

# Coronavirus job retention scheme: twenty questions

Mark Baycroft, Imran Umarji and Hannah Thomas answer questions on the coronavirus job retention scheme and explain how the provisions work in practice.

In response to the coronavirus global pandemic (Covid-19), the government introduced several schemes to protect the economy. One is the coronavirus job retention scheme (CJRS), designed to support employers affected by the virus in retaining their employees.

However, drafting the necessary Treasury direction and implementing the scheme has been no small task for the government. Inevitably, in the early stages, this led to a drip-feeding of information and not the most comprehensive of guidance, with HMRC continuing to provide standard responses to questions during their webinars. This left professional advisers in the unenviable position of deciphering what felt like a moving target to an infinitely unique set of client scenarios. With the scheme now having been operational for more than two months, and the published guidance having evolved, it is a good time to take stock of where we are and address some of the frequently asked questions we have encountered in advance of the publication of the Treasury direction for the post-30 June period.

## The basics

### 1. What is the CJRS?

The CJRS was announced on 20 March 2020, in the midst of the Covid-19 outbreak, aimed at supporting employers affected by the pandemic to retain their employees. The first version of the government scheme provides grants to employers to cover 80% of 'furloughed' employees' wages up to a maximum of £2,500 per employee each month. The grant also covers the associated employer National Insurance contributions (NICs) and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on that subsidised furlough pay.

The scheme is a temporary one, envisaged to run initially from the start of March 2020 to the end of May 2020, then extended to the end of June 2020. Claims for the period to the end of June 2020 can be made until 31 July 2020.

The government has recently announced that a second version of the scheme will be extended to the end of October 2020, but only for employees who had met the necessary furlough conditions in question 3 below before the end of June 2020. At the time of writing, the Treasury direction covering the period 1 July 2020 to 31 October 2020 has not been published, but initial announcements and guidance indicate that employees will be able to work part time and be furloughed part time, with employers only claiming the grant for the latter. Employers will also be required to contribute:

- the employer's NIC and minimum pension contributions from 1 August;
- 10% of the employees' reference salary from 1 September onwards; and
- a further 10%, taking the total employer contribution to reference salary to 20%, from 1 October onwards.



### 2. Who can operate the scheme?

HMRC's guidance for employers states that all employers are eligible to claim under the scheme as long as they:

- had created and started a PAYE payroll scheme and notified this to HMRC through a real time information (RTI) submission by 19 March 2020; and
- have a UK bank account.

Public sector employers and employees of individuals such as nannies or domestic workers may also be able to access the scheme as long as those conditions above are met. However, the government expects that in only a small number of cases will the CJRS be appropriate for use by public authorities. This could be organisations (and their employee costs) that are not funded by the government and whose staff cannot be redeployed to assist with the coronavirus response. This expectation also applies to non-public sector employers who receive partial or total public funding for staff costs.

The scheme was designed primarily to help employers whose operations are exceptionally impacted by Covid-19, and there remain requirements in the Treasury direction that furloughing of the employee must be by reason of circumstances arising as a result of coronavirus and that the claim must not otherwise be contrary to the exceptional purposes of CJRS.

Government guidance provides examples of categories of employees who can be furloughed, such as those:

- who are unable to work because they are shielding in line with public health guidance (or need to stay home with someone who is shielding);



- whose health has been affected by coronavirus; and
- who cannot work due to the coronavirus pandemic because they need to look after children.

However, outside these categories, no further examples are given of when furloughing is connected to reasons arising from the coronavirus pandemic in line with the Treasury direction.

### 3. Which employees can be claimed for?

Employers eligible for the scheme may claim for furloughed employees, being an employee that:

- the employer has instructed to cease all work in relation to their employment;
- the instruction is given by reason of circumstances arising as a result of Covid-19; and
- for the first version of the scheme, the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more.

Employees on any type of employment contract as well as foreign nationals are eligible to be furloughed as long as they were employed at 19 March 2020 and an RTI submission notifying payment in respect of that employee in the 2019-20 tax year was made to HMRC on or before 19 March 2020.

Employees made redundant in the period after 28 February and on or before 19 March, could be re-employed, placed on furlough and claims made for their wages under the scheme, as long as they were on the PAYE payroll as at 28 February 2020 and an RTI submission notifying payment in respect of that employee for 2019-20 was made to HMRC before 28 February 2020.

## Employer issues

### 4. How do I place my staff on furlough?

Employers must ensure that they are abiding by existing employment law when placing staff on furlough. This will usually mean varying the employee's employment contract, particularly where the placing of employees on furlough results in a reduced rate of pay and the employer does not intend to make up the difference.

HMRC's guidance for employers states that, to be eligible for the grant, employers must confirm in writing to their employees that they have been furloughed and there needs to be a written record of this, although the employee need not give a written response. A record of this communication must be kept for six years.

The requirement in government guidance that there only needs to be a record of the communication confirming furlough appears to be in contradiction to the Treasury direction that states that an employee will only be furloughed if there is a written agreement between the employer and the employee that the employee will stop working.

It would be advisable to obtain confirmation of an employee's agreement to being placed on furlough in writing (or electronic equivalent) if no written agreement was originally obtained.

### 5. Can redundancies be made while the CJRS is in operation?

Existing employment law rights and obligations still stand during the CJRS so employers have the right to dismiss employees as long as they are not in breach of employment law.

Employees with less than two years' continuous service may be dismissed in accordance with the terms of their contract. Employees with two or more years' continuous service are protected against unfair dismissal. In most cases, redundancies as a result of a closure of a business or workplace, or if there is a reduced need for employees to carry out work, are considered fair reasons for dismissal, provided a fair dismissal process is followed.

One potential issue in the case of dismissals during the operation of CJRS is whether it is fair for an employer to make an employee redundant if the scheme is available to support employers financially in the retention of their employees.

Each case will need to be considered on its facts, but some key indicators may include:

- whether the selection process of the employees being made redundant was fair;
- whether employees were consulted in advance;
- the financial position of the employer – in other words, whether they have the cashflow capacity to pay furlough and await the reimbursement from HMRC.

### 6. How is CJRS grant income taxed?

The grant income received under the CJRS is treated as taxable income of the business under general principles. Generally, this will be recorded as trading income on the business's tax return. However, the business can deduct the employment costs as usual when calculating its taxable profits.

Individuals that access the CJRS for employees such as nannies and other domestic staff will not be subject to tax on the grant income.

## Employee issues

### 7. What duties can employees perform?

The CJRS may only be claimed in respect of furloughed employees, being those out of work. If an employee is working for reduced pay, or under the first version of the scheme reduced hours, they are not eligible for the scheme. But what is considered work, particularly in the context of directors and their duty to perform their statutory obligations?

In such a case, furloughed directors may continue to meet these statutory obligations and remain furloughed as long as they do no more than would be judged reasonably necessary for that purpose. For example, ensuring that the company's operation of the payroll is compliant with PAYE would fall, arguably, within the statutory obligations of a director, but does this extend to actually running the payroll themselves, which could be seen as providing a service to the company?

If the payroll is run by employees other than a director, the employees would be providing a service and considered in work and therefore no longer within the furlough scheme. If this is a small portion of an employee's duties, it would be best to combine these with other critical business tasks to reduce the number of employees still in work and maximise the working hours of those employees. Alternatively, it may be advisable for an employee or director to take on the task of operating the payroll for a short time before going back on furlough, or to outsource the task with the director only undertaking the sign off.

Furloughed employees can undertake volunteer work or training without affecting their furloughed status as long as this does not provide services to or generate revenue for, or on behalf of their organisation or a linked or associated organisation.

'For salaried members of an LLP, the terms of the partnership agreement may require variation to reflect the impact of the furlough status on a member's duties and rights to remuneration from the LLP.'

### 8. What about employees who are self-isolating or on sick leave?

The CJRS was not intended to cover short periods of absence such as that taken by employees on sick leave or self-isolating as a result of Covid-19, hence the minimum furlough period of 21 calendar days. Employers should ensure they are paying the statutory sick pay (SSP) if an employee is not eligible to be furloughed. A claim of up to two weeks of SSP per employee may be available under the SSP rebate scheme if the employee is self-isolating or shielding due to coronavirus.

It should be noted that employees unable to work because they are shielding in line with public health guidance or who are on long-term sick leave may be placed on furlough.

An employer may furlough employees for business reasons while the employee is already off sick or self-isolating. In this case, the employee would be classified as a furloughed

employee and should be paid in accordance with the furlough scheme with the employer being eligible to claim under the CJRS rather than the SSP rebate scheme.

If an employee is furloughed and they become ill, they must be paid at least SSP because furloughed employees retain their statutory rights. It is up to employers to decide whether to move these employees on to SSP or to keep them on furlough. If moved on to SSP, the employer is no longer able to claim for the furloughed salary in respect of the employee, but may qualify for a rebate for up to two weeks of SSP.

### 9. Does it matter if there is no employment contract?

Some workers may be paid under PAYE but do not have an employment contract. The CJRS can be claimed for several such groups including office holders (in particular company directors), salaried members of limited liability partnerships (LLPs) and agency workers as long as they are paid through the PAYE system.

In the case of directors, a company may choose to furlough an individual salaried director if the firm is comfortable that the statutory duties of the director, or directors, to act in the best interests of the company is met, and that one or more of them can continue to fulfil their statutory obligations while furloughed. This decision should be implemented formally as a decision of the company; in other words, noted in the company records and conveyed in writing to the affected directors. This treatment also applies to salaried individuals who are directors of their own personal service company.

For salaried members of an LLP, the terms of the partnership agreement may require variation to reflect the impact of the furlough status on a member's duties and rights to remuneration from the LLP. The reference salary for the CJRS of an LLP member who is treated as being employed by the firm, is their profit allocation, excluding any amounts determined by the performance of the member or the partnership overall.

## Calculation issues

### 10. What is the effect of annual leave?

Several issues arise relating to the application of annual leave to furloughed staff.

First, HMRC has confirmed that employees may continue to take annual leave while on furlough without breaking the furlough period. And if employers have agreed to pay employees a reduced rate while on furlough, they must be paid full rate of pay for periods of annual leave taken during that time. The employer is still entitled to claim under the CJRS up to the qualifying cost amount calculated under the furlough scheme.

Under the Working Time Regulations 1998, statutory holiday pay should be paid at a rate of 'a week's pay' calculated using a 52-week reference period, while under EU law a worker must be paid their 'normal remuneration'. If an employee has been furloughed and subject to a reduced rate of pay for a period of time, the rate of holiday pay may also be reduced to below pre-furlough holiday pay rates.

As parties to an employment contract cannot contract out of these statutory provisions, statutory holiday pay should be paid at the full rate of pre-furlough remuneration: in other words, at the rate of 'a week's pay' for each week of statutory holiday taken.



If employees are entitled to additional annual leave in excess of the 5.6 weeks' statutory annual leave, the additional contractual annual leave may be paid at 80% of the employee's salary subject to the employee agreeing this as a temporary variation of contract. The employer may also seek the employee's agreement that the additional contractual annual leave entitlement will not accrue during furlough leave. Note that statutory entitlements, including statutory annual leave entitlements will continue to accrue during furlough regardless.

**11. Are agency workers and zero hour employees covered?**

Agency workers and those on zero-hour contracts who are paid through PAYE are considered employees within the CJRS. One concern that arises from the employer's right to choose which employees it furloughs is that it may decide not to furlough agency workers or those on zero-hour contracts and instead reduce their work hours to zero.

If agency workers and those on zero-hour contracts are furloughed, the reference salary for the purposes of determining the rate of furlough is the higher of:

- their average monthly wages in 2019-20; or
- their wages in the same month in the previous tax year.

The above reference salary applies to all employees with variable pay, and it is a requirement that at least 80% of the reference salary is paid to the employee for an eligible claim to be made under CJRS. For example, an employee who works an average of 50 hours a month at £20 an hour, but exceptionally worked 100 hours in May 2019, must be paid a minimum of £1,600 in May 2020 and not £800, being 80% of his average hours.

'The method of calculating the employers' NICs will vary depending on whether the employee was furloughed throughout the pay period and whether their pay was being topped up by the employer.'

**12. What happens when employees return from sick leave?**

For employees on a fixed contractual salary, the calculation of the reference salary for employees furloughed on return from family-related statutory leave, such as maternity leave, or from a period of sickness, should be calculated against their contractual salary, before tax, not the pay they received while on statutory or sick leave.

Claims for those on variable pay, returning from statutory leave or sick leave should be calculated using the higher of:

- their average monthly wages in 2019-20; or
- their wages in the same month in the previous tax year.

**13. Will NIC and pension contributions be covered?**

A claim can be made under the CJRS until 31 July for class 1 employers' NICs paid by the employer on the grant that covers 80% of employees' usual monthly wage costs up to a maximum of £2,500 a month for each employee. If employers top up their employees' wages, they are not able to reclaim the employer NICs on the uplift.

The method of calculating the employers' NICs will vary depending on whether the employee was furloughed throughout the pay period and whether their pay was being topped up by the employer. HMRC's guidance provides a step-by-step process on the different methods of calculation.

If an employer is also claiming the employment allowance, an adjustment will be required to ensure they are not over-claiming under the scheme. The amount claimed should not exceed the employer NIC due to be paid.

Employers are still required to pay pension contributions in respect of furloughed employees and until 31 July are able to claim for these up to the mandatory level of employer contribution. This is the case even when contributions are made outside of the auto-enrolment pension. Again, employers cannot claim for contributions if none are made or are due to the employee, nor for those that an employer willingly pays in excess of the mandatory employer contribution.

**Application issues**

**14. How do we cope with differing pay intervals?**

An employer can decide the length of a claim period. Usually, this will be determined by how frequently they run their payroll but the claim period does not need to match a payroll period and employees can be included in a claim period even if they have not been furloughed for three weeks in that period. In some instances, employers may run payrolls at different intervals, for example an employer may pay some employees on a weekly basis and some on a monthly basis.

It is not possible to make more than one claim for a claim period. Thus, all the employees for whom the firm wants to claim furlough in that period should be included in one submission. The employer will not be able to make another claim for the same period or one that overlaps nor, at the time of writing this article, is it possible to amend a claim once it is submitted. HMRC has said that it is looking into developing a process that will allow amendments to be made.

In the example of an employer paying employees on a weekly and monthly basis, it may be simpler to operate claim periods on a monthly basis. The employer would make claims for four and a bit weeks for weekly paid employees and one month for the monthly employees all in the same single claim. This will undoubtedly have its cashflow drawbacks at the benefit of simplifying the submission process.

**15. Can a claim be made for directors with an annual pay period?**

Employers may still claim for directors who are paid annually as long as they meet the conditions for furloughing (see response to question 3). In particular, an RTI submission relating to a payment of earnings for the director in 2019-20 must have been made to HMRC on or before 19 March 2020.

This will be an issue for those on an annual pay period if the last payment notified through RTI was before 5 April 2019 and no further payments were notified until after 19 March 2020. There is an obvious discrepancy between employers who ran an annual payroll in the first month of the tax year, and will therefore qualify, and those who waited until the last month of the tax year and will not qualify.

## Real life scenarios

### 16. What is the effect of a transfer of undertaking?

A business acquired employees under the Transfer of Undertakings (Protection of Employment) regulations ( TUPE ) on 19 February 2020 with the first pay day being 15 March 2020. Unfortunately, the RTI in respect of the employees was filed late (after 19 March 2020). Is the employer able to claim furlough for the acquired employees?

The Treasury direction states that if employees are employed by one employer on 19 March and are transferred to a new employer after that date under the TUPE rules, the new employees can be furloughed by the new employer.

HMRC's guidance for employers added to this stating that a new employer is eligible to claim under the CJRS for the employees of a business transferred after 28 February 2020 where either the TUPE or PAYE business succession rules apply. It is not clear whether employees transferred between 28 February and 19 March will only be eligible if their new employer made an RTI submission on or before 19 March.

In this case, because the employees were transferred before 28 February, the general requirements must be met to place an employee on furlough, including the submission of an RTI notifying payment for that employee to HMRC on or before 19 March 2020. Unfortunately, because this condition has not been met, the employer is not eligible to claim furlough for these employees.

### 17. How are system problems resolved?

An agent was completing a claim but was shut out of the system. On re-entering the portal, the agent was unable to access the previous claim or create a new one for the same dates, the system already recorded a claim for that period. What can be done to resolve this issue?

Unfortunately, there is little guidance or support in such a situation. The online portal created by HMRC is not forgiving in that, once a claim has been submitted, it cannot be amended. HMRC is working on a process to allow amendments to be made but, at the time of writing, no such process exists.

There is always the option of contacting HMRC by phone, however it is running a reduced service due to Covid-19 and is, as can be imagined, receiving a high number of calls.

One possible solution – not condoned by the authors – would be to create a new single day claim period following that in which the error arose. The desired claim could be made in full in that single day period while drawing HMRC's attention to the issue.

### 18. What is the effect of a business closure?

A pub owner, following the government guidance, closed their business on 20 March when the staff were placed on furlough. Until this date the employees were still working. Is the employer able to claim under the CJRS from 1 March or the 20 March?

Although the CJRS was backdated to operate from 1 March 2020, because it was intended to support all those employed at that time, claims can only be made for those periods when employees were on furlough. A claim cannot be made for periods before the date the first employee was first furloughed. Many had not heard of furlough until late March, but employers may have asked employees to stay at home on full pay before this date without realising until later that they had furloughed their staff.

In this case, because the employer did not agree to furlough their staff until 20 March and they were still working for the employer until then, the employer will only be eligible to claim under the CJRS from 20 March onwards.

### 19. Can pay be reduced below minimum wage levels?

A business has placed its employees on furlough, some of whom are paid minimum wage. Is the employer able to vary the employment contract of these employees to reduce their pay to 80%, even if this brings their wage below the national living wage or national minimum wage?

Individuals are entitled to the national living wage (NLW) or national minimum wage (NMW) for hours they are working or considered working as defined in the National Minimum Wage Act 1998.

HMRC's guidance for employers states that furloughed employees are not undertaking 'work' under the minimum wage rules, and so do not have to be paid the NLW or NMW rate while in a furloughed status.

However, if an employee undertakes training while furloughed, they may be classed as undertaking work and should have their pay topped up by their employer to the NLW or NMW rate for that period.

### 20. Can an already struggling business furlough staff?

A business was already struggling before the impact of Covid-19, are they able to furlough their staff and claim under the CJRS?

Although the guidance for employers states that 'all employers are eligible to claim under the scheme', both the guidance and the Treasury direction note that a requirement to place an employee on furlough is that the instruction given to the employee to cease all work is given by reason of circumstances arising as a result of Covid-19.

Companies under the management of an administrator can access the scheme as long as those conditions mentioned in the response to item 2 are met and there is a reasonable likelihood of the employees being rehired.

If a business is in the process of winding up, the question arises as to whether the employees are being instructed to cease all work as a result of Covid-19 or the winding-up. In such a case, it is unlikely that the employees will be eligible to be placed on furlough, and thus the employer would not be able to claim under the CJRS.



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