

The Coronavirus Job Retention Scheme

The afternoon of 15th April 2020 saw the Treasury issue a direction to HRMC, in accordance with its powers derived from ss.71 and 76 Coronavirus Act 2020, to operate the Coronavirus Job Retention Scheme ('CJRS'), which is to be applied in terms of the Schedule attached to the direction.

This article seeks to try to distil the Schedule and several adjustments which have followed.

Paragraphs 2.1 – 2.5 set out the purpose of CJRS. Unsurprisingly, it is to allow employers to claim reimbursement for '*the costs of employment*' they would otherwise incur for '*furloughed employees*' arising from the '*health, social and economic emergency*' created by '*coronavirus and coronavirus disease*.'

Duration

Paragraph 12 provides for reimbursement limited to earnings and direct pension payments paid or payable and NI contributions in respect of the period 1st March to 30th June 2020.¹

The Application

Paragraph 2.3 confirms claims are made in such manner and form as HMRC require. HMRC's Guidance² is likely to be authoritative in this regard. Claims must be submitted online via the GOV.UK portal, which opened on 20 April 2020. As per the latest guidance referred to above, the following information is currently required -

- The applicant's employer PAYE reference number;
- The number of employees being furloughed;
- National Insurance Numbers for the furloughed employees;
- Names of the furloughed employees;
- Payroll and employee numbers for the furloughed employees (though this is optional);
- The applicant's Self Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number;
- The claim period (start and end date for which the employee is to be furloughed);
- The amount claimed (not less than the minimum length of 21 consecutive days);
- The applicant's bank account number and sort code;
- The applicant's contact name; and
- The applicant's phone number.

¹ On 17th April 2020 Chancellor Rishi Sunak has announced extension to the intended end date on 31st May - <https://www.gov.uk/government/news/chancellor-extends-furlough-scheme-to-end-of-june>

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

Employers must also be enrolled for PAYE online and have a Government Gateway ID & password.

The direction also contains clear references to those who would submit purported fraudulent claims. Paragraph 2.4 obliges HMRC to state in Guidance that payments may only be used for the purposes of CJRS & for those unwilling or unable to use a payment to immediately return it. Paragraph 2.5 states those who are abusive/act contrary to CJRS's purpose should not qualify.

In order to be a qualifying employer under the scheme, paragraphs 3.1 – 3.2 make it clear that:-

- a) They must have a registered PAYE with HMRC's real time information system; and
- b) This must be the case as at 19th March 2020³

Employers can submit claims for staff on multiple PAYE schemes, but must submit a separate claim in and calculation in relation to each scheme (paragraph 4).

Who is an 'Employee (or Treated as an Employee)' for the Purposes of CJRS?

Paragraphs 13.1(e), 13.2 & 13.3(a) incorporate into the definition of employee for CJRS:-

- Those employed under a contract of service;
- Those engaged under a contract of apprenticeship;
- Crown employees;
- Agency workers;
- Workers working through intermediaries under s.61R Income Tax (Pensions & Earnings) Act 2003;
- Those members of LLPs treated for the purposes of the Income Tax Acts as being employed by the LLP under contract of service instead of a member of the partnership (in which case they are treated as employee and the LLP as the Employer).

Who is a Furloughed Employee for the purposes of CJRS?

Paragraphs 6.1 – 6.8 defines 'furloughed employees' as being –

- a) those instructed by their Employer to cease all work in relation to their employment⁴;
- b) for whom the furlough period under a) above is at least 21 days;

³ HMRC had previously used the 28th February 2020 so the extension brings in a significant number of individuals who either changed jobs or obtained work between those dates. The new date is earlier than Chancellor Rishi Sunak's 20th March announcement – thus avoiding the risk of staff disingenuously registered following it.

⁴ Exceptions apply for Office Holders, volunteers, for training and training aspects of apprenticeships, however.

- c) the instruction is given *“by reason of circumstances arising as the result of coronavirus or the coronavirus disease”*⁵ (para 6.1); and
- d) the Employer & employee agree in writing the latter would cease work (para 6.7)⁶

The requirement that the Employer and employee agree in writing appears to be a particularly stringent requirement, which is contrary to both previous and subsequent HMRC Guidance. The first four iterations of the Guidance suggested that Employers would need only write to employees notifying them that they have been furloughed. The fifth iteration of the HMRC’s Guidance for Employers, published after this Treasury direction, states that employees do not have to provide a written response. This is contradictory and further clarification from HMRC will be required given that the direction forms the legal basis of the scheme.

The furlough period is clarified to not start immediately on instruction if at the time –

- The employee is entitled to or in receipt of SSP, in which case the furlough period, starts instead after that period of SSP has ceased. Subsequent entitlement to SSP would not prevent the continuation of furlough status (para 6.3);
- Those on unpaid sabbatical or unpaid leave on 28th February 2020 cannot commence a furlough period until the later of either 19th March 2020 or the point the leave had been set to finish (or the ending, completion or occurrence of an event/ circumstance/purpose, if the date is unclear and referable to such (paras 6.4 – 6.5)).

A person has not ‘ceased all work’ if they work for –

- the Employer,
- a person connected with the Employer (in definition of s.993 Income Tax Act 2007⁷; s.1112 Corporation Tax Act 2010⁸ or, subject to references to tax years and subsection (7) being omitted, s.5 Small Charitable Donations Act 2012⁹ (para 13.4); or
- otherwise work indirectly for the employer (para 6.2);

⁵ This is a wider definition that Mr Sunak first suggested when unveiling the proposed scheme which initially was implied to cover only those who would otherwise be made redundant.

⁶ The First version of the HMRC Guidance required merely notification. This position was maintained in the Second, Third and Fourth versions. The dramatic change imposed by the Direction after many acted in reliance on the guidance may render this provision vulnerable to judicial review (special thanks to Daniel Barnett who identified this point and with Max Schofield have produced detailed guidance on it <http://emplawservices.co.uk/wp-content/uploads/2020/04/Claims-against-HMRC.pdf>)

The Sixth iteration of the Guidance states "To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response. A record of this communication must be kept for five years." However the step by step guide remains resolute agreement is required.

⁷ As to the meaning of connected persons for the purposes of income tax.

⁸ Arrangements between companies to distribute to each other’s members.

⁹ Which applies to the determination of whether charities are connected.

this is with the exception of training activities directly agreed between Employer and employee before being undertaken, which are disregarded as ‘work’ (para 6.8)

Paragraph 6.6 permits company directors to continue to do that which might fall in 6.2 only if solely to fulfil a duty or other obligation under an Act of Parliament concerning either –

- the filing of accounts; or
- provision of other information relating to administration of the Director’s company¹⁰

On what Pay is a CJRS Reimbursement (‘Costs of Employment’) Calculated?

Paragraphs 5(a) – (b) state *‘the costs of employment’* are costs which –

- relate to an employee to whom the Employer made a payment of *‘earnings’* on or before *‘a CJRS day’*, in the 2019/2020 tax year and shown in a Sch.A1 PAYE return;¹¹
- the Employer has not reported a cessation of employment on or before that date;
- that that employee is a *‘furloughed employee’* as defined by paragraph 6; and
- the conditions in 7.1 – 7.15 (‘reference salary’) are met

‘Costs of employment’ are specifically defined as meeting the conditions of paragraph 7.1 as–

- a) Pay relating to payment of earnings to the employee during their furlough period; and
- b) That is £2,500 or more (or the appropriate pro-rata if on some other pay period) or, if less, an amount equal to at least 80% of the *‘employee’s reference salary’*.

To mitigate unnecessary exclusion of those who agreed pay less than 80% of reference salary, if done after 1st March 2020, CJRS permits employers to remedy the underpayments by topping them up to 80% threshold before making a claim (paragraph 7.11 – 7.12)

‘Earnings’ are defined by paragraph 13.1(d), subject to the exclusions below, as including any salary, wage or fee, gratuity or other profit or incidental benefit if in monies worth and anything else constituting an emolument of employment.¹²

The ‘Employee’s Reference Salary’ Used for the Calculation of Pay under CJRS

Paragraph 7.2 defines (except in the case of fixed rate employees below) an employee’s reference salary as the greater of either (a) average monthly (or other pro-rated period) amount paid for tax year 2019/2020 (or the period of employment if employed less than the tax year) and (b) the amount paid to the employee in the corresponding calendar period in the previous year.

¹⁰ This is a very restricted definition of director’s duties, far more than the initially HRMC Guidance implied.

¹¹ The information employers are required to report to HMRC concerning employees for the purposes of PAYE

¹² Income Tax (Earnings & Pensions) Act 2003 s.62

Paragraph 7.6 defines ‘fixed rate employee’ as being entitled to an annual salary in respect of a number of hours (specified or otherwise ascertained) that do not vary according to business, economic or reasonable conditions, who receives no other pay in respect of those hours and would be paid regardless of the number of hours worked in a month or week. Fixed rate employee’s pay is taken from their last salary period on or before 19th March 2020 (para 7.7).

Paragraphs 7.16 – 7.17 provide a safety net to employers who prepared fixed rate employees’ CJRS claims used the old reference period (28th February)¹³, allowing it for a first claim.

Paragraphs 7.10 & 7.13 – 7.15 clarify that where a fixed rate employee’s last salary period included a period of unpaid sabbatical or unpaid leave (including social benefit leave,¹⁴ such as statutory sick pay, started before 1st March that was due to and does finish before 1st June 2020)¹⁵ consideration should be given to what would have been paid if they were in paid leave

Paragraph 7.3 requires the calculation for employees and fixed rate employees disregard anything that is not ‘*regular salary or wages*’ which paragraph 7.4 defines as –

- Pay that does not vary according to a relevant matter (performance of the business in whole or part or connected business; contribution made to the performance of or any part of any business; the performance of duties of employment; similar considerations or otherwise payable as a matter of discretion (para 7.5));¹⁶
- Pay that is not conditional on a new matter;
- Pay that is not a benefit of any other kind;¹⁷
- Pay that stems from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

HMRC has subsequently released a guide to calculating 80% of an employee’s wages under the scheme, including what payments can be taken into account (e.g. compulsory overtime/commission) and those which cannot (discretionary commission/overtime).

¹³ Indicated in HMRC’s first, second and third iterations of its guidance and Chancellor Rishi Sunak’s 20th March 2020 speech setting out his intention for the Scheme.

¹⁴ ‘Social benefit leave’ comprises the following benefits SSP (per s.151 SSCBA or s.147 SSCB(NI)A); (b) SMP per s.164 SSCBA or s.160 SSCB(NI)A; (c) SAP per s.171ZL SSCBA or s.167ZL SSCB(NI)A; (d) SPP pursuant to ss.171ZA & 171ZB SSCBA or ss.167ZA & 167ZB SSCB(NI)A; (e) Statutory Shared Parental Pay per ss.171ZU & 171ZV of SSCBA or ss. 167ZU & 167 ZW of SSCB(NI)A; (f) Statutory Parental Bereavement Pay per to s.171ZZ6 of SSCBA or any provision made for Northern Ireland which corresponds to that section (para 8.7)

¹⁵ This has the purpose of avoiding employers simply seeking to top up staff sick or parental leave pay achieving the intention of HRMC’s Guidance which indicates CJRS was not intended to top up short term SSP

¹⁶ i.e. discretionary bonuses or performance-based commission

¹⁷ Excluding benefits in kind such as company car or phone allowances, not otherwise conditional or varying

Paragraph 7.9 provides that for members of LLPs, in addition to the definition of regular salary or wages, no account is to be taken of pay unless in an agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)¹⁸ that is either –

- Fixed;
- Variable by reference to the overall amount of profit or loss of the LLP; or
- No in practice affected by the overall amount of those profits or losses

Reimbursement Under the Scheme

Paragraph 8.1 provides the reimbursement of employers may include –

- 1) ‘gross earnings’ paid or reasonably expected to be paid by employer to that employee limited to the lesser of £2,500 or 80% of the reference salary (para 8.2);
- 2) Secondary Class 1 NI contributions¹⁹ capped at what would fall due on those reduced gross earnings (paras 8.3- 8.5);²⁰
- 3) Pension contribution at CJRS level – the lower of (using the same reference period)–
 - a) that due to be paid over CJRS claim period under a registered pension scheme;²¹or
 - b) 3% of the above reduced gross earnings²² that are more than the lower limit for qualifying earnings in the pay reference period²³ (paras 8.9 – 8.10 & 8.12(c))²⁴

Paragraphs 8.6 – 8.7 make clear payment may not include amounts of parental and illness based benefits comprising SSP, SMP, SAP, SPP, statutory shared parental pay or statutory parental bereavement pay that are either being received or liable to be paid.²⁵ Any reimbursement is correspondingly reduced to avoid double counting.

Qualification Where a New Employer has No Qualifying PAYE Scheme

Paragraph 9.1-9.3 bring new employers within the scope of the Scheme (treating them as having a qualifying PAYE scheme & having paid the employee in tax year 2019/2020) if –

- a) The PAYE scheme did not qualify solely due to not being registered by 19th March 2020;
- b) The PAYE scheme has effect in relation to a ‘relevant employee’ who –
 - was employed by a different employer on 19th March 2020;
 - the former employer’s PAYE Scheme would have qualified;

¹⁸ As set out in s.863B(5) Income Tax Trading & Other Income) Act 2005

¹⁹ Which an employer is liable to pay as secondary contributor by ss.6 – 7 SSCBA or its Northern Irish equivalent.

²⁰ So if reimbursement is sought for an employee entitled to £1,000pcm gross pay would involve NI contributions on £800pcm. The total NI received should not exceed that paid by the Employer over the furlough period (8.4).

²¹ As defined under Part 4 of the Finance Act 2004 (Para 8.12(a)).

²² So for contractual entitlement to £1,000pcm gross pay reimbursement of pension contributions is 3% on £800.

²³ As defined under s.15 Pensions Act 2008 and its corresponding regulations (Para 8.12(b)).

²⁴ As set out in s.13(a) Pensions Act 2008.

²⁵ Regardless of whether or not a claim for those benefits has actually been made.

- the employee's employment changed to the Employer making the claim; and
- either Reg. 102 PAYE Regulations applies so the change was not treated as a cessation of employment or TUPE applied so the transfer did not operate to terminate employment ('a TUPE transfer') the transfer of trade business or undertaking resulting in the change did not break continuity of service per s.218 Employment Rights Act 1996 (para 9.10).

A key point here is that a new employer will still be able to furlough transferred employees under the scheme, even if the TUPE transfer took place after 28 February 2020.

Qualification if there is Succession to a Business with an Otherwise Qualifying PAYE Scheme

Paragraphs 10.1 – 10.2 bring within scope those new Employers who succeed a business which otherwise has a qualifying PAYE scheme (*who would otherwise be disqualified as they had not made payments to those staff in 2019/2020 tax years nor eligible per paras 9.1-9.3*).

Qualification in the case of Reorganisations

Paragraph 11.1 - 11.2 provides that a PAYE Scheme registered on HMRC's real time system after 19th March 2020 remains a qualifying scheme if it was due to the replacement of at least two of the Employer's PAYE Schemes owing to a business reorganisation and that the affected employees of one of the transferred schemes before the new Scheme impacted any staff.

In those circumstances a payment under the earlier scheme in the 2019/2020 tax year is treated as paid under the new PAYE scheme for the purpose of the CJRS claim.

Annual Leave

The Government has through its 'Check if Your Employer can Use the Coronavirus Job Retention Scheme' Guidance²⁶ clarified the following –

- annual leave will continue to accrue during the furlough period;
- employees may take holiday during the furlough period, although employers may have flexibility to restrict when holiday can be taken if there is a business need;
- holiday pay should be paid at rate in accordance with the Working Time Regulations 1998 such that employers must pay the additional amount over and above the grant from CJRS for periods of holiday

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Louis Howlett

Barnaby Large

DC Employment Solicitors

No.18 Chambers

²⁶ <https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme>