

We have until now had only snippets to work on from ministerial speeches and Government proposals but HMRC today have published formal Guidance on the incoming scheme.¹ The scheme introduces a relatively unfamiliar term – *furlough*.

'Furloughed Employees'

'Furloughing' is a term more familiar to a US Citizen. In America involves a temporary suspension of employment for a specified period of time, during which no wages are received. The US definition of 'furlough' is a mechanism that can both be deployed specifically to avoid making redundancies in a similar manner to a 'lay-off', such as that applied by the Federal Government in December 2018 involving a 34 day furlough of a significant portion of Federal staff. It can also be used as part of a planned period of time off work, such as an annual factory shutdown. This type of furlough remains something not currently applied in the UK.

Key Elements

- HMRC have expressed their intent to have CJRS up and running by the end of April 2020;
- The CJRS is intended to remain available for three months from 1st March 2020 but there has been suggestion this may be extended and the funding is so far said to be limitless²;
- A new online 'Portal' is being set up on HMRC's website to receive employer's applications;
- Claims will be back dated to 1st March 2020, enabling the re-instatement of employees already made redundant as well as the recouping of lost income;
- HMRC will *reimburse* up to 80% of what are being termed '*furloughed*' employee's pay, in respect of their *usual monthly pay* or £2,500pcm³ per employee, whichever is the lesser. Fees, commission and bonuses should not be included;
- HMRC will, in addition to the above payment, reimburse Employer National Insurance and automatic enrolment pension contributions on the 80% figure;
- Employers can choose to top up the remaining 20%, although they are not obliged to;
- The CJRS applies to full and part-time employees, employees on agency contracts and zero hours workers;

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

² See speech of The Chancellor Rishi Sunak MP 20th March 2020
<https://www.gov.uk/government/speeches/the-chancellor-rishi-sunak-provides-an-updated-statement-on-coronavirus>

³ £576.92 a week, just slightly above the intended increased cap on a week's pay under the Employment Rights (Increase of Limits) Order 2020 (SI 2020/215)

- The CJRS is available to all UK employers with a UK bank account for each *furloughed* employee on a PAYE payroll schemes as at 28th February 2020 (to exclude potentially fraudulent claims such as subsequent employment of family to increase household income);
- The Scheme will also be available for those employees made redundant since 28th February 2020 if they are rehired and also those placed on unpaid leave if it was since 28th February.
- Both public and private sector employers with staff funded by public funding are expected to continue to fund those staff members with that funding rather than turn to the CJRS;
- The Scheme is equally not intended for organisations in receipt of public funding specifically to respond to COV-19 who will not be expected to furlough staff.

The Mechanics of the Scheme

To be eligible an employer must first write to the employees intended to be subject of the CJRS, giving them notice of their status as *furloughed* and keep a record of the communication

Employers should discuss with staff and make changes to the employment contract by agreement. If there are sufficient numbers of staff collective consulting is likely required.

Employers should make a claim through the HMRC's Portal, which is currently in the process of being built and due to go live at the end of April. Employers may claim no more often than every three weeks, the minimum duration for which a furlough period may last.

Calculations of pay under the scheme are dealt with as follows –

- For full or part-time employee, their actual salary before tax should be used to calculate 'the 80%';
- For employees with variable pay who have been employed for twelve months or more the higher of the same month's earnings for the previous year or the average monthly earnings for the 2019/2020 tax year should be utilised;
- For employees with variable pay employed for less than twelve months, average monthly earnings since the inception of their employment should be used;
- For those that started in February 2020, a pro-rata of their earnings should be utilised

Once an employer has calculated the 80% pay for their furloughed employee, they must then calculate Employer's National Insurance and minimum auto-enrolment figures from this. The HMRC will cover the NI and auto-enrolment contributions on the 80% so those employers looking to top up their employees' remaining 20% of pay will need to fund the corresponding auto-enrolment and NI contribution balances.

Further to their calculations, Employers will need to detail on their application the following-

- The ePAYE reference number;
- The number of employees being furloughed;

- 'the Claim Period' (namely when the started *furlough* status or the backdated date (if they have been re-employed for example) and end date);
- The amount claimed, being not less than the minimum length of a furlough of 3 weeks;
- The employer's bank account and sort code;
- The employer's name and phone number

HMRC retain powers to audit the amounts claimed.

Once in receipt of a claim, payment will then be made via BACS to the identified account. The HRMC make clear "*You must pay the employee all the grant you receive for their gross pay, no fees can be charged from the money that is granted.*" So, for example, any training loans or historic overpayments cannot be recouped from this figure

Furloughed employees, to maintain eligibility, are not entitled to undertake work on behalf of the employee seeking reimbursement, whether generating revenue, simply providing services, on reduced hours or reduced pay. Further, eligible employees or agency staff must be "*not working*" but may take part in volunteering or training so long as it does not provide services or revenue on behalf of their employer.

Conversely to the above, an employee working for two employers can be furloughed by one but remain working for the other. Further, employees required to complete an online training course whilst furloughed must still be paid the national minimum or national living wage.

Whilst under the CJRS an employee will continue to be subject to usual income tax and other deductions.

There is no derogation from the Equality Act 2010 or other discriminatory prevention provisions (such as freedom from detriment for making a protected disclosure), so employers must be mindful of the rationale applied to the decision as to which employee to furlough.

Once the scheme ends, employers will then need to decide whether employees can return to duties or whether it is necessary to consider termination of employment, by for example redundancy.

Furloughed employees have the same rights as staff working for the employer including maternity, rights against unfair dismissal, those under the Equality Act 2010.

Where Further Clarity Appears to be Needed

Understandably there are a number of points which remain unanswered –

- Will the scheme apply only to those with 'employee status' or will a broader definition of 'worker' apply as in the case of entitlement to holiday pay?
- Whilst commission and bonuses are said to be excluded, what of those sectors where *usual monthly pay* is largely commission or bonus based? What about dividend income?

- Will employers have to pay the money back?
- How much notice is required to be given to a prospective 'furloughed employee'?
- What do you do if you have an employee you wish to retain but refuses to agree to the furlough? Can you force it upon them? Would a dismissal in the circumstances be fair?
- HMRC's Guidance makes clear its intended purpose is "*designed to support employers whose operations have been severely affected by coronavirus (COVID-19)*". It is unclear if this is a message that those few unaffected businesses that nevertheless seek to take advantage of it may find themselves facing enforcement or recruitment action?
- Will 'rehired staff' under CJRS retain continuity of service?
- How will employers calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions? Happily, HMRC have indicated further guidance on this will be provided before the CJRS becomes live.
- Will the provisions of collective consulting under s.188(1) Trade Union and Labour Relations (Consolidation) Act 1992 be applied in full or relaxed to allow for speed?

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