



CRISIS PRACTICE

# Coronavirus

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For more information,  
contact:

Jules Quinn  
+44 20 7551 2135  
[jmquinn@kslaw.com](mailto:jmquinn@kslaw.com)

Marie Hoolihan  
+44 20 7551 7587  
[mhoolihan@kslaw.com](mailto:mhoolihan@kslaw.com)

King & Spalding

London  
LLP  
125 Old Broad Street  
London EC2N 1AR  
Tel: +44 20 7551 7500

## Updates to the UK's Coronavirus Job Retention Scheme

HMRC has issued further guidance on the Coronavirus Job Retention Scheme (CJRS), including key changes to eligibility requirements. The Treasury has also issued a direction, which formally sets out the legal framework for the scheme. Set out below is a summary of the key updates.

### EXTENSION OF THE SCHEME UNTIL THE END OF JUNE

On Friday afternoon, the Chancellor announced that the CJRS would be extended by one month until the end of June. This is said to reflect the UK's continuing social distancing measures, also announced last week.

### PURPOSE OF THE CJRS – WHO CAN ACCESS THE SCHEME?

HMRC's initial guidance indicated that the scheme was to be used by employers as an alternative to redundancy or laying off staff. The guidance was subsequently updated without reference to this, stating that the scheme is to help employers whose operations have been "severely affected by coronavirus", but recognising that "different businesses will face different impacts".

Unfortunately, the details of what this means in practice have not been clarified by the Treasury's Direction, published on 15 April, 2020. The Direction sets out that the purpose of the scheme is to provide payments to employers in respect of furloughed employees resulting from coronavirus. The Direction states that no claim is to be made under the scheme if it is "abusive" or "otherwise contrary to the exceptional purpose" of the CJRS.

It is still uncertain how HMRC might establish whether or not an employer's operations were sufficiently affected but it seems employers have a discretion as to whether they should access the scheme, provided the scheme is not being abused for reasons unrelated to COVID-19.



## PREVENTING ABUSE OF THE SCHEME

HMRC has the right to retrospectively audit claims and can claw back payments from employers which wrongfully or fraudulently claimed the grant. Post-COVID-19, HMRC is likely to proactively investigate the legitimacy of claims given the significant amounts to be paid out under the scheme, estimated at £30-£40 billion and rapidly growing with the announced extension, expanding eligibility requirements and high take up. HMRC is urging employees to report their employer if they are asked to work while furloughed or suspect their employers of abusing the scheme. A hotline has been established so that employees can report employers' abuses of the scheme.

If found to have wrongfully accessed the scheme, not only will employers have to repay the claimed amounts (plus any penalties and interest), they would still be liable to pay their staff wages over the furlough period. It is also unlikely they would get a refund of the tax and National Insurance already paid. HMRC has confirmed it will consider criminal prosecution.

A likely issue HMRC will focus on is the content of email traffic with furloughed staff, which it already has the necessary powers to compel employers to disclose.

## CHANGE TO ELIGIBILITY DATE – 19 MARCH, 2020

Originally, in order to qualify for the scheme, an employee had to be on the payroll on 28 February, 2020. On 15 April, 2020, the Government announced that the eligibility cut-off had been extended to 19 March 2020. This means that newly hired employees who began their jobs after 28 February (but before 19 March) will now be eligible for the scheme. The new date also applies to employers who had a PAYE payroll scheme in place on 19 March, 2020. Previously, a qualifying PAYE scheme had to be in place on 28 February for an employer to qualify.

## FURLOUGH TO BE AGREED IN WRITING

Previously, the guidance said that employers should discuss furlough with their employees and make any changes to their employment contract by agreement. Updated guidance expanded on this to require employers to confirm the decision to furlough in writing and keep a record of this for five years. Unless an employer was changing the terms of employment (e.g. not topping up pay), written confirmation was sufficient under the guidance.

This conflicts with the Direction which states that an employee is furloughed "only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment." The reference to a five-year record is absent from the Direction.

## EXTENSION OF ELIGIBLE WORKERS

In addition to employees, the grant can now be claimed for the following types of workers, as long as they are paid via PAYE and are not doing any work: office holders (including company directors), salaried members of LLPs, "limb b workers" and agency workers.

Directors who are furloughed will still be allowed to perform statutory duties, so long as this is no more work than reasonably necessary to fulfil their statutory obligations. The Direction allows a limited range of duties, namely work done to fulfil a duty or obligation arising from an Act of Parliament, relating to the filing of company's accounts or provision of other information relating to the administration of the company.

## TUPE TRANSFERS

The updated guidance says that a new employer is eligible to claim under the CJRS in respect of employees of a business transferred after 19 March, if either the TUPE or PAYE business succession rules apply to the change in ownership.



## ADMINISTRATORS

The guidance states that where a company is under the management of an administrator, the administrator will be able to access the CJRS. However, HMRC expects an administrator would “only access the scheme if there is a reasonable likelihood of rehiring the workers”.

## CHANGES TO THE CALCULATION OF “REGULAR WAGES”

Under the updated guidance, in the calculation of “regular wages” employers can claim back include regular payments they are obliged to pay, including overtime, fees and compulsory commission payments. Previously, the guidance expressly stated that fees, commission and bonuses should not be included in the calculation. The Guidance now excludes discretionary bonus and commission payments. The Direction confirms that payments based on performance, discretionary payments, conditional payments and benefits in kind are all excluded.

The updated guidance confirms that benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee’s taxable pay should also not be included in the reference salary.

## STATUTORY LEAVE

A new section in the guidance confirms that, if employees who have recently returned from statutory leave (e.g. maternity, shared parental, sick leave, etc.) are furloughed, their ordinary salary will be used to calculate furlough pay – not the amount received while on leave.

The guidance now makes it clear that employers can claim for enhanced maternity pay (and enhanced pay for other forms of family leave) through the furlough scheme. So, if an employee on maternity leave is furloughed, the employer can reclaim their SMP in the normal way and then claim for any enhanced top up through the CJRS.

## IF YOUR EMPLOYEE IS SELF-ISOLATING OR ON SICK LEAVE

The Direction provides that, where SSP is payable, the period of furlough does not take effect until the original SSP period has ended. This is reflective of the previous HMRC guidance which stated that employees on sick leave or self-isolating could only be furloughed once they were no longer receiving SSP.

However, new HMRC guidance is inconsistent with this, stating that employees who are currently off sick are eligible to be furloughed and that it is up to employers to decide whether to furlough these employees or move them on to SSP. The guidance states employers can claim back from both the CJRS and SSP rebate scheme for the same employee, but not for the same period of time. Where an employee is furloughed, expenditure can only be claimed through the CJRS. The guidance makes it clear that short-term illness and self-isolation should not be a factor in deciding whether to furlough an employee.

Given the inconsistency, it is unclear whether an employee currently off sick and receiving SSP can be put on furlough. We suggest erring on the side of caution and following the Direction, given it appears to have statutory authority, rather than operating as HMRC guidance.

## REHIRING AND FURLOUGHING EX-EMPLOYEES

The initial HMRC guidance was that employers could rehire and furlough staff they had made redundant after 28 February, 2020. The Chancellor subsequently confirmed in a Q&A video on Twitter that employers could rehire and furlough staff who were on their payroll on 28 February but have since left “for whatever reason”. This seemingly includes those who voluntarily resigned or were dismissed.

The official guidance has been updated to state: “If you made employees redundant, or they stopped working for you on or after 28 February, 2020, you can re-employ them, put them on furlough and claim for their wages through the



scheme." This now applies even if they were not rehired until after 19 March, 2020. The Chancellor’s wording “for whatever reason” is missing from the guidance. There is a question mark over whether those who resigned to travel or study would qualify for the furlough grant if rehired, given their unemployment is not caused by COVID-19.

The guidance does not address the issues of continuity of service or repayment of any redundancy payments in these circumstances, or what will happen to rehired employees at the end of the scheme:

- Does the employer have to bring the employee back into the workplace?
- If unable to provide work, the employer would presumably have to follow a redundancy process. Would it then be liable for a redundancy payment it otherwise would not have had to pay if the employee initially left voluntarily?
- Are any redundancy payments which were paid at the point of the original redundancy repayable to the employer or payable again at the end of the furlough?

What is clear is that employers are under no obligation to rehire anyone – it is entirely at the employer’s discretion. An employer could rehire the employee but only on the agreed basis that they would receive payment at a rate of the maximum available grant and no top up. However, in light of the outstanding questions and uncertainty on this point, re-engaging staff is not a risk- or cost-free option.

Given the rapidly developing legal framework on this, more changes to the scheme are likely in the coming weeks, with the online portal set to go live at the end of this month.

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