

CORONAVIRUS: UPDATED BRIEFING: UK JOB RETENTION SCHEME, REMUNERATION AND EMPLOYEES

BACKGROUND

As part of its measures to help UK employers, the UK government announced the **Covid-19 Job Retention Scheme (CJRS)** at the beginning of March to help alleviate pressure on payroll costs. Under the CJRS, all UK employers can access support to continue paying part of their wage costs for individuals who are 'furloughed'. The HMRC online system for reimbursement is currently expected to be in place by the end of April 2020. Further guidance was published by the UK government on 26 March 2020, 4 April 2020 and 9 April bringing some further clarity, but a number of areas of uncertainty remain.

This briefing provides an update on how the CJRS operates following the 9 April guidance. Key updates from the guidance are highlighted in **bold**.

There is of course a similar scheme for self-employed individuals that is outside the scope of this briefing. There are also other schemes put in place globally and it is worth any international employers considering locally available schemes.

In terms of other updates, helpful clarity has been received from the OECD and HMRC on cross-border working and tax matters. This is summarised below under 'Broader pay and employer tax issues'.

How does the Scheme work?

- Starts at the end of April 2020 but backdated to 1 March 2020
- Runs for 3 months initially, but may be extended
- To qualify, businesses will need to designate and notify in writing qualifying individuals that they are 'furloughed' (see below)
- Information needs to be sent to HMRC about furloughed individuals and their earnings (when systems are ready)
- HMRC will reimburse 80% of any regular payments the employer is obliged to pay to the individual (including wages, past overtime, fees and compulsory commission payments) up to a cap of £2,500 per individual per month
- All UK businesses are eligible, there is no limit on the size of the organisation or their financial viability

KEY ISSUES FOR EMPLOYERS

What is 'furlough'?

Someone who is 'furloughed' is put on paid leave of absence by their employer. Under the CJRS, a 'furloughed' individual cannot do any work for the business at all, so reducing the working hours will not be enough to qualify.

Individuals who are furloughed can take on volunteering work or training, as long as they do not provide services or generate revenue for the employer in doing this. **NEW: The updated guidance clarifies that this includes providing services to or generating income for any linked or associated organisation**

Individuals can also work for third parties, subject to the terms of their contract with their furlough employer.

Employers cannot retrospectively designate a period as furlough if employees were working. Claims should start from the date that the employee finishes work and starts furlough and not when the decision to furlough is made.

Periods of furlough for affected individuals must be a minimum length of 3 weeks. It is possible for employers to 'stop and start' furlough, provided each furlough period respects the minimum 3-week period for an individual.

How does this impact employment rights?

An employee's employment rights should be unaffected by the period of furlough, and holiday will continue to accrue.

: Furloughed employees can be paid less than the National Minimum Wage, unless they undertake training during the furlough leave.

A key question for employers is whether placing employees on furlough requires their consent and what impact this has on the rights of the employee under the employment contract.

Placing employees on furlough on full pay, whilst maintaining benefits and terms and conditions in accordance with the contract, will be possible in most circumstances without consent.

By contrast, placing an employee on furlough on reduced pay (to reflect the cap imposed by the UK government) without consent is more difficult. The consequences of getting this wrong could be significant - employees could claim constructive dismissal or remain in employment and claim the balance as an "unlawful deduction from wages", making the employer liable to "top up" the wages in full at a later date and potentially liable for any financial loss attributable to the deduction (e.g. overdraft fees and bank charges).

How are employees selected?

Where a business remains operational, the employer may need to furlough some but not all of its employees, which may lead to some difficult decision making. Equality, discrimination and other employment laws continue to apply in the usual way to decision making processes. As a result, objective selection criteria must be applied to determine which employees will be furloughed. Where more than 20 employees are involved, consideration must

be given to whether collective redundancy consultation will be triggered by the furlough process; or if not, whether it will nevertheless have to be started during the furlough period.

How should employers document furlough arrangements?

Depending on whether the employer will top up salary during furlough, it may need to reach agreement with impacted employees, including consequential changes to the relevant employment contracts. As part of this, and to be eligible for the CJRS, employers will also need to write to their staff confirming that they have been furloughed and keep a record of employee comms.

The guidance confirms that this record must be kept for a period of five years.

If a company director is to be furloughed, a formal board decision is needed, noted in the company records, and communicated in writing to the director(s) concerned.

If an LLP member is to be furloughed they too must be notified in writing. In addition, depending on the terms of the furlough, it may also be necessary to amend the terms of any applicable LLP agreement.

What counts as wages?

Employers will be able to recoup the lower of 80% of an employee's 'regular wage' or £2,500 per month, plus the associated employer NICs and minimum automatic enrolment employer pension contributions on that wage (for monthly paid employees, currently 3% on the subsidised wage above £520 per month).

NEW: The updated guidance clarifies that grants for pension contributions can be claimed up to this cap provided the employer will pay the whole amount claimed to a pension scheme for the employee as an employer contribution.

For full time and part-time employees, the employee's actual base salary before tax, as of 28 February 2020, should be used for the wage calculation.

For individuals whose pay varies, the wage on which grant can be claimed is as follows:

- Individuals employed for a full 12 months → the higher of:
 - (i) the same month's earnings from 2019; or
 - (ii) the average monthly earnings from the 2019-20 tax year.
- Individuals employed for less than a year → the average monthly earnings since starting work.
- Individuals who started in February 2020 → work out a pro-rata for their earnings so far.

This can include any regular payments such as past overtime, fees and compulsory commission payments. Discretionary bonus (including tips), commission payments and non-cash payments are not included for the purposes of claiming under the CJRS. The reference salary used should not include non-monetary benefits, including taxable benefits in kind but directors' fees paid via PAYE are included.

Can employees on sick leave be furloughed?

Employees cannot be furloughed whilst receiving Statutory Sick Pay (SSP), but they can be furloughed under the CJRS once they are no longer receiving SSP.

NEW: The updated guidance sets out further clarity on the interaction of sick pay and the CJRS. It clarifies that if an employee becomes sick while furloughed; the furlough leave is not automatically ended; it is up to the employer to decide whether to move the employee onto SSP or to keep them on furlough. From a practical perspective, if only SSP is available and the employer is not topping up the furlough pay it is highly questionable why the employer would move the employee from furlough leave to sick leave; particularly as there is a risk that if this will result in an interruption to the minimum 3 week furlough period, it is unclear whether this will undermine the employer's ability to recover the employee's wages for the furlough period prior to sick leave.

NEW: Employees currently on sick leave (short or long term) can be furloughed; it is up to the employer to decide. However where the employee is furloughed they can no longer receive SSP.

How will the reimbursement work in practice?

The CJRS is a 'reimbursement' meaning that an employer must pay an individual first through PAYE (deducting income tax and NICs in the usual way) and then reclaim costs from HMRC, with the reimbursement paid directly to the employer. The government has indicated that businesses should look to the Covid-19 Business Interruption Loan Scheme to support cash flow in the interim.

If appropriate, worker's wages should be reduced to 80% of their salary within the employer's payroll before being paid, as this adjustment will not be made by HMRC.

Which individual employees are covered?

Furloughed individuals must have been on the payroll (i.e. paid via PAYE) on 28 February 2020 to qualify. This includes full-time and part-time employees, employees on agency contracts and those on flexible arrangements and zero-hour contracts.

The CJRS covers any employees whose employment ended (for whatever reason: resignation, redundancy or otherwise) after 28 February 2020 if they have since been rehired. Any employees who were hired after 28 February cannot be included.

The CJRS covers not only employees but also any of the following if they are paid via PAYE: office holders (including company directors), salaried members of Limited Liability Partnerships (LLPs), agency workers (including those employed by umbrella companies) and limb (b) workers (broadly individuals who engaged under contracts of personal service and are not supplying their services in a professional capacity). Apprentices and foreign nationals may also be part of the CJRS.

What if an employee earns more than £2,500 per month?

Employers can choose to fund the difference between the CJRS payment and an individual's salary, but do not have to. If an employer chooses not to, it will need to amend the individual's contract to reflect their revised salary whilst furloughed to avoid being exposed to a claim for constructive dismissal or unlawful deduction of wages. Any employer NICs or pension contribution on these additional amounts will of course not be refunded through the CJRS.

What about directors?

A company director may also be furloughed. A furloughed director can perform their statutory obligations, provided they do no more than is reasonably necessary for that purpose. They should not generate commercial revenue or provide services to or on behalf of their company.

Can employees on visas be furloughed?

NEW: The updated guidance clarifies that foreign nationals on visas can be furloughed as the CJRS does not qualify as accessing public funds that would otherwise invalidate the visa.

What about other contractual pay and benefits?

The employer will continue to be liable for contractual benefits such as health and life insurance policies and any other cash allowances such as cash in lieu of pension contributions, unless an employee agrees otherwise. Careful consideration of the terms of any scheme should be given to ensure that the furlough rate of pay does not adversely impact on such benefits by inadvertently forming the basis of calculation.

In terms of pensions contributions, minimum automatic enrolment pension contributions may be deducted from the individual's pay whilst on furlough. However, it is not clear whether higher employee pension contributions or pension contributions by way of salary sacrifice may be deducted from an employee's pay whilst furloughed.

What about salary sacrifice?

Post-sacrifice salary is the reference salary for the CJRS. Note also that the current Coronavirus crisis counts as a 'life event' that could warrant changes to salary sacrifice arrangements.

NEW: The updated guidance emphasises that the entire CJRS grant must be paid to furloughed employees in the form of money. No part of it can be netted off to finance benefits or a salary sacrifice scheme

What's the tax treatment of payments made to employers made under the CJRS?

Payments received by employers under the CJRS should be included as income in the business's calculation of its taxable profits for income tax and corporation tax purposes. On the basis that the payments of wages out to employees should be tax deductible, this should result in a tax neutral position for the employer.

NEW: Can the CJRS be accessed if there has been a payroll consolidation after 28 February?

Where a group of companies have multiple PAYE schemes and there is a transfer of all employees from these schemes into a new consolidated PAYE scheme after 28 February 2020, the new scheme will be eligible to furlough those employees and claim under the CJRS.

What about TUPE transfers/PAYE successions?

Many companies are concerned about their ability to claim under the CJRS where employees have moved to a new employer post-28 February 2020 as a result of a TUPE transfer.

NEW: The updated guidance states that the new employer (transferee) can claim under the CJRS in respect of employees who TUPE transfer after 28th February 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership. It should be noted that PAYE succession is something HMRC has to agree applies and a company cannot take its own decision on it.

NEW Can the CJRS be accessed by an employer who uses a payroll agent?

Where an employer uses an agent that is authorised to act for it for PAYE purposes, it will be able to make a claim on its behalf. If an employer uses a file only agent (that files its Real Time Information return but doesn't act for the employer on any other matters) the agent won't be authorised to make a claim; this will have to be made by the employer itself.

Broader pay and employer tax issues

In these uncertain and worrying times, companies are considering a broad range of other responses to adapt to the new environment.

Calling for PAYE/NICs holiday:

There is no proposal from the government as yet, but many businesses are calling for a 3-month PAYE and NICs holiday to be introduced. If implemented, this would be similar in nature to the extended business rates holiday that has already been introduced for certain businesses. For businesses in real financial distress, the government has also indicated that HMRC's Time to Pay service may offer support with outstanding tax liabilities.

Conserving cash and setting pay:

Businesses are working through difficult issues around executive and wider employee pay, including considering pay cuts or freezes, zero or reduced bonuses and how best to deal with performance-related pay.

Trends we are seeing and discussing with companies include many of those seen during the global financial crisis of 2008 onwards.

- For performance-related pay, including performance against any Covid-19 related business plans as one of the performance measures for 2020.
- Ensuring businesses have enough flexibility in bonus and long-term incentive plans to increase or decrease pay outs in the future. Being clear on the powers and discretions here, particularly when communicating with employees, is key.
- Amending or revisiting existing performance targets where it is clear that targets previously agreed no longer offer any incentive.
- Suspension of performance-related pay at senior levels, particularly in light of shareholder advisers Pirc writing to 4,000 listed companies globally urging them to suspend payments (other than salary) to their executives from April until the end of the financial year.
- Director and senior executive pay cuts.
- Conserving cash by paying employees and directors in shares and other instruments.
- New incentive arrangements, especially for businesses actively involved in tackling Covid-19 where specialist skills, expertise or simply manpower are at a premium.

NEW - Employees in different places – Cross border tax

Current travel restrictions have meant that many workers are unable to physically work in their normal country of employment. This unprecedented situation has led to many related tax headaches for employers:

- A change in place of work may affect where and how individuals are taxed and there has been concern about unexpected tax consequences for employees and employers alike due to Coronavirus displacement.
- The Organisation for Economic Co-operations and Development (OECD) has now issued guidance saying that the current exceptional circumstances call for an exceptional level of co-ordination between countries to mitigate any unplanned tax implications.
- In the UK, HMRC has confirmed that individuals who are quarantined, who have been advised not to travel from the UK, or where international borders are closed can disregard days spent working in the UK in these circumstances for UK tax purposes.
- The OECD has also confirmed that it is unlikely that a change in place of work as a result of the Coronavirus crisis would affect the tax residence status of individuals.
- Helpfully, the OECD has confirmed that where a government has stepped in to subsidise an employee's wages (as in the case with the CJRS), the income the employee receives from the employer should be attributable to the place where the employment is normally carried out.

Broader employment issues

Issues that employers are grappling with go well beyond the Job Retention Scheme including:

- Dismissing employees engaged since 1st March 2020 (who are not covered by the Furlough scheme).
- The practicalities surrounding remote redundancy consultation (collective and individual).
- Whether there may be “lay-off” provisions which enable them to send workers home without pay for a designated period or “short-time” working providing for reduced hours and pay.
- Savings by the reduction of contractors, workers and dialling down time on zero hours contracts,
- Variations to the contract to reduce pay or other benefits with consent or without (having regard to contractual and statutory requirements when doing so or the need to engage in collective consultation).
- Employee holiday, can they be required to take it during designated periods, when do employees have a right to roll over to future years under the new legislation in this area?
- Home working and the employers' duties, equipment needs, safe system of work and reasonable adjustments for those with long term disabling conditions.
- Guidance from applicable regulators and/or the Health & Safety Executive on home working.

CONTACTS



Sonia Gilbert
Partner
London

T +44 (0)20 7006 2041
E sonia.gilbert@cliffordchance.com



Andrew Patterson
Partner
London

T +44 (0)20 7006 6160
E andrew.patterson@cliffordchance.com



Catrin Wright
Head of Practice
Development –
Incentives, London

T +44 (0)20 7006 2920
E catrin.wright@cliffordchance.com



Michael Crossan
Partner
London

T +44 (0)20 7006 8286
E michael.crossan@cliffordchance.com



Chinwe Odimba-Chapman
Partner
London

T +44 (0)20 7006 2406
E chinwe.odimba-chapman@cliffordchance.com



Alistair Woodland
Partner
London

T +44 (0)20 7006 8936
E alistair.woodland@cliffordchance.com



Clare Hoxey
Partner
London

T +44 (0)20 7006 8899
E clare.hoxey@cliffordchance.com



Tania Stevenson
Knowledge Director
London

T +44 (0)20 7006 8938
E tania.stevenson@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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