

Coronavirus Job Retention Scheme – An Update

On the 27th March I provided an article ‘The Coronavirus Job Retention Scheme – What is it and How Does it Work’¹ following publication by HMRC of details of the CJRS scheme.

HMRC have on 9th April since updated the guidance clarifying its position on a number of issues set out below and again on 15th April 2020 varying the qualifying date by which staff need to be employed on or before is now the 19th March no 28th February 2020, bringing a host of further individuals into the Scheme who obtained employment between those dates.²

A summary of the 9th April amendments are as follows –

- **Apprentices** can be furloughed in the same way as employees but with differences –
 - Continued apprenticeship training whilst furloughed does not disqualify from CJRS;
 - They must receive the National Minimum Wage so any shortfall between the amount received under CJRS and their NMW entitlement must be made up by the employer³
- **Publicly Funded Bodies** – of those public sector and publicly funded private bodies who are indicated as likely to be expected not to furlough, HMRC have clarified a small number of staff may still qualify (examples given are those unable to be redeployed to assist with COVID-19 or where not primarily publicly funded).
- **Employers who are Individuals** – unsurprisingly these people can furlough staff as well and this does include nannies provided the PAYE, requirements as to timing and other CJRS thresholds are met.
- **Administrators** – are eligible but would need to show staff are likely to be retained.⁴
- **Foreign Employees** – CJRS grants are not counted as ‘access to public funds’.
- **Tax & NI** – furlough wages will be subject to usual income tax and other deductions.
- **Reduced Hours** – those on reduced hours or reduced pay will not be eligible for CJRS.
- **Unpaid Leave** – claims will only be accepted if unpaid leave started post 28th February. If unpaid leave started after this date you cannot furlough them until the date it was agreed they would cease unpaid leave.

¹ <https://www.no18chambers.com/downloads/CJRS.pdf>

² See <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

³ See further guidance concerning changes in apprenticeship arrangements in light of COVID-19 at <https://www.gov.uk/government/publications/coronavirus-covid-19-apprenticeship-programme-response/coronavirus-covid-19-guidance-for-apprentices-employers-training-providers-end-point-assessment-organisations-and-external-quality-assurance-pro>

⁴ see *re Carluccio's Ltd* [2020] EWHC 886 (Ch) which addresses issues arising in relation to administrators

- **Sick Leave/Self-isolation** – Staff in receipt of sick pay may be switched to furlough status and likewise from furlough status to sick pay. HRMC stress it not intended to be a top-up nor for short term illness, in its words this is “*not the SSP rebate scheme*”.
- **Shielding Employees** – Staff shielding in line with public health guidance are eligible. The writer anticipates this point will impact health & safety dismissals and detriments concerning COVID-19 under ss.44 and 100 Employment Rights Act 1996.
- **Employee’s with Caring Responsibilities** – Unsurprising employees unable to present for work due to caring responsibilities are eligible for CJRS.
- **Fixed Term Employees** – a fixed term contract can be extended or renewed despite the fact that the employee is currently in furlough status, but if neither extended nor renewed, entitlement to CJRS will cease on the expiry of the term of the contract.
- **Non-Employees** – subject to conditions, the following non-employees are eligible –
 - a) Office Holders – the furlough arrangement requires agreement between office holder and PAYE operator. If the office holder is a company director or LLP member the arrangement should be formally adopted (see below).
 - b) Company Directors – the board of directors on behalf of the Company seeking to furlough a salaried director, should make such decision having in mind their statutory duties and formally adopt such decision, noting this in the Company’s records and notifying the director concerned.

Importantly directors owing statutory duties to the Company may continue to fulfil that part of their role if they do not more than reasonably necessary for that purpose (HRMC state this would not include tasks generating revenue nor provide services to or on behalf of the Company)
 - c) Salaried LLP Members⁵ – the agreement between LLP member and their business may need to be varied by formal decision of the LLP, HRMC giving the example of requiring that no work is done during the furlough period.

‘Salary’ for an LLP member is profit allocation excluding sums paid in respect of performance of the LLP or member;
 - d) Agency Workers – eligibility is attributed regardless of not being a PAYE employee or even if engaged via an umbrella company. Furlough is agreed with the agency, although consultation with a relevant end-client is advised. Whilst furloughed they must not perform work via the agency.
 - e) Limb (b) Workers – eligibility is limited to those workers paid through PAYE with those paying profits through self-assessment invited to use the SEISS.⁶
 - f) Contractors with in Scope of IR35 – subject to the stated public sector bodies above, the public sector body would have to formally agree with the

⁵ Designated as employees for tax purposes under the Income Tax (Trading and Other Income) Act 2005

⁶ “Self-Employed Income Support Scheme” – see <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>

Personal Service Company ('PSC') and fee payer including agreement to do no work for the public sector body during the furlough period.

The 'fee payer' is then expected to pay at least the amount of the CJRS grant to the PSC and report payment via PAYE using the contractors details and make appropriate NI and tax deductions in scope of the IR-35 rules.

- **TUPE** – new employers are eligible for CJRS for staff who TUPE'd after 19th March (per HMRC's amendment of 15th April) if either TUPE/PAYE business succession rules apply.
- **Training** – furloughed staff may undertake training so long as it is not generating revenue or providing services for or on behalf of the employer or linked organisation. But if the training is undertaken at the request of the employer pay must exceed NMW
- **Maternity, Adoption, Paternity or Shared Parental Leave** – normal rules apply but it is possible to apply for 'enhanced' contractual pay for those qualifying for maternity, adoption, paternity or share parental pay.
- **Record Keeping** – records of communications with staff of furlough arrangements must be kept for 5 years.
- **Pension** – limited to a figure up to the minimum autoenrollment contribution of 3% on qualifying earnings at the subsidised furlough rate figure.
- **Further Guidance on CJRS Pay** – employers may include regular payments they are obliged to make including wages, past overtime, fees & compulsory commission.
Entitlement does not include discretionary bonus (including tips), commission payments, non-cash payments nor most non-monetary benefits including taxable benefits in kind, benefits provided via salary sacrifice
All of the grant received by the employer must be paid over in the form of money not netted off to pay for benefits or salary sacrifice. Importantly, HRMC has agreed COVID-19 is a 'life event' for the purposes of switching out of a salary sacrifice arrangement.
- **Apprenticeship Levies & Student Loans** – continue to be payable when on furlough;
- **Information for a CJRS Claim** – extended to now include –
 - Employer PAYE reference number;
 - the number of employees being furloughed;
 - NI Numbers for the employees you want to furlough;
 - Names of the employees you want to furlough;
 - Payroll/works number for the employees you want to furlough;
 - Self Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number;
 - the claim period (start and end date);
 - amount claimed (nb the minimum length of furloughing of 3 consecutive weeks);

- your bank account number and sort code;
- your contact name;
- your phone number.

15th April 2020

Barnaby Large