where the Associate is paid through the payroll?

If an Associate is being paid via the payroll, the practice can furlough the employee in relation to private work. However, most Associates will not be paid via the payroll.

Where the Associate is not working via the payroll, can the practice refuse to pay the Associate or terminate the Associate agreement?

Every Associate agreement is different and the terms of the Associate agreement should set out how the Associate will be paid, the calculation for the renumeration and the amount of notice that the practice must give to terminate the agreement.

Are there other financial claims that Associates and other self-employed members of the dental team can make in relation to their income?

Yes, a scheme exists for self-employed individuals called the Self-Employment Income Support Scheme (SEISS). However, an individual who is self-employed is not eligible to apply for support under the scheme, unless their trading profits are less than £50,000. This would not cover most Associates unless the Associate was very part-time, but it could cover other self-employed individuals in the practice such as self-employed therapists.

What are the eligibility criteria for the Self-Employment Income Support Scheme (SEISS)?

The eligibility criteria are that the practice member must –

- Be self-employed or a member of a partnership.
- Have lost trading/partnership trading profits due to COVID-19.
- Have filed a tax return for 2018-19 as self-employed or a member of a trading partnership. Those who have not yet filed for 2018-19 will have an additional 4 weeks from the Government's announcement to do so.
- Have traded in 2019-20; be currently trading at the point of application (or would be except for COVID 19) and intend to continue to trade in the tax year 2020 to 2021.
- Have trading profits of less than £50,000
- More than half of the person's total income must come from self-employment. This can be with reference to at least one of the following conditions:
 - the trading profits and total income in 2018/19.
 - the average trading profits and total income across up to the three years between 2016-17, 2017-18, and 2018-19

When must self-employment have begun for the individual to qualify?

A self-employed individual at the practice cannot claim a grant under the Self-Employment Income Support Scheme (SEISS) unless they have submitted an Income Tax Self-Assessment tax return for the tax year 2018-19 and continued to trade in the tax year 2019-20. This means that the latest date a self-employed person can have started working to be eligible for the scheme would appear to be 5 April 2019.

Should the practice cease to pay the Associate performing services under the Contract?

Where there is an NHS contract and the Associate is providing services under that contract, NHS England will be continuing to pay the contract value to the practice and there seems no reason why the payments to the Associate should stop when the practice is continuing to be paid.

Section E – General Dental Council Obligations

Will the General Dental Council (GDC) take action against registrants during the pandemic?

On 3 March 2020, the GDC issued a statement as follows - *“We recognise that in highly challenging circumstances, professionals may need to depart from established procedures in order to care for patients and people using health and social care services. Our regulatory standards are designed to be flexible and to provide a framework for decision-making in a wide range of situations. They support professionals by highlighting the key principles which should be followed, including the need to work cooperatively with colleagues to keep people safe, to practise in line with the best available evidence, to recognise and work within the limits of their competence, and to have appropriate indemnity arrangements relevant to their practice”*

This is welcome news and the GDC has reported that it will be sympathetic to people who are finding it difficult to maintain their CPD in current circumstances, and that no-one will be removed from the register because of a lack of access to CPD during the crisis period.

This does not mean that the GDC will overlook misconduct committed by dentists during the pandemic but the GDC will take into account the effect of the pandemic in reaching a decision.

How could dentists fall foul of their GDC obligations during the pandemic?

The pandemic will cause increased stress upon dentists whether those operating urgent care centres or those who cannot open due to routine treatments being cancelled as a result of the pandemic. There could be financial pressure on the dentist which could lead to poor decision making.

Standard 1.3 of the Standards for the Dental team require dentist to be “Be honest and act with integrity”. Practice owners should be extra careful in making claims for furlough leave to ensure that the practice is not receiving a double recovery of government funds and NHS monies.

Could I face GDC action for making a false or misleading payment claim?

Yes. In the case of mixed practices, practice owners should ensure that there are clear written records of what is being claimed in relation to each employee. Those employees who are placed on furlough leave should not be undertaking working for the practice. Practices should not enter into underhand arrangements to pay employees “cash in hand” to undertake work.

HMRC will be undertaking an audit of monies paid out under the furlough leave scheme and practices could be required to repay overpayments but worse still, a dentist who is dishonest could have to explain his or herself before the GDC.

Should practices cancel their insurance during the pandemic?

No. Practice owners who feel subjected to financial pressure should take care before panic cost-cutting. Practice insurance to include indemnity insurance should be maintained to avoid any subsequent allegations by the GDC of practising without insurance.

Where a practice owner is under pressure from patients to provide treatment, should home delivery alginate kits be used to start patients in treatment during the COVID crisis?

No. It is the view of the British Orthodontic Society that DIY Orthodontics is not ethical nor safe. No patient starts should begin treatment without a consultation in person with a trained orthodontist. To use DIY Orthodontics may is likely to cause the practitioner to fall foul of his or her GDC obligations.

The GDC issued a statement regarding DIY Orthodontics in which it stated “*We have received reports that providers of 'direct-to-consumer orthodontics' are offering services which may not include face to face patient contact with a registrant authorised to provide direct services to patients. Our view is that for all dental interventions, this important interaction between clinician and patient should take place at the beginning of the patient consultation. This enables the clinician to carry out the assessments necessary for making clinical judgements that ensure the suitability of the proposed course of treatment, that support the prescribed course of treatment, and that address any underlying oral health problems. It also gives patients the opportunity to ask questions, provide valid and informed consent and be satisfied that the course of treatment proposed is likely to meet their needs and expectations*”

Section F – Practice Owners who are Directors

Can a practice owner be furloughed as a company director?

Yes, but only in relation to private practice. The HMRC guidance states that directors, including those who are directors of their own personal service company, can be furloughed.

The HMRC guidance states: ‘company directors owe duties to their company which are set out in the Companies Act 2006. Where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed.

Where it is decided by the board that one or more individual directors should be furloughed, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned.

What if a director is furloughed but must fill out forms for company's house?

Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.

What is the financial entitlement of a company director who is furloughed?

The company director is treated in the same way as an employee (see above) and the practice can apply for a grant for the director that covers 80% of the usual monthly wage costs, (up to £2,500 a month), plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions.

Section G – Is there a risk of employment claims during the pandemic and what should practice owners look out for?

Do you have an employee asserting that there has been a breach of your health and safety obligations?

The practice employees have the right not to be subjected to a detriment on the ground that they:

- in circumstances of danger which they reasonably believed to be serious and imminent and which they could not reasonably have been expected to avert, left (or proposed to leave) or (while the danger persisted) refused to return to their place of work or any dangerous part of it

- in circumstances of danger which they reasonably believed to be serious and imminent (in relation both to themselves and to others, such as members of the public), took (or proposed to take) appropriate steps to protect themselves or other persons from the danger

To receive the protection in law, the employee's belief must be both genuine and reasonable. Your employees are also protected against dismissal in those circumstances and any such dismissal would be automatically unfair.

One example is where a practice is providing emergency treatment and an employee does not consider that proper infection control procedures are being followed.

Another example could be where an employee chooses to self-isolate in circumstances where they are not required to do so, and the practice requires them to return to work.

In both examples, provided that the employee genuinely and reasonably believe themselves to be in imminent and serious danger which they could not reasonably have been expected to avert, both employees could potentially be protected against disciplinary action the employer might decide to take against them for being absent from work, including any pay penalty incurred as a result of staying away from work or any reduction in pay.

What if an employee raises concerns about the practice's procedures or infection control methods?

Where employees or other workers raise concerns about matter such as health & safety issues to include infection control concerns or the practice not complying with a legal obligation, the individual may have protection under the Public Interest Disclosure Act 1998 known as whistleblowing. The practice should take any concerns raised by its staff during the pandemic very seriously and all matters raised should be investigated. No member of staff should receive detrimental treatment due to raising genuine concerns with the practice even if the concern turns out to be unfounded.

What should the practice do about outstanding grievances or disciplinary hearings?

These should not be automatically ignored because there is a pandemic. The practice should contact the employee and agree on a timescale. Hearings can take place remotely using Skype, Zoom or Microsoft team.

Where a practice does not investigate a grievance or prolongs a disciplinary hearing unnecessarily, the employee could resign and bring a claim of constructive dismissal.

Section H – Data Protection Issues arising from Coronavirus?

If the practice has received a subject access request under the Data Protection Act will the Information Commissioner take action if the practice cannot action this due to the pandemic?

The time limit to reply to a request for information is 40 days and the Information Commissioner has stated that this cannot be extended because the time limit is set by statute. However, the Office of the Information Commissioner has issued guidance stating that during the pandemic, it accepts that employer's data protection practices might not meet usual standards and that responses to information rights requests may take longer. The Information Commissioner will not take regulatory action against practices who cannot comply promptly due to the pandemic.

NHS England has requested NHS practices provide the names and contact details of all NHS staff so that they can sign up as volunteers, will the practice need consent from the staff member before supplying the contact details?

Yes. It should not be automatically assumed that you can forward the staff details without consent. Staff members should be asked for consent and it should be explained that the practice funding depends on the staff being offered for redeployment even though the requirement to assist has not yet

been made compulsory. If the member of staff refuses, NHS England should be notified of this and asked for the legal justification for the request.

Section I – PDS Contract issues arising from the pandemic

How will NHS England deal with my PDS Contract 2019/20 activity targets?

On 25 March 2020, NHS England wrote to practices setting out how practices will be paid as a result of the pandemic. In England, for the current financial year, the month of March 2020 will not be counted due to the effect of the pandemic and instead March 2019 will be included in place of March 2020.

How will under-performance be assessed by NHS England?

Taking into account data from March 2019 rather than March 2020, NHS England will assess under-performance in the usual way using the 96 per cent threshold.

Section J – Redeployment of staff to meet with the wide NHS Covid-19 response

Do I have to deploy my staff to help the NHS in general?

Purely private practices will have no issue with having to redeploy staff. However, members of staff may decide to voluntarily assist the NHS during furlough leave.

With NHS or mixed practices, NHS England stated in its letter of 25 March 2020 that the continued NHS payments were conditional on practices supporting the wider NHS Covid-19 response and making NHS employees available for redeployment.

On 4 April 2020, NHS England issued a paper entitled *“Deploying the clinical dental workforce to support the NHS clinical delivery plan for COVID-19”* in which it was stated: *“The dental workforce has a wide range of skills and*

experience that can be utilised to undertake activities that will help clinical colleagues and the wider workforce” and details of the redeployment scheme were set out.

At the time of writing, the redeployment of staff is voluntary and the practice cannot force any member of the NHS dental team to help with the larger NHS Covid-19 response. The NHS paper of 4 April 2020 states - *“There will be no obligation for any member of the dental workforce to provide services”*. Whilst there is currently no forced redeployment, this may change as the pandemic develops.

Should the practice owner provide staff contact details to NHS England if these are requested?

Please see our section on Data Protection above. It is submitted that consent should be obtained before providing staff contact details to NHS England. If members of staff refuse to consent, the practice should notify NHS England that consent is not forthcoming from the member of staff, express concern about breach of the practice’s duties under the Data Protection Act 2018 and ask for the legal justification for the request.

Section K – Other financial help available for practices

Can the practice obtain a business loan?

Yes. There is a government scheme which allows businesses (including dental practices) to apply for loans which will be interest free for 12 months.

Subject to approval, the practice may be able to obtain a loan of up to £5m and the government is providing lenders with a guarantee of 80% on each loan.

What about taxes?

The Government has said that employers can choose to defer income tax for 31 July 2020 until 31 January 2021.

VAT can also be deferred until 30 June 2020.

Developments – 26 June 2020

HM Treasury has issued a new Treasury Direction on the Coronavirus Job Retention Scheme on 26 June 2020, modifying its earlier Directions in April and May 2020. The new Direction allows for a new type of furlough arrangement known as 'flexible furlough'

What is flexible furlough?

The Government has announced that from 1 July 2020, employers can bring furloughed employees back into the workplace for any amount of time and any shift pattern BUT still be able to claim the Coronavirus Job Retention Scheme grant for the hours not worked.

For orthodontic and dental practices who are able to furlough staff (mainly mixed NHS practices: see the start of this article for further information) your employees are no longer prevented from doing any work for you if furloughed. The staff can work for some of the week and be furloughed for the rest, in proportions decided between the practice and the employee.

Under flexible furlough must the employee be furloughed for three weeks?

No. The minimum three-week period for furlough has been removed (as of 1 July 2020). There is no minimum period, although any claim through the Coronavirus Job Retention Scheme portal must be in respect of a minimum one-week period. The practice can only put in four claims a month.

The Government's guidance on how to make claims is at
<https://www.gov.uk/guidance/steps-to-take-before-calculating-your-claim-using-the-coronavirus-job-retention-scheme>

When will the furlough scheme end?

The furlough scheme will be come to an end completely on 31 October 2020.

When is the cut-off date for making claims?

The new Direction states that the cut-off date for making claims under the original Coronavirus Job Retention Scheme is 31 July 2020.

Can I furlough an employee under flexible furlough if I have not furloughed them in June?

No. At the time of writing, a practice will only be able to participate in the flexible furlough scheme that applies from 1 July 2020 if it has made a claim under the original scheme by 31 July 2020 in respect of an employee who has been furloughed for a minimum of three weeks beginning on or before 10 June 2020. The new Direction confirms the exception to the 10 June 2020 cut-off for family leave returners and armed forces reservists.

Does the practice need the employee's agreement?

Yes. As the new Direction confirms, the practice and the employee must reach agreement in writing on the flexible furlough arrangements

Does the practice need to retain the written agreement?

Yes. The practice must retain the written agreement until at least 30 June 2025.

Frequently asked questions asked on the BOS Helpline

The following are some of the frequently asked questions from our members -

If the practice has a wind-down contract would this be regarded as NHS funds preventing a member of staff from being furloughed?

There is no set guidance from NHS England on the subject of wind-down contracts and furlough but we would argue that a wind-down contract is an NHS contract where there has been the receipt of NHS funds. Even though there is no on-going monthly payment, the practice is still NHS funded.

Should a practice with a wind-down contract pay its Associate during the lockdown period?

There is no set guidance but we would argue that it should. The Chief Dental Officer's statement within the third letter of preparedness set out that a condition of receiving ongoing NHS payments was subject to a number of conditions.

One of these was a requirement on practices to ensure that all staff including associates, non- clinical and others continue to be paid at previous levels. Depending on the terms of the contract, it possible that not to pay the associate would result in the practice being in breach of contract.

Can an NHS practice continue to pay its associate but deduct a payment from the associate for a notional laboratory fee for the sums received during the lockdown period on the basis that the associate would have paid a laboratory fee if he or she had been working?

The Chief Dental Officer's statement within the third letter of preparedness set out that a condition of receiving ongoing NHS payments was subject to a number of conditions. One of these was a requirement on practices to ensure that all staff including associates, non- clinical and others continue to be paid at previous levels.

Some practices have interpreted "previous levels" as meaning that an associate should be paid the net amount he / she would have received which is less laboratory fees.

Insisting that from the NHS sums paid to the associate that the associate pays a notional laboratory fee is unlikely to foster good relations between the practice and its associate. We do not consider that this is a sensible arrangement as there is no actual laboratory fee being incurred by the practice nor would the laboratory be charging a fee.

The associate is naturally likely to feel cheated and that the practice is making a profit from the situation.

We understand that practices are concerned that NHS England may adjust the promised 1/12 of the contract value. We recommend that these practices should have discussions with their associates rather than impose a notional laboratory charge.

Practice owners should first check the terms of the associate agreement to see if the existing agreement helps them and already enables a claw-back or a reduction if NHS England did reduce the practice's payments.

If not, the practice owner could, by agreement, vary the associate agreement to ensure that the associate will repay any amounts that the practice has overpaid. In these matters, communication with the associate is key.

If the practice owner no longer requires an associate after July as a result of a lack of surgery space following the need to rotate surgeries to avoid cross-contamination post the coronavirus pandemic can the associate's contract be terminated?

Yes. If the changed environment following coronavirus means that the practice can no longer accommodate the associate, for example, a lack of practice space due to the practice owner rotating between surgeries, it would be possible to terminate the associate's agreement on providing contractual notice.

The practice may wish to seek legal advice before deciding to terminate the associate's agreement, but the contractual notice must always be given.

What can practices do to maintain good relations with its staff and associates during the pandemic?

Practices are highly likely to need loyalty from their staff and associates as normal work slowly resumes with patients. It may be that the practice will require staff to work extra hours to meet UOA targets by 31 March 2021 or take on extra tasks such as cleaning duties due to cross-contamination issues.

Communication with staff and associates is vital and practice owners should avoid imposing changes to contractual arrangements or working practices without discussion.

Many associates who have contacted the BOS Helpline inform us that they have been told about changes to their contract and payments without any discussion. Many have said that they would be willing to assist the practice but worry about the breakdown in communications. It is understandably tempting for a busy practice owner to simply send a formal letter to the associate imposing new contractual terms. However, meetings and discussions with staff will save a lot of wasted time in dealing with disputes and grievances at a later date.

Practice owners seeking to impose changes may have a good reason whether it is payments being adjusted or a failure to meet UOA targets or staff leaving having been paid during the pandemic and the best way to address these is discussing them with associates and seeking variations to the associate agreement following those discussions. Although there are exceptions, many associates appreciate that these are difficult times and will do their best to accommodate the practice owner if a discussion is held in advance of any changes.

What will happen if a member of staff refuses to return to work as they are worried about the risks?

In these circumstances, the practice should write to the member of staff inviting them to an informal meeting to discuss their concerns. Ideally, there should be a meeting with the member of staff using video conferencing such as face-time or Zoom. The meeting should be attended by a note-taker from the practice who will make a note of what is said at the meeting. It is important to document precisely why the employee is refusing to return to work. This may be due to a genuine reason on the part of the employee such as a pre-existing illness or alternatively, it may be anxiety.

The practice should consider whether the employee may be regarded as disabled under the Equality Act 2010 due to a physical or mental impairment. The question as to whether or not an employee is disabled is a very complicated one and one of the most complex aspects of employment law.

Being classed as disabled by an Employment Tribunal is very different from the meaning of disability in other contexts. A person does not need to have notified the practice in advance that he or she is disabled to have protection under the Equality Act 2010. It is also a misconception that disabled staff are in receipt of disability allowances.

Anxiety could amount to such a disability in certain circumstances. Advice can be taken via the legal helpline on this point. If the employee is disabled, the practice may need to make reasonable adjustments to accommodate them which could mean altering working patterns, duties or providing extra PPE. Dismissing an employee due to his or her disability or something arising from the disability could lead to a claim of disability discrimination in the Employment Tribunal.

If the employee is not disabled and has no rational explanation as to why he or she will not attend work then the practice will need to go through a series of consultation meetings with the employee warning of the consequences of the failure to attend work and as a last resort, the practice may be able to dismiss the employee following a formal disciplinary hearing.

Dismissal would very much be as a last resort and following attempts made by the practice to resolve the situation to including finding alternatives such as home-working if this is possible or a period of unpaid leave. If there is no alternative other than to dismiss, the practice owner should always offer a right of appeal against dismissal.

Dismissal in these circumstances is complex and Employment Tribunals may well have sympathy for staff who are treating patients in a high risk environment. We would strongly advice that legal advice is taken. All BOS members are entitled to 30 minutes free advice via the legal-helpline.

We hope that above guidance was useful.

For further information please contact Julie Norris of Lawyers for Doctors Limited (solicitors) on 0117 304 8030.

BOS Members should telephone the helpline **on 0208 166 5829** and provide their membership number.



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