



CORONAVIRUS JOB RETENTION SCHEME

27th March 2020

Introduction

The government has now published additional detail on the Coronavirus Job Retention Scheme (CJRS). The additional information is available [here](#)¹ (there is also separate guidance for employees available [here](#)²).

As a reminder, the CJRS is designed to help employers keep employees on the payroll if as a result of COVID-19 they are unable to operate or have no work for the employee to do. This is known as being 'on furlough'.

It is important to note that the CJRS is essentially just financial support for employers to continue paying employees who are not working. It does not of itself directly alter the employment relationship between the employer and the employee, or the rights (both statutory and contractual) that employees have. Employers will need to address these issues as part of their decision on whether to use the CJRS, as explained below.

Who is eligible?

The CJRS is open to all UK employers with a UK bank account and PAYE payroll scheme in place on 28 February 2020. This includes companies in administration.

An employer can furlough any employees who were on the PAYE payroll on 28 February 2020

(whether full-time, part-time, on agency contracts or on zero hours or flexible contracts).

The CJRS also covers employees who were made redundant after 28 February, provided that they are re-hired by the former employer. Although there is no obligation on an employer to re-hire, some may come under pressure to do so.

Employees on sick leave or self-isolating should get statutory sick pay (SSP) for that period, but can be furloughed after this. Since SSP is payable for up to 28 weeks, it may be that employees on sick leave or self-isolating are therefore excluded from the CJRS (at least for this period), which may be problematic. Employees who are shielding in line with public health guidance can be placed on furlough (although it is not clear if this still applies if these employees are receiving SSP).

Employees on unpaid leave are not eligible, unless they were placed on unpaid leave after 28 February. This would presumably include employees who are taking unpaid dependants leave to look after children or elderly relatives, although they would become eligible when such leave ends.

Employees taking paid family leave (maternity, paternity, adoption or shared parental) will be eligible. Employers can already reclaim the majority of statutory pay for these types of leave from HMRC, and would be able to reclaim

¹ <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

² <https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme>

any enhancement through the CJRS (subject to the limits set out below). However, the interaction of paid leave, such as maternity leave, and a furlough period is not clear: will a period of furlough leave bring maternity leave, for example, to an end?

Although the CJRS is clearly aimed at employees who would otherwise be made redundant, there is no explicit requirement for the employer to demonstrate this as a condition of obtaining the grant.

There is nothing in the guidance which prohibits rotating furlough leave amongst employees, provided each employee is off for a period of at least three weeks.

What costs are covered?

The grant from HMRC will cover the lower of (i) 80% of an employee's regular wage (more information below) and (ii) £2,500 per month.

The grant will also cover the associated Employer National Insurance contributions (NICs) and minimum automatic enrolment employer pension contributions on that subsidised wage (i.e. 3% of income above the lower limit of qualifying earnings (£512 per month until 5 April, £520 per month from 6 April onwards)). HMRC will issue more guidance on how employers should calculate these sums, before the scheme goes live.

For full- or part-time salaried employees, the reference to 'regular wage' is the employee's

actual gross salary as at 28 February 2020, excluding any fees, commission, or bonus.

For employees on variable pay, the employer can claim for the higher of:

- the same month's earning from the previous year; or
- average monthly earnings from the 2019-20 tax year.

For an employee employed for less than a year, the employer can claim for an average of their monthly earnings since they started work.

The amount paid to employees is subject to deduction for income tax and NICs in the usual way. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

Employers can pay employees more than the amount covered by the CJRS (for example, to top up to full pay), but any such top-up (and related employer NICs and pension contributions) will not be reimbursed.

What is the process?

Claims will be made by the employer through an HMRC portal. The scheme is '*expected to be up and running by the end of April*'.

Employers will need to confirm in writing to the employee that they have been furloughed, and keep a record of this communication.

Once HMRC have received the claim and established that the employer is eligible for the grant, they will pay it via BACS payment to a UK bank account nominated by the employer.

The employer should make its claim in accordance with actual payroll amounts at the point at which it runs payroll or in advance of an imminent payroll.

Employers can only submit one claim every three weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until 1 March if applicable.

HMRC will have the right retrospectively to audit all claims.

Employee consent

The guidance states that employers '*should discuss with their staff and make any changes to the employment contract by agreement*'. The guidance for employees is more emphatic that '*both you and your employer must agree to put you on furlough*'.

There is nothing in the guidance that states that consent is a condition for eligibility for the scheme; government guidance on consent focuses on changes to the employment contract.

The employer guidance goes on to say that employers may need to seek legal advice on that process and that '*it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment*'. This reflects the underlying legal position, which the government has not sought

to alter to the employer's advantage. Where applicable, unions may need to be engaged.

The employee guidance makes it clear that an employee who refuses an offer of furlough may be at risk of redundancy or termination of employment, depending on the employer's circumstances. However, this must be in line with normal redundancy rules and protections.

Selecting for furlough

Employers do not need to place all of their employees on furlough. When employers are making decisions in relation to the process, including deciding to whom to offer furlough, equality and discrimination laws will apply in the usual way. Care will need to be taken if employees are selected for furlough and, since any employee furloughed can do no work at all for the employer, an employee who is needed for any work at all cannot be furloughed. There may also be an impact on bonus and commission entitlements which cannot be earned during furlough.

What happens during furlough?

The minimum length of a furlough period is three weeks. An employee can be placed on furlough more than once, and one period can follow straight after an existing furlough period, while the scheme remains open.

During furlough, normal employment rights continue to apply, including SSP entitlement, maternity and other parental rights, rights against unfair dismissal and to redundancy

payments. Holiday continues to accrue and may be taken. It is not yet clear how holiday taken during a period of furlough would need to be paid.

A furloughed worker must not do any work for the employer organisation (this includes any provision of services or revenue-generation).

Doing volunteer work or training is permitted, as long as there is no service provision or revenue generation. If an employee is required to complete online training courses for the employer while furloughed, training time will need to be paid at a rate that meets national minimum wage / national living wage floors, which may require an employer top-up if the 80% or £2,500 amount described above is insufficient.

The guidance is silent on whether work for other employers is permitted during furlough, but most employment contracts would not permit this (at least without employer consent). If an employee has more than one job, they can be furloughed (and the cap applies separately) by each employer.

When does furlough end?

When the government ends the scheme, an employer will need to determine whether an employee can return to their duties. The guidance recognises that if not, it may be necessary to consider termination of employment on the grounds of redundancy, although there is likely to be an expectation that this scheme will help employers avoid such an outcome in return for government support.

Other implications

There is nothing in the additional detailed information that explicitly makes access to the CJRS conditional on an employer not paying dividends or other remuneration issues. However, clearly messaging and reputational issues will need to be considered where public financial support has been provided and employees are affected in this way.

Payments received by a business under the scheme are made to offset deductible revenue costs. They must therefore be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.

Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

There are a number of other issues with the operation of the CJRS which remain unresolved by the guidance. If you would like to discuss the implications of these for your business, please speak to your usual Slaughter and May contact.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



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