

# The Coronavirus Job Retention Scheme



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## The Coronavirus Job Retention Scheme – What we know now

By now, we are all aware of the Coronavirus Job Retention Scheme (CJRS or “the Scheme”), which allows employers to claim back 80% of the wages (up to £2,500 per month) of employees who have been “furloughed” (put on a leave of absence) in response to the COVID-19 pandemic.

Since the Scheme was first announced on 20 March, we’ve had guidance from HMRC on the details from both an [Employer](#) and [Employee](#) perspective, which have both been updated several times, most recently on 15 April 2020. HM Treasury has now issued a [Direction](#) to HMRC under powers conferred by the Coronavirus Act 2020. This is likely to be the definitive guidance on how the CJRS works.

Here, we seek to consolidate the key points from all the guidance in a comprehensive, “user friendly” guide to the CJRS. Of course, there are many fact-specific questions arising from the CJRS and we would encourage you to seek legal advice in relation to any queries that you may have.

### 1. Who can claim?

- a. Broadly speaking, the Scheme is open to all UK employers that have a UK bank account and had a PAYE scheme registered on HMRC’s real time information (RTI) system for PAYE on or before **19 March 2020**. This includes businesses, charities, recruitment agencies with agency workers paid through PAYE, and public authorities.
- b. The guidance makes it clear that it is not expected that public authorities will use the scheme as long as the government continues to fund wage costs in the usual way, and this expectation also applies to non-public sector employers who receive public funding for staff costs. However, in a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the Scheme may be appropriate for some staff.
- c. Where a company is in administration, the administrator will be able to access the CJRS. However, it is expected that an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers in light of, for example, an anticipated sale of the business.
- d. The CJRS is not limited to those employees who would otherwise be made redundant. It applies in respect of “furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease”.
- e. The CJRS is open for at least 3 months starting from 1 March 2020. Eligible employers can use this scheme at any time during this period.

### 2. Which employees can you claim for?

- a. The scheme covers the following individuals, whether they are employees or workers, provided that they were on a UK employer’s PAYE payroll on or before **19 March 2020** and were notified to HMRC on an RTI submission on or before 19 March 2020 (this means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020):
  - i. Full-time employees.
  - ii. Part-time employees.
  - iii. Employees on agency contracts.
  - iv. Employees on flexible or zero-hour contracts.
  - v. Apprentices (provided that they are paid at least the applicable apprenticeship national minimum wage rate for all the time they spend training).

- b. Non-UK nationals can be furloughed by a UK employer. Grants under the scheme are not counted as “access to public funds” and an employer can furlough employees on all categories of visa.
- c. Employees who were made redundant, or left employment for any reason, since 28 February 2020 can qualify if they are re-engaged by their former employer, even if that re-engagement does not take place until after 19 March, as long as they were on the payroll on 28 February and had been notified to HMRC on an RTI submission on or before 28 February.
- d. There has been conflicting information about this, but the Direction indicates that employees who are on sick leave or self-isolating should get Statutory Sick Pay but can be furloughed afterwards. If an employee becomes sick during furlough then it is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate.
- e. Employees 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) can be furloughed.
- f. Employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed (e.g. employees that need to look after children).
- g. Employees on unpaid leave cannot be furloughed, unless that unpaid leave started after 28 February 2020. If the unpaid leave started after 28 February, then they can be furloughed instead. If they are furloughed they should be paid at least 80% of their regular wages, up to the monthly cap of £2,500.
- h. Where an employee has more than one job, their employments are treated separately for the purposes of furlough leave, and the reimbursement cap applies to each employer individually.
- i. Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the CJRS. Where a fixed term employee’s contract ends because it is not extended or renewed then the employer will no longer be eligible for the grant.
- j. The 9 April 2020 update to the guidance states that employees returning from statutory leave, including maternity, paternity, shared parental leave, adoption leave, sick leave and parental bereavement leave, can be furloughed. Therefore, some employees who started a period of unpaid statutory leave before 28 February 2020 can be furloughed. The guidance further confirms that the furlough pay for those employees should be calculated in accordance with their normal salary, not the pay they received while on statutory leave. However, it suggests that the furlough pay of employees on variable pay should be calculated based on the same month’s earnings from the previous year, or the average monthly earnings for the 2019-20 tax year.
- k. Employees who have transferred under TUPE after 19 March 2020 can be furloughed by the new employer.
- l. The 4 April 2020 update clarified that some individuals who may not be employees under employment law will be eligible for the CJRS. It provides that the grant can be claimed for the following groups, if they are paid via PAYE:
  - i. Office holders (including company directors)
  - ii. Salaried members of limited liability partnerships (LLP).
  - iii. Agency workers (including those employed by umbrella companies).
  - iv. “Limb (b) workers”.

The Employer guidance contains the further comment on each of these groups.

### 3. What can the employer claim back?

- a. Employers can claim up to the lower of 80% of usual monthly wage costs or £2,500 per employee, **plus** the associated employer national insurance contributions and minimum auto-enrolment employer pension contributions on the capped furlough pay (The guidance makes it clear that these payments can be reclaimed in addition to the cap).
- b. The sum paid to the employee during furlough is gross and then subject to income tax and national insurance in the usual way. Employees will also pay pension contributions unless they have chosen to opt-out.
- c. The previous version of the guidance stated that fees, commission and bonuses should not be included in the calculation. However, since the guidance was updated on 4 April 2020 it has stated that the employer can claim for "any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded."
- d. Non-monetary benefits, including taxable benefits in kind, should not be included in the reference salary. This includes benefits which are provided through salary sacrifice schemes, including pension contributions, that reduce an employee's taxable pay. The guidance provides that where the employer provides benefits to the furloughed employees, this should be in addition to furlough pay.
- e. The 9 April 2020 update to the guidance confirms that all the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme.
- f. In the Treasury's Direction it states that the employer cannot claim for any salary which is "conditional on any matter". This may exclude any salary payments which the parties have agreed are conditional on the Job Retention Scheme paying out.
- g. The employer can claim for earnings which it "reasonably expects to be paid" to the employee - that seems to include deferred earnings, deferred until the Scheme pays out (provided they are not *conditional* on the Scheme paying out).
- h. The maximum level of grant for employer pension contributions on subsidised furlough pay is set in line with the minimum automatic enrolment employer contribution of 3% on qualifying earnings. 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.
- i. Employees on maternity (or similar) leave can continue to draw SMP (or similar) payments. If you offer enhanced maternity pay to women on maternity leave, this is included as a wage cost that you can claim through the scheme.
- j. Claims should only be made from when the employee finishes work for the employer, not from when they are written to, or when they confirm their agreement in writing.
- k. Employers can only claim once every three weeks, i.e. they cannot get weekly reimbursement. Claims can be backdated to 1 March 2020.

#### 4. How is the 80% of salary calculated?

- a. The way you work out your employees' wages is different depending on what type of contract they're on, and when they started work
  - i. If an employee has regular earnings - The furlough pay for full or part time salaried employees should be 80% of their gross salary, as in their last pay period prior to 19 March 2020. If, based on previous guidance, employers have calculated their claim based on the employee's salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020), the employer can choose to still use this calculation for their first claim.
  - ii. If an employee has irregular earnings – If the employee has been employed (or engaged by an employment business) for a full 12 months prior to the claim, the employer can claim for the higher of either:
    - The same month's earning from the previous year.
    - Average monthly earnings from the 2019-20 tax year.

If the employee has been employed for less than a year, the employer can claim for an average of their monthly earnings since they started work.

If the employee started employment in February 2020, their earnings so far should be pro-rated.
- b. As we explained above, past overtime, fees and compulsory commission payments can be included provided that they are "regular payments" but discretionary payments and non-cash payments should be excluded.
- c. The employer will need to do this calculation before it agrees furlough leave with the employee because they are agreeing to a contractual variation in terms of payment and will want to ensure that they do not commit to payment in excess of that which may be recovered from HMRC.
- d. Some employers may take the view that those casual or zero hours workers and employees who are not guaranteed work from the employer do not need to be put on furlough leave at all because the employer can instead simply refrain from offering them work. However, this approach is not in the spirit of the scheme which intends to ensure that employees and PAYE workers retain a basic income during the crisis stages of the pandemic.
- e. Employees on furlough leave do not need to be paid national minimum wage (NMW) with reference to their normal working hours (with the exception of apprentices who need to be paid the appropriate rate for all the time they spend training). However, if they undertake any online training then they must be paid the NMW in respect of those training hours (although their furlough pay may satisfy that requirement).

#### 5. What steps must employers take to put employees on furlough leave?

- a. Employers should discuss the proposal with staff and make changes to the employment contract by agreement.
- b. It is a condition of eligibility for reimbursement that the employer and the employee must have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work. Employers will therefore need to ensure that employees confirm their agreement to the furlough in writing, and that the written agreement specifically instructs the employee to cease all work in relation to their employment. This needs to be kept for 5 years.

- c. Furlough leave must be taken in minimum blocks of 21 calendar days to be eligible for funding. Employees can be furloughed multiple times, provided they are furloughed for the minimum period of 21 calendar days at a time.
- d. Employers are entitled to continue paying full pay during furlough leave, but they are not obliged to do so. If they do top up, they can only claim back employer national insurance contributions and minimum auto-enrolment payments up to the cap.

Withholding 20% of an employee's salary will, however, amount to breach of contract and unlawful deduction of wages unless the employee gives their consent. It is expected that the majority of employees will consent since furlough leave is a better alternative than unpaid leave, lay-off or redundancy.

- e. It is critical to ensure that the employees do not carry out any further work for that employer, or any linked or associated employer, while they are furloughed.
- f. If sufficient numbers of employees are involved and it is anticipated that you will terminate contracts if employees do not agree to furlough, then it may be necessary to engage in collective consultation to procure agreement to change the employees' terms.
- g. Employees can be furloughed multiple times, subject to the minimum three consecutive week (21 calendar days) period.

#### **6. How does the employer make a claim?**

- a. HMRC are creating a portal which employers can claim through. This is expected to be up and running by 20 April.
- b. Employers will then need to submit information to HMRC about the employees that have been furloughed and their earnings through the new online portal,
- c. It will be for the employer to calculate the amount they are claiming, HMRC will retain the right to retrospectively audit all aspects of the claim.

#### **7. What happens during furlough leave?**

- a. Furloughed employees retain their statutory rights, including statutory sick pay, maternity and other parental rights, rights against unfair dismissal and redundancy payments.
- b. A furloughed employee may work for another employer. However, the employee cannot do work for the employer seeking the reimbursement during furlough, and it cannot ask them to do work for another linked or associated business. Also, the employee's contract of employment will continue during furlough leave so any enforceable restrictions on working elsewhere during employment will continue to apply. However, in the circumstances, employers may consider relaxing any such restrictions to allow employees to take up a role with a non-competing business with their prior consent.
- c. Employees on furlough leave can do volunteer work. This assumes that the volunteering in question is not for the employee's employer and being used to circumvent furlough leave but receive reimbursement of wages. That would likely be regarded as fraud and the government has explicitly identified the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claims.

- d. A furloughed employee may also undertake training for the employer seeking the reimbursement. This assumes that the training is not used by the employer to generate revenue as a way of circumventing furlough leave. If the employer requires the employee to complete training during furlough then this will not bring their furlough leave to an end, but they must be paid the national minimum wage in respect of the training. However, the furlough payment will be taken into account in determining whether national minimum wage requirements have been met in terms of the training hour so, unless a significant amount of training is undertaken, this will normally satisfy this requirement. If the employer intends to require the employee to undertake online training during furlough leave, then this should be agreed with the employee and reflected in the correspondence confirming furlough leave.
- e. Although not mentioned in any of the “official” guidance, it is our view that an employee may request, or be given the necessary notice, to take annual leave. While on annual leave, they should be paid at their normal rate of salary, rather than their reduced “furlough” salary.

We hope you find this guide helpful, and we will look to continue to update it as and when we receive more information following the launch of HMRC’s portal.

In the meantime, if you have any questions contact a member of our employment team via the contact details below:

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