

## **Q: What support has the UK government announced for employers / employees?**

- On Friday 20 March 2020, the UK government announced a range of measures to help employers and employees as a result of the COVID-19 pandemic and its effect on normal working practices. The aim of the measures is to deal with the expected hardship that employees will suffer and also help businesses retain a workforce that it can call upon when business picks up again (thereby avoiding mass redundancies).
- Measures such as the deferral of VAT and income tax payments, a 12 month break for payment of business rates in some sectors, in addition to the changes to SSP, have been brought in to assist business in the current climate.
- Importantly, the government has also introduced the **Coronavirus Job Retention Scheme (CJRS)** which is discussed below.
- At the moment, there is limited guidance by the government on the CJRS but we will continue to update you as and when more information becomes available. A new-website was launched today (24 March) to help businesses find out how to access the support: [Coronavirus Business Support web-site](#). Hopefully more detail on the CJRS will be uploaded to that. At the moment it says that they expect the first grants to be paid “within weeks”.

## **Q: What is the Coronavirus Job Retention Scheme and what does it cover?**

- For now, we know that the CJRS will allow all UK employers (big and small, private and public) to apply for a grant to reimburse them for part of the salaries that they pay to those employees who are laid off because of the downturn in work (otherwise known as ‘furloughed workers’).
- The ‘furloughed workers’ will be on ‘furlough leave’. During this time, they will continue to be employed by the employer but they will not be required to work for a temporary period of time. For the avoidance of doubt, ‘Furlough’ is not a widely recognised concept in the UK employment sphere. It is a term which is used in other countries (such as in the USA) to refer to a period of time where employment is temporarily suspended and employees do not receive payment of their usual wages. The closest that we have to this in the UK is ‘lay off’.
- The CJRS will assist employers by reimbursing them up to 80% of the wages of each ‘furloughed worker’, up to a maximum of £2,500 a month. (We will update you once the government confirms whether this means £2,500 a month before or after tax).

## **Q: When is the CJRS running from and how long for?**

- Our understanding is that the CJRS will run from April 2020 (date to be confirmed) but will be backdated to 1 March 2020 (such that anyone who has been laid off since 1 March and has not left the business under redundancy can be caught by the scheme) and is expected to run for at least 3 months (although the government may decide to extend it as things progress).

- The current guidance around the CJRS talks about “reimbursing” employers for wage costs and so our expectation is that employers will need to pay their employees at least 80% of their normal wages during any lay off period and then they apply for a grant which will reimburse them. This means that employers are likely to have to deal with cash flow issues in the interim (note the availability of the Coronavirus Business Interruption Loan which may be of assistance).

**Q: What about employees who were dismissed before the CJRS came into force?**

- As above, although the scheme is being backdated to 1 March 2020, it is thought that the CJRS will be applicable to staff who were still employed by their employer at the time of the CJRS being announced by the Chancellor on Friday 20 March 2020.
- Anyone who has been dismissed before 20 March may not come within the scope of the scheme however further detail is awaited and we will update you once this has been provided.

**Q: How can employers obtain a grant from the CJRS?**

- Government guidance, as it currently stands, advises of the following steps to be undertaken by employers in order to obtain a grant from the CJRS:
  1. Employers will need to designate affected employees as ‘furloughed workers’ and notify those employees of this change and agree this with them. Currently, the government guidance notes that this change to the employee’s status is subject to employment law and, therefore, contracts will need to be reviewed to ascertain what rights employers have and/or employee consent obtained:
    - Some contracts of employment may contain a contractual right to lay people off if there is a downturn in work. Where that is the case, employers should be able to just notify employees that they are being ‘furloughed’ as the right already exists for the employer to do this.
    - In other contracts where no lay-off or short-time working provisions exist, employers will need to agree with employees that they are being ‘furloughed’ since this will be a change to their terms and conditions of employment. They should do that, initially, by seeking their consent (through winning “their hearts and minds”) and, if not freely given, through an information and consultation exercise. Worse case is that they have to go through a dismissal and re-engagement process with them but we expect this is not required. Plus, if there are more than 20 employees who do not agree to their contracts being changed, formal consultation is required for up to 45 days with a contractual notice period and businesses do not have this long to wait. Technically if there is no lay-off clause, the employer still remains liable for the remaining 20% unless there is an agreement from the employee to the contrary and so that makes it even more important for letters to seek express employee consent.

2. Employers then need to submit information to HMRC about those employees who have been designated as 'furloughed' and their earnings via a new online portal which is being set up.
3. HMRC will then reimburse 80% of wage costs for 'furloughed workers' up to a cap of £2,500 per month, per 'furloughed worker'. Exactly when these funds will be available is current unknown.

## **Q: Do employers have to pay the money back?**

- The word "grant" is used in all of the guidance. There is no indication that you need to pay the money back.

## **Q: How should employers notify their employees of their decision to designate them as 'furloughed workers'?**

- Employers are advised to ensure this is done in writing and explain the reasons as to why this decision was necessary (i.e. due to the current uncertain economic climate as a result of the COVID-19 pandemic).
- As above, there will be a need for agreement between the employer and employee where there are no lay-off or short-time working provisions in an employee's contract. Given the current circumstances however, our view is that employees are unlikely to complain about still being able to receive 80% of their wages while not at work and employees should be informed of this in order to offer them some reassurance during this difficult time.

## **Q: What if employees do not agree to becoming 'furloughed workers'?**

- It is thought that employees will agree to this (temporary) contractual variation by their employer as they would still be in receipt of 80% (or all) of their usual pay, which seems more desirable for employees than the other options which would include:
  - Being made redundant with no promise of the employer being able to pay a redundancy payment and so the employee would need to incur a great deal of additional time and cost in suing their employer / claiming from a government fund. They will then need to find a new job at a time when the UK/ world is likely to be in a huge recession;
  - Being dismissed for "Some Other Substantial Reason (SOSR)" for genuine business reasons due to the inability to pay these people and a failure on their part to co-operate at a time of crisis;
  - Being asked to take unpaid leave for a period of time (the length of which is currently unknown as no one knows if/when things will get back to normal);

- Being asked to use up their paid annual leave (remember employers can ask employees to take leave so long as they give twice the amount of notice than the leave they want them to take) and then, after that, being on unpaid leave.

## **Q: Can an employee decide that they want to be furloughed?**

- No - it is the choice of the employer and so if the employee requests to be furloughed, the employer can refuse to agree e.g. if there is still work for them to do.

## **Q: What wages does the £2,500 monthly cap cover? Does this refer to basic pay or the employee's take-home pay?**

- The government has not stated whether this refers to basic pay or take-home pay. However, it would be plausible to consider that the wages covered by the CJRS would be applicable to the employee's take-home pay and indeed, HMRC would have access to records to support this.
- In the government's guidance to employees on this subject, it mentions that employers can claim a grant of up to 80% of a 'furloughed employee's' wages '*for all employment costs, up to a cap of £2,500 per month*'. This suggests that this covers things such as pension contributions, employer's NICs etc.
- Further information on this point is awaited so it can be confirmed whether employers can only use the CJRS grant in respect of an employee's basic pay or their average take-home pay (which may, for example, include overtime and commission too).

## **Q: Does the employer have to make up the remaining 20% of a 'furloughed employee's' wage which is not covered by the CJRS grant?**

- The government guidance for employers does not deal with this point- however, the guidance to employees states that an employer could "choose" to make up the difference but is not obliged to. It appears, therefore, that the employer has a choice as to whether it pays the difference to the employee or not. We suspect that very few will make up the difference in the circumstances.

## **Q: Is an employer able to claim less than 80% of a 'furloughed employee's' wage through the CJRS?**

- The government guidance states that employers can claim '*up to 80%*' of wages for a 'furloughed employee'. This suggests that employers would be able to claim less than this amount but there does not appear to be much reason for employers to do so and at the moment- there is little information on this.
- If employers did choose to claim less than 80% of wages through the CJRS, they would need to consider the larger shortfall this would cause in the wages paid to 'furloughed employees' and how they would address this. Employees may be less likely to agree to becoming 'furloughed' if it means they would receive less than 80% of their wages.

- Also, it is not clear whether employers can make multiple requests for grants such that they ask for further wages at a later stage and/or for different groups of people. It seems best to ask for as much as you can at the start.

**Q: Can employees work for their employer at all while being ‘furloughed’?**

- The government’s guidance to employees states that employees should not undertake any work for their employer while they are ‘furloughed’. The fact that the employer is unable to give its employees any work for the time they are ‘furloughed’ is what allows them to claim up to 80% of the employee’s wage for all employment costs (up to £2,500 a month).
- It seems to us that working even partial hours would not allow employers to be reimbursed for any wages paid in respect of the hours worked. In other words, this scheme does not seem to apply to those on short-time working (e.g. shorter days) or those working certain days of a working week, although this is not yet clear. We will update you when we have further information.

**Q: Can furloughed employees work for someone else whilst they are on furlough leave e.g. get a job at a local supermarket?**

- We are awaiting further guidance from the government on this but we think it would not be right for employees to “double recover”, i.e. taking 80% of their wages from their employer and then earning elsewhere too.
- However, it may be that they are allowed to earn the remaining 20% elsewhere so long as they do not come home with more than 100% pay in total. Also, there will be some sectors where employers will not want their employees working for another company whilst they are still employed by them (e.g. in case there is a risk of confidential information being leaked or a chance that they may well stay at the new company and not return to work at their employer once the market picks up).

**Q: Does the CJRS cover workers as well as employees?**

- Though the current guidance from the government has not yet clarified this point, it would appear that the CJRS is intended to apply to all staff who are paid via the employer’s payroll and on PAYE. This would usually include workers who are directly engaged where the employers would deduct income tax and NI contributions.
- It is unclear and unlikely, therefore, that the scheme would apply to agency workers (but we wonder if their employer, the agency, can make the application for a grant on behalf of the end user) or those who operate and work under a self-employed arrangement and who are not directly engaged / paid by the employer (although separate measures may come into play as we are aware there is currently a petition to the government).

**Q: Is there any indication that self-employed people will be given similar assistance?**

- Yes - the Coronavirus Bill that was supposed to complete its passage through the House of Commons on 23 March 2020 included provision for a new Statutory Self-employed pay. If passed, that will ensure that the net monthly earnings of (a) self-employed and (b) freelancers do not fall below 80% of that which they received in the previous 3 years or £2,500, whichever is the lower. The purpose is to top up self-employed pay in a similar way to the grant reimbursing employers for 80% of employee's pay.
- The Bill will go to the House of Lords on 24 March 2020. Any changes that are requested will be discussed at report stage, which is most likely to be 25 March 2020. It would then return to MPs on 26 March 2020. Either way, it should be signed into law by the end of 26 March 2020. We will let you know as and when there are any developments on this front.

**Q: What if the employer has employees who have not yet been laid-off but have taken paid or unpaid holiday / leave?**

- As mentioned above, in order for the CJRS to apply, employees must have been designated as 'furloughed' and the scheme will be backdated to apply from 1 March 2020.
- It seems right that those on unpaid leave would prefer to be deemed as 'furloughed' so that they are able to receive at least up to 80% of their salary while not being at work.
- Employees who are currently on paid holiday may wish to continue taking their holiday as it may seem more favourable to them, especially where the employer will not be making up for the 20% shortfall in salary as a result of applying for the grant from the CJRS.
- However, it doesn't appear that many employees would opt to simply exhaust their holiday entitlement just to receive the 20% remainder of their salary which wouldn't be paid by the CJRS, unless of course their salary is substantially high.
- For those who have already agreed to take unpaid leave, our advice would be to write to them to confirm that they are now 'furloughed' so as to include them in the group that is covered by the government grant.

**Q: What about employees who are on sick leave or receiving sick pay (statutory or contractual) because they are self-isolating, the over 70s and those self-isolating because they are pregnant?**

- It is unclear what rights these people will have in respect of the CJRS- however, it appears that these employees could still be considered when deciding which employees to designate as 'furloughed' as long as you can show that if they were fit and healthy / not self-isolating in line with official advice, there would be no work for them to do.
- We are anticipating that further guidance will be provided in respect of sickness or self-isolation and will update you as soon as this has been published.

## **Q: What about employees who are currently on maternity leave?**

- It would be best to wait until the maternity leave has ended and if at that point there is a need to designate that employee as 'furloughed', the CJRS could apply in respect of that employee, but not while they are still on maternity leave.

## **Q: What about employee's rights whilst they are 'furloughed'?**

- As the contract of employment will continue, we anticipate that any rights and benefits (save for those in respect of their pay), will continue to accrue as usual and in the same way they would during a period of lay-off. As such, employees would also continue to accrue holiday whilst they are 'furloughed'. That is the general position regarding accrued holiday pay with normal UK lay-offs.

## **Q: When will the new HMRC portal go live for employers to use so they can apply for the grant via the CJRS?**

- HMRC are working to get this up and running before the end of April 2020. Hopefully it will be available before then.
- Given the understanding is that employers will need to pay employees up to 80% of wages whilst they are 'furloughed' and then apply for a reimbursement grant, if employers fear cash-flow problems, they may be able to apply for a Coronavirus Business Interruption Loan to assist in the meantime. We can advise further on that scheme.

## **Q: Do employers need to prove / evidence that there is no work for the designated furloughed employees to do?**

- It is unclear whether anyone will look behind the scenes to test if there is indeed a downturn in work to justify 'furloughing' employees (and so it is arguably open to abuse) but you must work on the basis that it could be checked and so you must comply with the rules of the scheme.

## **Key tips for employers:**

- Ensure that you document your thought processes and discussions when deciding which employees are to be designated as 'furloughed' - treat it as if it is a redundancy situation and think about how you would need to evidence your decision.
- Consider if putting employees on furlough leave is absolutely necessary and reasonable to do in the circumstances. Again, make sure you record your reasons (in writing).
- Ensure that you notify employees being designated as 'furloughed' in writing, giving your reasons, making clear any terms that will apply during this period, and offering reassurance that financial support via the CJRS will be available.

- The CJRS is intended to be a reimbursement scheme so it is envisaged that the employer will have to make the payments to employees first and then seek reimbursement from HMRC.
- Be understanding that there may be groups of employees that feel hard done to e.g. those who are genuinely sick with the Coronavirus, those having to self-isolate as a family member is sick, the over 70s and those in vulnerable groups who are only entitled to SSP or contractual sick pay (which may be less than 80% pay) and they feel it is unfair that those 'furloughed' are getting much more. Equally, you may have some self-employed contractors in your business who are not entitled to anything (certainly at the present time unless things change).

## Useful links:

1. Link to employer guidance released so far: [COVID-19 employer guidance](#)
2. Link to employee guidance released so far: [COVID-19 employee guidance](#)
3. BBC news on the Job Retention Scheme: [Job Retention Scheme first announced](#)
4. Statutory Sick pay amends: <https://www.gov.uk/statutory-sick-pay>
5. Tax helpline to support businesses: [Tax-helpline for businesses](#)
6. Government summary of what the Coronavirus Bill aims to do? [Summary of Coronavirus Bill](#)
7. More detailed proposals in the Coronavirus Bill: [Detail on Coronavirus Bill](#)
8. Coronavirus Bill- Self-employed pay: [Statutory self-employed pay](#)

We hope that this note is helpful. The situation is changing by the day, and even the hour, and so as soon as there is any further information we will share that with you.

In the meantime, if you have any questions or you encounter issues with getting employees to agree to being 'furloughed', please do not hesitate to seek assistance from one of the Employment team.

*This note is not intended to constitute legal advice and you must take specific advice in respect of your particular circumstances.*

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