



# UPDATE: CORONAVIRUS JOB RETENTION SCHEME

6 April 2020

## Introduction

Initial government guidance on the Coronavirus Job Retention Scheme (CJRS) was published on 26 March 2020. We gave an overview in a [previous briefing](#).

On 4 April 2020, the government published revised versions of its guidance for employers (available [here](#)<sup>1</sup>) and employees (available [here](#)<sup>2</sup>).

This briefing provides an overview of the operation of the CJRS, noting the key changes in the revised guidance, as well as some areas where uncertainties remain.

As a reminder, the CJRS is a grant scheme, administered by HMRC, designed to help employers keep employees on the payroll if as a result of COVID-19 they are unable to operate or have no work for the employee to do. This is known as being 'on furlough'.

## Which employers are eligible?

The CJRS is open to any entity with a UK bank account and PAYE payroll scheme in place on 28 February 2020. The employer must have enrolled for PAYE online - this can take up to 10 days.

The revised guidance states that the CJRS is designed to help employers whose operations have been severely affected by COVID-19 to retain their employees. However, it then goes on to confirm that *"all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus"*.

## Companies in administration

The revised guidance states that, although an administrator can access the CJRS, HMRC would expect an administrator to access the scheme only if there is "a reasonable likelihood of rehiring the workers". This is likely to be a difficult test for administrators to satisfy in the current climate, unless there is an imminent sale of the business or other outcome which will protect jobs.

## Which employees can be claimed for?

An employer can claim for any employees who were **on the PAYE payroll on or before 28 February 2020** (whether full-time, part-time, fixed-term, or on zero hours or flexible contracts), and who are designated by the employer as furloughed.

To be eligible for the grant, **employers must confirm in writing** to their employee that they have been furloughed. A record of this communication must be kept for five years.

<sup>1</sup> <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

<sup>2</sup> <https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme>

The revised guidance clarifies that the CJRS also covers employees who were made redundant, or otherwise stopped working for the employer, on or after 28 February, provided that they are **re-hired** by the former employer.

The revised guidance notes that foreign nationals are eligible to be furloughed.

There is some further information in the revised guidance on the position of employees who are on sick leave or self-isolating:

- Employees who are receiving **statutory sick pay (SSP)** cannot be claimed for. This will be possible only once they are no longer receiving SSP. Since SSP is payable for up to 28 weeks, the CJRS may therefore be of limited use to employees on sick leave or who are self-isolating, and the position of those on contractual sick pay remains unclear.
- Employees who are **shielding** in line with **government guidance**<sup>3</sup> can be claimed for if they are unable to work from home and the employer would otherwise have to make them redundant. The same applies to employees who need to stay home with someone who is shielding.

The revised guidance states (as did the earlier guidance) that employees on **unpaid leave** are not eligible, unless they were placed on unpaid leave after 28 February. This may include employees who were taking unpaid dependants leave to look after children or elderly relatives. The revised guidance states that employees who are unable to

work because they have caring responsibilities resulting from COVID-19 can be furloughed.

Employees taking paid **family leave** (maternity, paternity, adoption or shared parental) will be eligible. Employers can already reclaim the majority of statutory pay for these types of leave from HMRC, and would be able to reclaim any enhancement through the CJRS (subject to the limits set out below). However, the interaction of paid leave, such as maternity leave, and a furlough period remains unclear: will a period of furlough leave bring maternity leave, for example, to an end? The latest guidance does not clarify this point.

Although the CJRS is aimed at employees who would otherwise be made redundant, there is no requirement for the employer to demonstrate this as a condition of obtaining the grant - other than, it seems, in relation to shielding employees, as noted above.

There is nothing in the guidance which prohibits **rotating furlough designation** amongst employees, provided each employee is furloughed for a period of at least three consecutive weeks.

### Other eligible individuals

The revised guidance helpfully clarifies that an individual does not have to be an "employee" for employment law purposes to be eligible for the CJRS, provided that person is paid through PAYE. There is now specific guidance to confirm that the following individuals can be furloughed:

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<sup>3</sup> <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#what-is-shielding>

[covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#what-is-shielding](https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#what-is-shielding)

- **Office holders, including salaried company directors.** The furlough arrangements should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned. Furloughed directors can undertake statutory duties, provided they do no more than would reasonably be judged necessary for that purpose. They should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provide services to or on behalf of their company.
- **Salaried members of LLPs.**
- **Apprentices.**
- **Agency workers,** who must be furloughed by the agency, following discussions with the end user. The agency worker should perform no work for, through or on behalf of the agency that has furloughed them while they are furloughed, including for the agency's clients.
- **Workers** who do not count as "employees", provided that they are paid through PAYE.

## What costs are covered?

The grant from HMRC will cover **the lower of (i) 80% of an employee's pay** (more information below) **and (ii) £2,500 per month.**

The grant will also cover the associated employer National Insurance contributions (NICs) and minimum automatic enrolment employer pension contributions on that subsidised pay (i.e. 3% of income above the lower limit of qualifying earnings (£512 per month until 5 April, £520 per month from 6 April onwards)).

For full- or part-time salaried employees, the reference to 'pay' is the employee's actual gross salary as at 28 February 2020. The revised guidance specifies that this includes any regular contractual payments, such as wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips), commission payments and non-cash payments such as benefits in kind are not reimbursable under the CJRS.

The revised guidance confirms that benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay are also not included in the reference salary, and are therefore not eligible for reimbursement. HMRC will however agree to treat COVID-19 as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly.

For employees on variable pay, the employer can claim for the higher of:

- the same month's earning from the previous year; or
- average monthly earnings from the 2019-20 tax year.

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

The amount paid by the employer to employees is subject to deduction for income tax and NICs in the usual way, as well as student loan repayments. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have

chosen to opt-out or to cease saving into a workplace pension scheme.

Employers can pay employees more than the amount covered by the CJRS (for example, if they are contractually entitled to pay and benefits greater than the amounts covered by the CJRS). Any such additional amounts (and related employer NICs and pension contributions) will not be reimbursed. The Apprenticeship Levy cannot be reclaimed, and remains payable.

## What is the process?

Claims will be made by the employer through an HMRC portal. The portal is expected to be up and running by the end of April.

The employer should make its claim in accordance with the amounts in its payroll - either shortly before or during the time each month that it pays its personnel and operates PAYE. If employers are combining furlough with a reduction in wages, the employer should make that reduction within its payroll before the relevant employees are paid: this adjustment will not be made by HMRC.

The revised guidance clarifies that eligible claims can be made in respect of the period from when the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status. We understand this to mean that if an employee had no work from a date after 1 March 2020, it may be possible to claim for their wages from that date. Claims can be backdated until 1 March only where employees have already been furloughed. Grants will be prorated if the employee is only furloughed for part of a pay period.

Once HMRC have received the claim and established that the employer is eligible for the grant, they will pay grants under the CJRS via BACS payment to a UK bank account nominated by the employer.

HMRC will have the right retrospectively to audit all claims.

## Employee consent

The revised guidance does not state that consent is a condition for eligibility for the scheme; government guidance on consent focuses on changes to the employment contract.

That guidance states that employers '*should discuss with their staff and make any changes to the employment contract by agreement*'. The guidance for employees is more emphatic that '*both you and your employer must agree to put you on furlough*'.

The employer guidance goes on to say that employers may need to seek legal advice on that process and that '*it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment*'. This reflects the underlying legal position, which the government has not sought to alter to the employer's advantage. Where applicable, unions may need to be engaged.

The guidance makes it clear that an employee who refuses an offer of furlough may be at risk of redundancy or termination of employment, depending on the employer's circumstances. However, this must be in line with normal redundancy rules and protections.

### Selecting for furlough

Employers do not need to place all of their employees on furlough. When employers are making decisions in relation to the process, including deciding to whom to offer furlough, equality and discrimination laws will apply in the usual way. Care will therefore need to be taken in selecting employees for furlough from a pool of employees who currently have some work to do

### What happens during furlough?

The minimum length of a qualifying furlough period is three consecutive weeks. An employee can be placed on furlough more than once, and one period can follow straight after an existing furlough period, while the scheme remains open.

During furlough, normal employment rights continue to apply, including SSP entitlement, maternity and other parental rights, rights in relation to unfair dismissal and to redundancy payments. Redundancy pay cannot be claimed under the CJRS, as the revised guidance makes clear.

The position on **annual leave** is not clear, and the revised guidance is silent on this. ACAS has produced separate [guidance](#)<sup>4</sup> which appears to suggest that holiday continues to accrue and may be taken during furlough. It is not yet clear how

holiday taken during a period of furlough would need to be paid.

If it is later clarified that holiday cannot be taken during furlough, meaning that it is not “reasonably practicable” for an employee to take holiday for the purposes of [separate regulations recently adopted by the government](#)<sup>5</sup>, they would become entitled to carry part of that holiday over for the next two years.

A furloughed worker **must not do any work for the employer organisation** (this includes any provision of services or revenue-generation). The revised employee guidance goes further, suggesting that furloughed employees cannot work for **any company linked or associated to their employer**.

Doing **volunteer work or training** is permitted, as long as there is no service provision or revenue generation. The revised guidance suggests that furloughed employees should be encouraged to undertake training, and that employers can agree to find furloughed employees new volunteering opportunities whilst on furlough if this is in line with public health guidance.

If an employee is required to complete training for the employer while furloughed, training time will need to be paid at a rate that meets national minimum wage / national living wage floors, which may require an employer top-up if the 80% or £2,500 amount described above is insufficient.

The revised guidance confirms that **work for other employers is permitted** during furlough (most

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<sup>4</sup> <https://www.acas.org.uk/coronavirus/using-holiday>

<sup>5</sup> <https://www.gov.uk/government/news/rules-on-carrying-over-annual-leave-to-be-relaxed-to-support-key-industries-during-covid-19>

employment contracts would not permit this without consent from the “first” employer). Any employer that takes on a new employee should ensure they complete the [PAYE starter checklist form](#) correctly (and if the employee is furloughed from another employment, they should complete statement C).

If an employee has more than one job, they can be furloughed (and the cap applies separately) by each employer.

## When does furlough end?

As already noted, claims under the CJRS can only be made in relation to furlough periods of at least three consecutive weeks. Subject to that, the employer can bring furlough to an end at any time.

The CJRS will be in place for an initial period of three months ending on 1 June 2020, but the government has said that it may be extended if necessary.

When the government ends the scheme, an employer will need to determine whether an employee can return to their duties. The guidance recognises that it may be necessary to consider termination of employment on the grounds of redundancy, although there is likely to be an expectation that this scheme will help employers avoid such an outcome in return for government support.

## Other implications

There is nothing in the guidance that makes access to the CJRS conditional on an employer not

paying dividends or other remuneration issues. However, messaging and reputational issues will need to be considered by companies that have used the CJRS when considering dividends and how to remunerate their executives.

Payments received by a business under the CJRS are made to offset deductible revenue costs. They must therefore be included as income in the business’s calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.

Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

There are a number of other issues with the operation of the CJRS which remain unresolved by the guidance. If you would like to discuss the implications of these for your business, please speak to your usual Slaughter and May contact.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



**Philip Linnard**

T +44 (0)20 7090 3961

E [philip.linnard@slaughterandmay.com](mailto:philip.linnard@slaughterandmay.com)



**Padraig Cronin**

T +44 (0)20 7090 3415

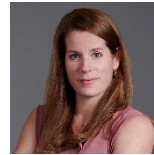
E [padraig.cronin@slaughterandmay.com](mailto:padraig.cronin@slaughterandmay.com)



**Lizzie Twigger**

T +44 (0)20 7090 5174

E [lizzie.twigger@slaughterandmay.com](mailto:lizzie.twigger@slaughterandmay.com)



**Clare Fletcher**

T +44 (0)20 7090 5135

E [clare.fletcher@slaughterandmay.com](mailto:clare.fletcher@slaughterandmay.com)