



FLEXIBLE FURLOUGH - WHERE NEXT FOR THE CORONAVIRUS JOB RETENTION SCHEME?

1 June 2020

On 29 May 2020 the Chancellor announced details of how the Coronavirus Job Retention Scheme (CJRS) will be modified in 'Phase Two' of the scheme. The key changes are that:

- employers can bring furloughed employees back to work part time in July;
- employers must contribute progressively more to the employment costs of furloughed employees from August;
- the CJRS will close to new entrants at the end of June, and will end entirely at the end of October; and
- employers have until 10 June 2020 to furlough any additional employees.

Employers now need to consider whether and how to use the CJRS through Phase Two. Employers will also need to start thinking about their workforce requirements, and arrangements for bringing their employees off furlough following the closure of the CJRS at the end of October.

Introduction

The CJRS has allowed employers to reclaim some of the costs of their furloughed employees since 1 March 2020. The grant from HMRC is a maximum of 80% of monthly wages up to a cap of £2,500, plus employer national insurance and minimum employer pension contributions. Employers have remained liable for any additional costs relating to furloughed employees, including any wage costs above the cap. Employees are currently prohibited from carrying out any work for their employer during periods of furlough. Full details of how the CJRS has operated to date can be found in our [previous briefings](#).

As of midnight on 24 May 2020, the scheme had been used by 1 million employers, in respect of around 8.4 million employees, at a total cost of £15 billion.

A 'Phase Two' of the CJRS was first announced by the Chancellor on 12 May 2020, with the aim of increasing flexibility for furloughed employees to carry out work for their employer, and for employers to make some (or a greater) contribution to the employment costs of furloughed employees.

On 29 May 2020, more details were published of the changes to the CJRS, via a [press release](#) and a [factsheet](#).

Flexible furlough

From 1 July 2020, furloughed employees will be permitted to undertake some work for their employers. This is a month earlier than had been suggested in the 12 May 2020 announcement, and is intended to help support the transition back to work.

Furloughed employees will be able to return to work for any amount of time and any shift pattern, although this must be agreed between the employer and the employee. The agreement must be confirmed in writing. The employer will be responsible for paying the employee's wages for any period of work, while still being able to claim the CJRS grant (up to and in proportion to the existing capped level) for their normal hours not worked.

The Chancellor in his statement gave the example of an employee working two days per week (paid for by the employer), while the CJRS pays for the other three days. He also confirmed that there will be no minimum amount of time employees must spend on furlough, as opposed to working.

When claiming the CJRS grant for furloughed hours from 1 July 2020, employers will need to report and claim for a minimum period of one week. This is a change from the current minimum furlough period of three weeks, and will provide additional flexibility. Employers can (if they choose) continue to make claims for longer periods, such as for monthly cycles.

Employers can claim the CJRS grant for the hours their employees are not working, calculated by reference to their usual hours worked in a claim period. Employers will be required to submit data on the usual hours an employee would be expected to work in a claim period, and actual hours worked.

Further guidance on flexible furloughing and how employers should calculate claims will be published on 12 June 2020.

Closure to new entrants

To enable the introduction of flexible furlough, claims in respect of furloughed hours accrued on or after 1 July 2020 will only be available to employers that have previously used the scheme in respect of employees they have previously furloughed. It seems that this does not require employees to actually be furloughed as at midnight on 30 June 2020, provided that they have been furloughed at some point before 30 June.

The scheme will close to new entrants from 30 June 2020. From this point onwards, employers will only be able to furlough employees who they have furloughed for a full three week period prior to 30 June 2020. This means that the final date by which an employer can furlough an employee for the first time will be 10 June 2020, in order for the current three week minimum furlough period to be completed by 30 June 2020.

Employers will have until 31 July 2020 to make any claims in respect of the period to 30 June 2020. Employers will be able to make their first claim under the new scheme from 1 July 2020.

The number of employees an employer can claim for in any claim period cannot exceed the maximum number they have claimed for under any previous claim under the current CJRS.

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Also from 1 July 2020, claim periods will no longer be able to overlap months (for example, employers could not claim for a three week period from 27 July to 16 August 2020). This reflects the monthly changes to contribution rates set out below. Employers who previously submitted claims with periods that overlapped calendar months will no longer be able to do this going forward. They will need to ensure that one claim ends on the final day of the calendar month, and make a new claim from the first day of the next calendar month.

Employer contributions

From 1 August 2020, the level of government grant provided through the CJRS will be tapered downwards:

	CJRS grant		Employer contribution	
	For furloughed hours	For furloughed hours	For furloughed hours	For working hours
June	80% of wages up to a cap of £2,500 per month Employer NICs and minimum pension contributions	Any additional amount which remains payable under the employee's contract (incl. holiday pay top up to 100% of salary)	N/A	
July	80% of wages up to a cap of £2,500 per month Employer NICs and minimum pension contributions	Any additional amount which remains payable under the employee's contract (incl. holiday pay top up to 100% of salary)	Normal contractual pay	Employer NICs and pension contributions
August	80% of wages up to a cap of £2,500 per month Employer NICs and minimum pension contributions not covered	Any additional amount which remains payable under the employee's contract (incl. holiday pay top up to 100% of salary) Employer NICs and pension contributions	Normal contractual pay	Employer NICs and pension contributions
September	70% of wages up to a cap of £2,187.50 per month Employer NICs and minimum pension contributions not covered	10% of wages, up to a cap Any additional amount which remains payable under the employee's contract (incl. holiday pay top up to 100% of salary) Employer NICs and pension contributions	Normal contractual pay	Employer NICs and pension contributions

	CJRS grant	Employer contribution	
	For furloughed hours	For furloughed hours	For working hours
October	60% of wages up to a cap of £1,875 per month Employer NICs and minimum pension contributions <u>not</u> covered	20% of wages, up to a cap Any additional amount which remains payable under the employee's contract (incl. holiday pay top up to 100% of salary) Employer NICs and pension contributions	Normal contractual pay Employer NICs and pension contributions

Comment

As with previous iterations of the CJRS, the devil in 'Phase Two' will undoubtedly be in the detail. Further guidance is not expected until 12 June 2020, two days after the cut-off for new entrants to the scheme.

The required employer contribution to wages and wage-related costs are more phased and at a lower percentage than many were expecting. It will however be difficult for employers to budget accurately for these additional costs without further guidance. The fact sheet states that the cap on employer contributions of 10% or 20% will relate to the proportion of "normal hours" not worked by employees who remain furloughed. The calculation will presumably be based on the figures for normal hours and unworked hours that employers will be required to submit as part of their new claims from 1 July 2020. This will in turn depend on what new flexible furlough agreements are reached with employees.

The changes will apply to all sectors, including those that are yet to reopen (and may not reopen for some time). This may, for example, cause problems for the leisure and hospitality industries in particular if their businesses remain closed at the point that employers become required to contribute to their furloughed employees' wages. There may also be scope for regional variations, for example if businesses in Scotland and Wales reopen more slowly; employers there may be impacted more by the tapered lifting of the CJRS if their leisure and hospitality sectors have not reopened when the taper begins. It remains to be seen whether other systems of financial support may need to be introduced for businesses that continue to struggle. The Institute of Directors has said that a quarter of its members using the CJRS risk insolvency if they are required to make any contribution towards furloughed workers' wages.

Employers who chose to furlough new employees by 10 June 2020 will have to do so on the basis that they undertake no work for the employer until 1 July 2020, when the new flexibility in the CJRS takes effect. The loss of these workers during a period when businesses are reopening could be a further disincentive to furlough additional employees at this stage.

The Chancellor did not take this opportunity to impose any conditions on companies accessing the CJRS, in relation to executive pay and dividends. Conditions of this type were, by contrast, recently introduced for companies accessing the Coronavirus Corporate Financing Fund (CCFF) - see our

[separate briefing](#) for further details. Companies should nonetheless continue to consider whether it would be appropriate to award pay rises and bonuses to their senior management and other members of their non-furloughed work force whilst receiving grants from the CJRS.

What should employers be doing now?

1. Employers will need to furlough any additional employees before the cut-off date of 10 June 2020. This may include employees who are currently working part time, who could not therefore previously be furloughed. Any such employees will need to undertake no further work for the period from 10 June to 1 July 2020, when the new flexibility in the CJRS takes effect.
2. Employers should consider whether and how to use the additional flexibility available under the CJRS from 1 July 2020. It seems there will be scope to accommodate many different working patterns. The one week minimum claim periods will allow employers to “test the waters” by reopening some functions.
3. Employers will also need to review their contractual arrangements with furloughed employees to see what changes will be needed to introduce flexible furlough.
4. Employers may need to consult with employees or trade union representatives before implementing flexible furlough. This will depend on the nature of the changes envisaged, and the employee consultation processes in place for each particular employer. Any new flexible furlough arrangements agreed with employees will need to be confirmed in writing.
5. Employers will also need to check that they have a means of recording working hours accurately, in order to meet the new reporting obligations for flexible furlough. This may pose additional challenges where employees are working remotely.
6. Employers will also need to review their claim periods, and ensure that these periods do not overlap a month after 1 July 2020.
7. When considering all these actions, employers should remember that further guidance on flexible furlough should be available on 12 June 2020. We will report further when the guidance is published.
8. Looking a little further ahead, employers should be aware that 31 October 2020 is now looking increasingly like a cliff edge. The Chancellor in his statement ruled out any further extension to the CJRS beyond this date, even if there is a second spike of infections. Employers may therefore need to keep in mind the possibility of redundancies at that stage, and that if 100 or more redundancies are proposed, a minimum period of collective consultation of 45 days would be needed before the first of any redundancies take effect (and 30 days if there are between 20 and 99 redundancies proposed). This may cause employers to evaluate their headcount needs before the end of the CJRS, and to start collective redundancy consultation ahead of time in order to minimise excess employment costs from the start of November.

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If you would like further details on these changes, or to discuss the impact of COVID-19 on your business more generally, please speak to your usual Slaughter and May contact or any of the following:



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