

Ashfords Solicitor FAQs Coronavirus Job Retention Scheme (CJRS)

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On Saturday 4 April 2020 the Government updated its guidance (for both employers and employees) on claiming through the Coronavirus Job Retention Scheme (CJRS).

■ What is the CJRS?

The Coronavirus Job Retention Scheme (CJRS) is designed to support employers whose operations have been severely affected by COVID-19, by allowing employers to place employees on "furlough" (a leave of absence) and claim 80% of their monthly wages, up to a cap of £2,500 per month, back from the government.

■ Who does the CJRS apply to?

The CJRS is available to all UK employers that:

- had an operating PAYE payroll scheme on or before 28 February 2020;
- are enrolled for PAYE online (prior to making a claim); and
- have a UK bank account.

Any UK organisation can apply under the CJRS, including charities, recruitment agencies and public authorities. However generally speaking where public sector organisations receive public funding and there is no interruption to that funding, the government expects employers to continue to pay staff in the normal way and not to apply for a grant for wages under the CJRS.

■ Which employees are eligible

Furloughed employees must have been on the employer's payroll as at 28 February 2020 for the employer to be eligible to recover their wages under the CJRS and can be on any type of contract, including employees on flexible or zero-hour contracts.

The definition of employees is wider than the employment law definition and includes others who are paid through PAYE such as office holders and company directors.

■ How long will furloughing last and is there a minimum period required under the CJRS?

The original intention of the CJRS seemed to be for employees who would otherwise have been laid off without pay or made redundant. However, the most recent updated guidance (4 April 2020) reflects a general trend that we have seen towards wider eligibility. We now consider that provided an employer can demonstrate that their business was affected by the COVID-19 outbreak, and as such they needed to furlough staff, this will be enough. There is not a need for a clear redundancy situation.

However, the position remains unclear where an employer is not generally furloughing staff because their operations are continuing (such as care, homelessness support and supermarket retail) and whether staff who cannot work due to having to shield or look after a shielder or have child care issues due to the COVID-19 crisis can be furloughed for that reason alone. Until the recent guidance it was considered by some commentators to be possible to furlough these staff even where their jobs were clearly safe and the business not obviously impacted by COVID-19. However, the recent guidance now states that in relation to shielders (or those who have to care for shielders) they can be furloughed, where you would otherwise have to make them redundant'. Some commentators are of the view that this goes against the otherwise wider discretion that has been given to the employer elsewhere in the guidance and such requirement has not been mentioned as applying to those who have child care issues and so cannot work as a result. It is difficult to see that the government would have intended to treat such groups differently.

Further clarity will certainly be needed on this specific issue and legal advisors and other interested parties are seeking that clarity from the government so it is hoped that this will shortly be resolved one way or the other.

What is clear is that employees who are on sick leave or self-isolating (in line with PHE guidance) should receive Statutory Sick Pay (and company sick pay, if applicable) and can only be furloughed after their period of sickness absence or self-isolation has ceased.

■ What is the benefit?

HMRC will reimburse 80% of the furloughed workers' wages, up to £2,500 per month, plus the associated employer's NI contributions and automatic enrolment employer pension contributions on the subsidised wage.

If an employer chooses to top-up employees' salaries in addition to the grant, employer's NI contributions and automatic enrolment pension contributions on this top-up of salary will not be funded through the CJRS. Similarly, any pension contributions provided by an employer above the minimum mandatory automatic enrolment contribution will not be funded.

The CJRS will cover the cost of wages backdated to 1 March 2020 and is initially open for 3 months (but will be extended if necessary).

■ How are an employee's wages calculated?

For salaried workers, their gross salary as at 28 February 2020 should be used to calculate the 80%.

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For employees whose pay varies, the 80% will be based on the higher of:

- the earnings from the same month in the previous year; or
- the average monthly earnings from the 2019-20 tax year (or less, if they've worked for less than a year).

The calculation should include any regular payments the employer is obliged to pay its employees, which includes wages, past overtime, fees and compulsory commission payments. Discretionary bonuses (including tips), discretionary commission payments and non-cash payments should not be included in the calculation.

Updated guidance has clarified that the reference salary should not include the cost of non-monetary benefits provided to employees, including taxable Benefits in Kind. Similarly, benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should not be included in the reference salary.

■ How is the CJRS accessed?

The CJRS is expected to be up and running by the end of April 2020.

In order to access the CJRS, businesses will need to:

- designate affected employees as furloughed workers and notify such employees of this change in writing; and
- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal.

Once HMRC have received an employer's claim and determined eligibility, HMRC will make a payment into the employer's bank account via BACS.

The record of the written notifications must be kept for five years.

■ Can employees carry out work whilst furloughed?

No, whilst on furlough, an employee cannot undertake work for their employer, but can volunteer and undertake training. If they are required to complete training whilst on furlough, they must be paid at least the National Minimum Wage or National Living Wage for the time they spend training. The amount reclaimed through the CJRS can be taken into account in calculating whether the NMW or NLW has been paid.

If it is the case that there is a reduced requirement for work, employers will either need to decide to furlough some staff while retaining others or agree with employees

that they will work reduced hours for a reduced rate of pay in the absence of a contractual clause allowing for this to be imposed.

If contractually allowed, employees are permitted to work for another employer while their original employer has placed them on furlough.

■ How do employers decide who to furlough?

In some cases an entire business or area of the workforce will be closing and in which case deciding who to furlough will be simple. Where there is a downturn of work and so a reduced need for staff, employers will need to assess workloads, the resources required and people best suited to carry out that work.

Employers should be mindful of any potential discrimination risks and take advice on particular circumstances if they are unsure.

■ What if an employee has a job with a different employer too?

Employers can reclaim 80% of an employee's gross monthly salary subject to a maximum of £2,500 per month (all of which must be paid to the employee) and the entirety of the amount reclaimed must be passed onto the employees (following deductions made through payroll).

Employers are still contractually obliged to pay an employee's full salary unless the employee agrees otherwise (or unless there is a contractual provision allowing for a reduction).

In practice, we anticipate that the majority of employees will agree to a reduction in their pay where it is genuinely not possible for the employer to meet the additional salary costs and where the alternative would be redundancy.

■ What happens to employees' benefits during the furlough period?

Updated guidance from the government states that where the employer provides non-cash benefits to furloughed employees, they should continue to be provided during a period of furlough.

Further guidance from the government regarding contractual benefits and holiday accrual during the period is awaited, but current guidance suggests that an employee's rights on furlough are not affected.

■ How long will furloughing last and is there a minimum period required under the CJRS?

The minimum length of each period of furlough is

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consecutive weeks. When the employee returns to work, they must be taken off furlough, but can then be furloughed again at any time for another minimum period of 3 consecutive weeks. The duration of furloughing will be need to be considered depending on the needs of the business. At present, the CJRS is open from 1 March 2020 for three months.

Furloughing may commence at any time during the continuation of the CJRS.

■ What if staff have already been made redundant or placed on unpaid leave due to COVID-19?

Employers are able to re-employ people who ceased working for them since 28 February 2020, and then furlough them. This is not limited to employees who were made redundant as a result of COVID-19.

Employees who have been placed on unpaid leave since 28 February 2020 can be placed on furlough leave instead.

Employers can make a retrospective claim to 1 March 2020 for such employees.

■ Can a period of furloughing cease and then resume?

Yes, to qualify for the payment, an employee must be furloughed for a minimum of three weeks, but employers can place employees on furlough more than once, and one period can follow straight after an existing period of furlough.

■ What happens at the end of the current CJRS period?

It is expected that an extension of the period may be made by the government, but furloughing will need to cease whenever the CJRS comes to an end. Employers would then have to review the situation at that time.

■ How do employers furlough staff?

Agreement needs to be reached as furloughing requires an amendment to the employee's contract of employment.

Employers should consult individually in relation to any proposed variations to an employee's contract of employment specifically related to the impact of COVID-19 on the business. Collective consultation will also be

required if an employer is to make 20 or more employees redundant in a 90 day period.

Once agreement is reached, employers will need to write to employees confirming that they have been furloughed and keep a record of this communication.

■ What happens if employees refuse to accept a variation to their contract of employment to enable furloughing?

Employees need to consent in order to be furloughed. If consent is not obtained, employers will have to consider other options which may include compulsory redundancies.

■ Can an employee appeal against a decision to furlough them?

Employees have the option to refuse to consent to the variation. As such there is no need for an appeals process.

■ Does a variation to an employee's contract of employment extend beyond the impact of COVID-19?

No, any variation should be specific to the impact of COVID-19 and subsequent return to sustained recovery from the effects of the virus and resulting normal trading conditions. Employers should keep the situation under close and ongoing review.

■ What happens if an employee is in their probation?

Employees in their probation can be furloughed but we would recommend that their probationary period is extended by the furloughed period.

■ Can employees be furloughed if off sick, or on a phased return?

Employees cannot be furloughed if off sick, but when they have returned to work (including on a phased return) then they can be furloughed.

■ What happens at the end of the furlough period?

Employers must make a decision as to whether employees can return to their duties or if redundancies are necessary.

ARAG works in partnership with Ashfords' solicitors, the content of this article was written by Ashfords' Employment Team.

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