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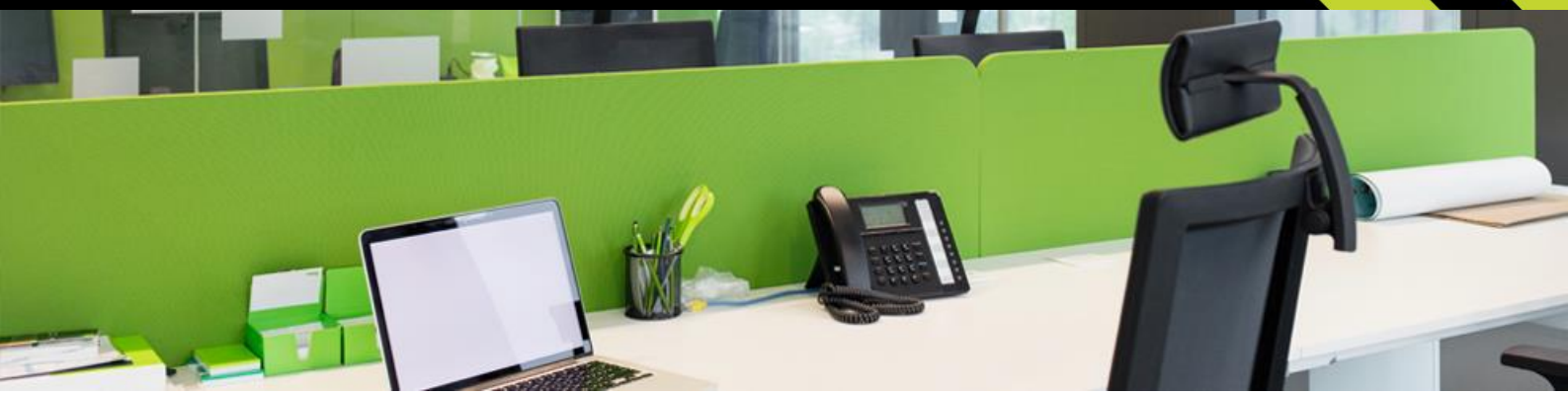

CORONAVIRUS JOB RETENTION SCHEME – WHERE ARE WE NOW?

This document has been written in general terms and may not include all relevant information. This information is not a substitute for taking legal advice on your particular circumstances.

The basics

All UK employers are eligible for this scheme, including businesses, charities, individuals and recruitment agencies (where agency workers are paid through PAYE). The employer must have created and started a PAYE payroll scheme on or before 19 March 2020, enrolled for PAYE online, and the PAYE scheme must have been registered on HMRC's real time information system for PAYE ('a qualifying PAYE scheme') on or before 19 March 2020 in addition to the employer having a UK bank account. Moreover, to qualify for the CJRS for the period 1 July – 31 October 2020, the employer must have made a qualifying CJRS claim on or before 31 July 2020. The guidance makes it clear that where there is public funding for staff costs, the expectation is that the scheme should not be used.

Save for limited exceptions, individuals must have been put on furlough for the first time on or before 10 June 2020 to be eligible for the CJRS.

'Flexible furloughing' was introduced on 1 July and employers are now able to agree with previously furloughed employees that they return to work part-time when on furlough leave. For example, a furloughed employee who normally works five days in a working week may be requested to work two days but not the remaining three days. In such a case, the employee would be paid full pay by the employer for the two days worked and at the furlough rate for the three days not worked. There is no minimum number of hours to be worked and employers may vary the hours each week in accordance with business needs.

The Direction published on 25 June states that "the purpose of CJRS is that the amounts paid to an employer pursuant to a CJRS claim are used by the employer to continue the employment of employees in respect of whom the CJRS claim is made whose employment activities have been adversely affected by the

coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission". There was some debate about whether this meant that employers may no longer be able to claim the grant for an employee's notice period; however, HMRC has subsequently confirmed that as the guidance has stated that employers are able to make redundancies during furlough, employers will be able to claim the CJRS grant for the period of notice (both statutory and contractual), thus reducing the cost of the notice period to the employer. The CJRS cannot however be claimed in relation to any payment in lieu of notice ('PILON').

How much does the Government pay?

Until 31 July 2020, employers can claim a grant of 80% of the wages of employees placed on furlough leave, up to £2,500 per month gross (when paid to the employee this will be subject to deduction of tax and employee national insurance contributions). Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or stopped saving into their pension. Until 31 July, the grant to the employer will also include the associated employer national insurance contributions (NICs) and minimum automatic enrolment employer pension contributions that are paid on the subsidised furlough pay.

From 1 August 2020, employers will be required to pay the employer NICs and pension contributions for the hours the employees are on furlough.

From 1 September, employers will only be able to claim a grant of 70% of the employee's wages (to a cap of £2,187.50) for the hours they are on furlough. The employer will be required to top up the additional 10% of wages, to the original cap of £2,500.

From 1 October, this will reduce to 60% of the employee's wages (to a cap of £1,875) for the hours they are on furlough. The employer will be required to top up the additional 20% of wages, to the original cap of £2,500.

Where the employee is working under the flexible furlough scheme, the cap set out above will be proportionate to the hours when the employee is on furlough and not working. Employers will be able to claim for the hours not worked by the employee that would have made up their usual hours, but for furlough. HMRC has produced guidance and examples for working out usual hours for employees, which can be read in full here.

For any hours worked, the employee would be entitled to their usual non-furlough rate of pay. The Government has also produced worked examples of how to calculate the amount to claim for an employee who is flexibly furloughed; see these here.

The scheme will be open until the end of October 2020, however please see below for the cut-off date for new entrants to the scheme. The employer will need to pay the agreed amount of pay during furlough leave and apply to the CJRS to recover the grant. There is no requirement for employers to top up employees' wages to ensure they receive 100% of their usual wages during any period of furlough unless they are working out their statutory minimum notice period (the position is less clear in relation to notice above the statutory minimum where it is likely that the lower, furlough, rate can be paid).

Individuals are only entitled to the national living wage (NLW) or national minimum wage (NMW) for the hours they are actually working under the flexible furlough scheme or for any hours spent training. The NLW/NMW is not relevant for periods of time spent on furlough because no work is being performed during that time.

What is a 'furloughed employee'?

The guidance linked here sets out which employees may be put on furlough to use the CJRS. An employee is flexibly furloughed if:

- the employee has been instructed by the employer to cease work in relation to their employment for some or all of their usual working hours; and
- the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease or the measures taken to prevent or limit its further transmission.

There must be an agreement, in writing or confirmed in writing, between the employee and employer in which the employee agrees to cease work for some or all of their usual working hours for the employer or its group. The instruction/agreement may be in electronic form, eg an email. The instruction may be made by means of a collective agreement between the employer and a trade union.

Additionally, the employer is required to retain the agreement or confirmation until at least 30 June 2025.

Where the employee is a director and carries out work undertaken by directors of a company to fulfil a duty or other statutory obligation relating to filing company accounts or providing other information that relates to the administration of the director's company, such employees can carry out this work whilst on furlough leave and still qualify for CJRS, provided the other conditions have been satisfied (see above).

Additionally, training activities directly relevant to an employee's employment, which have been agreed between the employer and employee, can be carried out while the employee is on furlough leave as long as this does not provide services to, or generate revenue for, the employer.

Making a claim

The HMRC guidance from 12 June and additional Government guidance provide a step-by-step guide to making a claim and how the claims should be calculated.

Claims for the period up to 30 June must be submitted on or before 31 July. From 1 July, claims will no longer be able to straddle two calendar months and must instead start and finish in the same month. From 1 July, although there is no longer a minimum number of days or weeks the employee must be on furlough to be eligible to make a claim, the minimum period for a claim to be put through the portal is seven days, unless there is a period of fewer days which falls into a different month that has already be separately claimed for.

Until 31 July, the basic rule for what can be claimed is that it is 80% of the worker's wages, before tax, up to a cap of £2,500 a month. £2,500 is 80% of £3,125, equivalent to a gross salary of £37,500 and proportionate to time spent on furlough under the flexible furlough scheme. In order to claim under the flexible furlough

scheme, employers will be required to record the hours worked by the employee for each claim period. This is due to the fact that the guidance states that employers should be certain of the correct hours they are claiming before they submit the claim for the relevant period. If the employer has incorrectly claimed, it will be required to pay back the additional amount (if the employer thinks it has under claimed, it may be possible to claim the additional sum; however, this will be subject to additional scrutiny from HMRC). Guidance about how to do this can be found here.

The employer should pay the employee all of the grant received for the employee's gross pay. If the employer wants to top up pay levels, it can, but it will not be able to claim for more than the prevailing Government contribution. It should go without saying, but employers are not permitted to deduct any fee from the furlough payments as they must pay their employees the entire grant received for their employees' gross pay in the form of money.

The amount that can be claimed will reduce from 1 August, as set out above, when employers are required to contribute to the scheme.

From 1 July 2020, the number of individuals in relation to whom a claim can be submitted will be capped at the maximum number of individuals a company has claimed for at any one time under any earlier claims, save in relation to any employees returning from maternity or other family leave, or where they are a returning army reservist.

Reaching agreement

Due to the fact that it will result in a change to the employee's contractual entitlements, agreement will need to be reached with employees regarding the return to a combination of part-time work and furlough leave under the flexible furlough scheme. This agreement should be confirmed by the employer in writing and should set out matters such as pay and the periods to be worked as well as confirmation that the employee will remain on furlough for their outstanding contractual hours. Although not required, it is recommended that employees be asked to sign in order to document their agreement to the terms. Such agreement or confirmation may also be via email.

Choosing which employees to work which hours during flexible furlough will depend on factors like the availability of useful work to be performed, the ability of some staff to work remotely and the capabilities and qualifications of staff relative to the business needs. Discrimination law will apply to the decision-making process so employers should be mindful of their obligations under the Equality Act not to discriminate because of protected characteristics.

Employers may choose to rotate their staff or choose which staff to bring back for some/any hours on an ongoing basis, though employers will need to be mindful of any difference between their claim periods and the rotation periods as consideration may need to be given to calculating the period worked if the individual has not been furloughed for the entire claim period.

If an employee refuses to agree to furlough, the employer cannot unilaterally impose this. Instead, the employer will have to consider its options going forwards, which may include changes to pay or even whether there is a requirement for redundancies. Employers may also have to give consideration to such options where they are not in a position to be able to afford to pay the increased contributions towards the scheme that are required from 1 August.

If an employee refuses to return to work on a flexible furlough scheme in circumstances where they reasonably believe they are in serious and imminent danger, and they are subsequently subjected to a detriment or dismissed as a result of their refusal to work, they would be able to bring a claim to a tribunal, including for automatic unfair dismissal for health and safety reasons. It is the employee's belief that is relevant here, though this must be reasonably held. Whether this belief is reasonably held can be impacted by current Government guidance, as well as the steps taken by the employer to avoid the potential danger. Employers that require staff to continue to work in situations where they might be at risk should carry out proper risk assessments and consider requests from individuals to be furloughed without any working hours, or to take a period of holiday or other agreed unpaid leave.

Collective consultation may need to be considered where there are 20 or more employees who are being furloughed. If agreement is reached with the employees that they will accept a variation to their contract leading to reduced pay and no requirement to work while on furlough, then it may not be necessary to undertake collective consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

However, if there is a clear risk that a contract change will need to be imposed, or where the alternative to furlough would be a redundancy programme, the consultation requirements are likely to be engaged regardless of consent. This is particularly so if the employer has in place a plan to furlough the employees or make them redundant if consent is not given. It will be difficult for employers to carry out a full consultation exercise, which may include an initial stage for the election of employee representatives, in time for furlough to be meaningful. However, in some cases it may be sensible to start the collective consultation process at the same time as seeking agreement to furlough. It is probable that the tribunals will be forgiving in terms of awards if the statutory timescale for consultation is not met, but taking specific advice on individual situations is strongly recommended.

Specific issues

Long-term ill health

An employer is responsible for deciding which employees are placed on furlough leave. The guidance states that employers are entitled to furlough employees who are being shielded or are on long-term sick leave in the same way as other employees, although automatic deeming of incapacity for SSP purposes for those shielding in line with Government advice as being extremely vulnerable will end from 1 August. Although there has been some conflicting guidance on this point, following the initial Treasury Direction and new SSP regulations that provide that a person is deemed to be incapable of work if they are unable to work because they are shielding, with the new second Treasury Direction it now seems that it is possible for the employee to be taken off sick leave and furloughed if this is agreed by both parties, and that grants will be made to employers that make claims for these employees. If the employee had not been furloughed at least once by 10 June 2020 however, they would no longer be eligible for the payments under the CJRS and so may now be best advised to remain on sick leave.

What happens if an employee becomes ill whilst on furlough leave or is already off on sick leave?

If an employee becomes ill during furlough leave they must be paid at least their SSP. If a furloughed employee becomes sick and is moved to SSP, the employer can no longer claim for the furloughed salary. If an employee not on furlough is on sick leave, the Treasury Direction states that they can only move to

furlough leave once their period of incapacity for work ceases and they are no longer in receipt of statutory sick pay. As above, the timing of the end of the period of incapacity for work is to be determined by an agreement between the employer and employee, according to the 20 May 2020 Treasury Direction.

After 1 July, if the individual becomes ill during a period they would otherwise have been scheduled to work, they would receive SSP. If they become ill during a period they were scheduled to be furloughed, they would receive the furloughed salary. If they start a period of ill health during the period they were due to work and this continues into the period they were due to be on furlough, there is some uncertainty regarding the legitimacy of using the CJRS to make furlough salary payments where an individual is sick on a short term basis, as the guidance states that the CJRS is not intended for this purpose. Nonetheless, the guidance goes on to say that if employers want to furlough employees for business reasons and they are currently off sick, they are able to do so, as with other employees. It seems therefore that it will still be possible to agree to end sick leave (as above) and for the employee to receive furlough payments.

Holidays

The Government guide to holiday entitlement and pay during coronavirus can be found here.

Holiday entitlement will continue to accrue as normal during furlough leave. If it is not practicable for an employee to take their leave before the end of a holiday year for reasons related to coronavirus, then new regulations permit them to carry over up to four weeks of their annual leave rather than use it and the carried over leave can be taken in the next two holiday years. Employers will be able to refuse requests for carried over leave to be taken at a specific time provided they have good reasons for doing so. Employers can also encourage and even require employees to take holiday at any time, including during periods of furlough leave, to try to reduce the impact of a build-up of leave being taken at the end of furlough when business needs may require greater attendance.

The Government has confirmed that holiday (including bank holidays) taken during furlough leave will not break furlough as employees will still not be doing any work for their employers. Employers that are happy for holiday to be taken during furlough leave should therefore communicate this to their staff.

For those employees on flexible furlough, hours taken as holiday should be considered furlough hours instead of working hours for the purposes of the claim.

The Government guidance confirms that employers should pay their employees their usual pay, as opposed to the furlough rate, for holiday whilst on furlough leave. Employers will therefore need to 'top up' any amount over and above the furlough rate when staff take holiday. It appears that it is open to employers to reach agreement with employees to accept a reduced rate of pay for any contractual holiday entitlement over and above the statutory entitlement of 5.6 weeks FTE. However this would be subject to a separate agreement.

If employees are usually required to work during bank holidays, these days would be paid at the furlough rate. If the employee does not work these days, they would be treated as holiday.

Maternity leave

The Government guidance states that the usual rules about maternity (and other forms of parental leave and pay) apply: see here for more information. Employees can be furloughed when on family related leave, however employers are not able to reclaim the statutory payments as a grant under the CJRS. Employers

can however claim for enhanced maternity payments through the CJRS. The same principles would also apply to paternity leave, adoption leave, shared parental leave and parental bereavement leave. Upon return from such leave, furlough pay should be based on the individual's usual salary rather than the payment received whilst on leave. For those on variable pay, it is advisable that the calculation should be adapted to account for the period of leave, despite this not being stipulated in the guidance.

If an employee is receiving maternity allowance, they are not entitled to also receive furlough pay. Furlough pay may be a higher sum and so they may prefer to be placed on furlough for the relevant period. The guidance states that the individual should then be advised to contact Jobcentre Plus to stop their maternity allowance payments.

If an employee agrees to be put on furlough and end their maternity leave early, they will need to give the employer at least eight weeks' notice and they will not be eligible for furlough pay until the end of the eight weeks.

The requirement for the individual to have been furloughed for the first time by 10 June does not apply to those who have been on maternity, shared parental, paternity or parental bereavement leave. Instead, as long as the employer has previously furloughed at least one other employee for three weeks prior to 30 June, individuals who have been on these types of leave will still be eligible to be placed on furlough on their return. These individuals are not counted when considering the cap of the number of individuals in relation to whom a claim can be submitted after 1 July.

Can employees shielding in line with public health guidance, or staying at home with someone who is shielding, be furloughed?

Potentially. The guidance states that employers are entitled to furlough employees who are being shielded or off on long-term sick leave in the same way as other employees. Although there has been some conflicting guidance on this point following the initial Treasury Direction and new SSP regulations from 16 April, which provide that a person is deemed to be incapable of work if they are unable to work because they are shielding, following the second Treasury Direction it now seems that it is possible for the employee to be taken off sick leave and furloughed if this is agreed by both parties, and that grants will be made to employers that make claims for these employees.

Shielding will come to an end on 1 August 2020, meaning that the automatic deeming of incapacity for SSP purposes for those shielding in line with Government advice as being extremely vulnerable will end.

Can employees be given notice of termination whilst on furlough and if so, what will the employer be responsible for paying?

Despite the potential conflict in the new guidance regarding the purpose of the scheme (now resolved as set out above), there is nothing in the guidance that states that notice to terminate cannot be given whilst an individual is on furlough or flexible furlough. If an employee's notice period is at least one week longer than the statutory minimum, the employee will be entitled to their contractual notice pay. This may be at a reduced level of pay, dependent on any agreed furlough terms. If however the employee is only entitled to receive statutory notice, or less than one week in addition, they would be entitled to their notice pay based on their usual week's pay. The guidance remains unclear as to whether the week's pay is based on the reduced furlough pay or their pre-furlough pay, however it seems likely (and indeed probably would be considered best practice in any event) that this should be on full pre-furlough pay.

What about employees on work permits?

In relation to furloughed employees on Tier 2, 4 and 5 visas: UK Visa and Immigration (UKVI) confirmed on 3 April 2020 that employers that have temporarily reduced or ceased trading can temporarily reduce the pay of their sponsored employees to 80% of their salary or £2,500 per month, whichever is the lower.

Any reductions must be part of a company-wide policy to avoid redundancies and in which all workers are treated the same. These reductions must be temporary, and the employee's pay must return to at least previous levels once these arrangements have ended.

Employers should therefore be able to seek an extension of stay for the Tier 2, 4 and 5 furloughed employees without an issue regarding the salary. Grants under the scheme are not counted as 'access to public funds', which means that employers can furlough employees on all categories of visa.

We also advise making a report on the sponsor management system concerning the temporary change in salary. This is the UKVI system for sponsoring and reporting any changes for sponsored workers.

What next?

A number of employers are turning their minds to what will happen once the CJRS ends in October. If there is no work, or a need for fewer employees, employers may need to consider making redundancies. As set out above, the consultation period can take place during furlough; however, being furloughed should not be used as a pre-selection for redundancy. The Government confirmed on 30 July that for those with regular, fixed salaries, any redundancy payments must be based on an employee's pre-furlough salary. For those employees who receive variable pay however, their redundancy payment should be calculated using an average of the payments made in the preceding 12 week period. This would mean that, for those employees, payments could be based either wholly or in part on the furlough rate paid.

Those employers that retain their employees until 31 January 2021 will be eligible to receive a £1,000 bonus for each retained employee who had been placed on furlough. The payment will be subject to the employee earning at least £520 per month between November 2020 and January 2021, with the payments to be made in February 2021.

Finally, there have been some concerns raised about the fact that the CJRS is open to abuse. In the short term, the Government has been focusing on bringing in the scheme and producing guidance as issues come out as a result of the fast drafting. Looking forward however, it is likely that HMRC will scrutinise in greater detail the claims that have been made and it has specifically stated that it has reserved the right to carry out audits into companies it suspects of having abused the scheme. Whilst we expect that there will be some sympathy for claims that have been inaccurately made as a result of unclear guidance, the Government has consulted on a regime to recover grants that have been paid as a result of fraud, suggesting a more stringent approach to recovery may be brought in. For this reason, employers should now be taking steps to ensure that all of their records are up to date and are safely retained in case of any future audit.