

Coronavirus

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Q&A: The Coronavirus Job Retention Scheme and Other Employment Developments

THE CORONAVIRUS JOB RETENTION SCHEME (CJRS) – WHAT IS IT?

Under the new CJRS, UK employers will be able to claim back up to 80% of the wages paid to “furloughed” employees, or up to a total of £2,500 per employee per month (whichever is lower). Employers will also be able to claim back associated Employer National Insurance contributions and minimum automatic enrolment employer pensions contributions on that wage.

The employer will continue to pay the furloughed employee through the payroll and claim back a grant (not a loan) through a new online HMRC portal, expected to be up and running by the end of April 2020.

WILL OUR BUSINESS BE ELIGIBLE?

The scheme will be available to all UK employers that had a PAYE payroll scheme on 28 February 2020 and a UK bank account. The scheme applies regardless of size and sector to all organisations, including businesses, charities and agencies providing agency workers.

An exception to this is organisations which are receiving public funding for staff costs (whether in the private or public sector). The Government has said that, if that funding is continuing, it expects employers to use that money to continue to pay staff in the usual fashion and correspondingly not furlough them.

WHICH OF OUR STAFF WILL BE ELIGIBLE?

The scheme applies to employees who were on your PAYE payroll on 28 February 2020 and who “would otherwise have been laid off” during the COVID-19 pandemic but who are instead designated as “furloughed workers” for at least three weeks and kept on the payroll.

The scheme applies to any type of employment contract, including full-time, part-time, fixed-term, flexible or zero-hour contracts, or employees



on agency contracts. The scheme does not apply to self-employed contractors.

Employees hired after 28 February 2020 cannot be claimed for under the scheme. Employees who were made redundant after 28 February 2020 will be eligible if they are subsequently rehired and furloughed.

An employee who has been furloughed must remain employed and on the payroll but not undertake any work for you. Employees who have been on unpaid leave before 28 February or continuing to work reduced hours or receive reduced pay will not be eligible.

While the initial announcement and guidance emphasised the requirement for the employee to otherwise be laid off, the further guidance published on March 27, 2020 does not address this. It is not entirely clear what is meant by the Government's use of the phrase "laid off", which colloquially refers to redundancy but has a technical statutory meaning to refer to employees who are denied work using a lay-off provision in their employment contract. It is likely that the Government means employees who would otherwise be made redundant although the guidance published to date does not expressly state that only employees at risk of redundancy can be furloughed.

WHAT EVIDENCE IS REQUIRED TO SUBMIT A CLAIM?

No details have been provided as to whether employers will need to produce evidence to show that redundancy was the alternative or that their business was severely affected by COVID-19. The guidance on "what you'll need to make a claim" is silent on this, listing only details such as your ePAYE reference number, bank and contact details, the number of employees being furloughed, the claim period and the amount claimed.

It is possible that the fact furloughed employees are not doing any work will be enough to show that they would have otherwise been laid off. HMRC has retained the right to retrospectively audit all aspects of any claim. Given how vague the guidance is on this, there is potentially a risk that HMRC would not provide the grant if an employer is unable to demonstrate this.

DO WE HAVE TO TOP-UP THE WAGES?

No. Employers can top-up the 80% payment if they wish, but do not have to in order to qualify for the scheme. If an employer does not top up the 20%, it would be a variation of the employees' terms of employment and the employee would need to agree to this as part of the furlough agreement.

HOW DO YOU DESIGNATE AN EMPLOYEE AS A "FURLOUGHED WORKER"?

The guidance suggests that only employees who agree to be furloughed would be covered by the CJRS. However, if the employer is topping up the 20% or has the contractual right to lay employees off without pay (which is rare), it will not necessarily need the employees' consent to designate them as furloughed. Where there is no contractual right to lay off, designating staff as furloughed without their agreement would amount to a breach of contract and an unlawful deduction of wages. Any changes to the employment contract will need to be made by agreement.

Employers who are topping up pay will have little trouble in securing employees' agreement. Issues may arise where the maximum grant is significantly lower than employees' wages and the employer is not proposing to pay the difference. However, the alternative risk of redundancy should make furlough a more attractive option. For employees considering retirement, redundancy may have some appeal.

Employers should ensure they have fair and objective reasons for the selection. An obvious reason exists for employees who are unable to work from home and have no work to undertake. Where it is less clear or only some workers need to be furloughed, employers should follow a similar exercise to a redundancy process by calling for volunteers, consulting on the proposed furlough and using pooling and selection criteria. Unfair dismissal, equality and discrimination laws will apply in the usual way.



If trade unions are recognised or you have an elected employee body, consultation will likely be required as to the extent to which the CJRS will be applied. If you are proposing to dismiss 20 or more employees as redundant if they refuse to be furloughed, collective consultation obligations will apply.

Any furlough agreements should be in writing and state any variations to the employment contract, the agreed length and start date of the furlough, when it will be reviewed and how to keep in contact during furlough. It should also make clear that the employee should not undertake any work for you during the furlough period.

HOW LONG CAN EMPLOYEES BE FURLOUGHED?

The CJRS is a temporary scheme which will last for at least three months and be extended if necessary (currently 1 March to 31 May 2020). Claims can be backdated to 1 March 2020, however the grant would only be available from the start of the furlough period. An employee must remain on furlough for a minimum period of three weeks in order to be eligible.

CAN YOU RETROSPECTIVELY DESIGNATE SOMEONE AS FURLOUGHED?

Yes, given that the scheme was announced on 20 March 2020 and said to be backdated to 1 March 2020. It will be a factual question as to whether the employee met the eligibility criteria at that time and was in fact furloughed and not undertaking any work.

CAN FURLOUGHED EMPLOYEES ROTATE WITH ONE ANOTHER?

The guidance does not state whether the three week minimum period of furlough has to be consecutive or can be aggregated. There may be flexibility for employees to move in and out of the scheme, however until the position is confirmed, any rotations should be based on minimum three week terms.

CAN A FURLOUGHED EMPLOYEE UNDERTAKE AD HOC TASKS FOR US?

No, an employee cannot do any work for you if they are furloughed. Performing work and being furloughed are mutually exclusive under the CJRS. If an employee undertakes any type of work, it may jeopardise your eligibility to claim the grant. If you have some work available, but not enough, you should consider a reduced working week.

The guidance says that a furloughed employee can take part in volunteer work or training, as long as they are not providing services to, or generating revenue for, your organisation. Employees must be paid at least the National Living Wage (NLW)/National Minimum Wage (NMW) for time spent training (even if this is more than 80% of their wages).

WHAT IF AN EMPLOYEE HAS MORE THAN ONE JOB?

The guidance states that if your employee has more than one employer, they can be furloughed for each job. Each job is treated as separate and the cap applies to each employer individually.

CAN FURLOUGHED STAFF WORK FOR OTHER EMPLOYERS?

The restrictions on undertaking work while furloughed appear to only relate to working for the particular employer that placed staff on furlough. It is currently unclear whether or not furloughed employees will be restricted from taking on new work while receiving payment under the scheme. Presumably the Government would not want to discourage employees without work from finding alternative work with essential services. Employees would be prevented from doing this to the extent it breached their employment contract by working for a competitor.



HOW SHOULD 80% OF WAGES BE CALCULATED?

The base for the 80% calculation is the employee's normal salary before tax as of 28 February 2020. For employees whose pay varies, the employer can claim the higher of:

- the same month's earnings from the previous year; or
- average monthly earnings from the 2019-2020 tax year.

If the employee has been employed for less than 12 months, the employer can claim for an average of the employee's monthly earnings since the employee started work.

Once you have worked out how much of an employee's salary you can claim for, you can then work out the corresponding amount of Employer NIC and automatic enrolment pension contributions.

WHAT PAYMENTS WILL NOT BE COVERED BY THE SCHEME?

The CJRS refers to 80% of the employees' "regular wage" and expressly excludes payments such as fees, commission and bonuses. The guidance does not address overtime (although see above as to how the grant is calculated for employees whose hours vary).

Should employers choose to top-up wages, the employer NICs and pension contributions on this top-up will not be covered. Voluntary pension contributions above the minimum mandatory employer contribution of 3% will also not be covered.

Contractual benefits such as health insurance and gym memberships will need to be maintained during the furlough, (unless you agree otherwise with your employees) and will not be reimbursed under the scheme.

WHAT IF FURLOUGHED EMPLOYEES RECEIVE LESS THAN NATIONAL MINIMUM WAGE?

Employees are only entitled to the NLW/NMW for the hours they are working. As furloughed employees are not working, they may receive 80% their usual salary even if this would be below NLW/NMW.

WILL HOLIDAY CONTINUE TO ACCRUE WHILE AN EMPLOYEE IS FURLOUGHED?

Yes, staff will remain continuously employed and holiday will continue to accrue.

WHEN CAN WE ACCESS THE SCHEME?

It is expected that the scheme will be operational by the end of April, with HMRC currently working to set up an online portal. Employers needing support cash flow in the interim may be eligible under the Coronavirus [Business Interruption Loan Scheme](#).

HOW OFTEN CAN WE MAKE A CLAIM?

You can only submit one claim every three weeks.

WHAT HAPPENS TO INCOME TAX, NICS AND PENSION CONTRIBUTIONS?

Wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employers must still pay Employer NICs and pensions contributions on wages paid and must deduct employee NICs.

If an employer chooses to top-up employees' wages, the employer NICs and automatic enrolment contributions on the top-up will not be funded by the scheme. Payments received by employers under the scheme must be included as income in the calculation of its taxable profits.



WHAT HAPPENS WHEN THE CJRS ENDS?

Employers must make a decision as to whether employees can return to their duties. If not, it may be necessary to consider redundancies.

OTHER EMPLOYMENT LAW DEVELOPMENTS

CHANGES TO STATUTORY SICK PAY (SSP) – WHAT ARE THEY?

The Government has passed emergency legislation extending the availability of SSP to those self-isolating to prevent infection with COVID-19, in accordance with advice published by Public Health England (or Public Health Wales or NHS Scotland) and who by reason of that isolation are unable to work.

Under the new Coronavirus Act 2020, SSP will be available from day one in respect of COVID-19 related absence (whether the employee is unwell or self-isolating), instead of day four. Employers with fewer than 250 employees will be eligible to reclaim up to 2 weeks' SSP per employee for COVID-19 related absence.

WHEN DO THESE CHANGES TAKE EFFECT?

The new SSP provisions will have retrospective effect from 13 March 2020.

'EMERGENCY VOLUNTEERING LEAVE' – WHAT IS IT?

The Coronavirus Act 2020 also introduced the concept of "emergency volunteering leave" (EVL), which allows workers to take a new form of statutory leave to volunteer for health and social care authorities. EVL can be taken in blocks of two, three or four weeks' leave, but only one period of EVL can be taken in any period of 16 weeks. The Employment Rights Act has been amended to protect workers from suffering a detriment for taking EVL or because their employer believes they are likely to do so.

HOW DO WORKERS APPLY FOR EVL?

Employees must give their employer three working days' notice and produce a certificate from an appropriate authority certifying that:

- they have been approved by the authority as an emergency volunteer; and
- they will be acting as an emergency volunteer from the date and for the period specified.

Further guidance is anticipated.

DO WE HAVE TO PAY STAFF FOR EVL?

No, EVL is unpaid leave. However, the Secretary of State is establishing a fund to compensate volunteers for loss of earnings and expenses incurred at a flat rate.

CAN WE DECLINE OR DEFER AN APPLICATION FOR EVL?

Only employers with fewer than 10 employees will not be required to grant leave. There are also limited exemptions for Crown and Parliamentary employees, Police and military personnel.

CHANGES TO THE WORKING TIME REGULATIONS (WTR)

On 27 March 2020, the Government announced that it will 'relax' the WTR to permit workers who have not taken all of their statutory annual leave entitlement due to COVID-19 to carry it into the next two leave years.



Previously, the four weeks of EU annual leave granted by regulation 13 could generally not be carried forward, however the 1.6 weeks of annual leave granted by regulation 13A could be carried forward one leave year by agreement.

The Working Time (Coronavirus) (Amendment) Regulations 2020 allow up to four weeks of unused statutory leave (under regulation 13) to be carried into the next two leave years “where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy)”. This must also be paid in lieu if an employee’s employment terminates.

This eases the current requirement for businesses to ensure that workers take at least the 4 weeks statutory amount of annual leave in any one year. Employers are only able to deny workers the opportunity to carry forward this leave for “a good reason” (not defined).

The change is aimed at allowing businesses under particular pressure from the impact of COVID-19 the flexibility to better manage their workforce while protecting workers’ rights to paid holiday. The Government’s guidance is focused on allowing staff to continue working in the national effort against coronavirus without losing out on their leave (for example, employees working in hospital or supermarkets). Employees working from home who simply do not want to take their leave due to travel restrictions would arguably not meet the requirement of it being not reasonably practicable for them to take leave.

WHAT ABOUT ENHANCED CONTRACTUAL HOLIDAY?

It is open to the employer to dictate whether or not any enhanced contractual entitlement may be carried forward.

The new regulations do not change the position on enhanced holiday entitlements, only on the four weeks of leave in regulation 13 (regulation 13A is also unchanged). Carry over of this holiday will remain subject to the terms of the contract or holiday policy.

Please do not hesitate to contact us if you would like advice on any of the above.

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