

Coronavirus Job Retention Scheme – where are we now?

Since HMRC published the initial informal guidance on the Scheme on 26 March 2020, the numerous updates have sought to provide clarity with mixed results. The government's formal direction to HMRC (Directions) were finally published on 15 April and further HMRC guidance has been issued in the past few days, addressing e.g. annual leave and the requirement for written agreement between the parties. But what has changed, what are the risks, and where there are apparent contradictions between the Direction and the guidance what should you follow?

The HMRC online portal went live on 20 April 2020 with a reported 140,000 businesses seeking support. Whilst furlough is a new concept, it should be used in accordance with employment law but currently without the benefit of case law to aid understanding. Where you have specific queries please do contact one of our employment team.

Update

Purpose of the Scheme – not just to avoid redundancy

- Whilst the original guidance referred to furloughing as an alternative to redundancy, the guidance now places the furloughing of employees as a response to business operations severely affected by coronavirus, opening the scheme up to a wider group of employees.

Time frame – scheme extended by one month

- The temporary nature of the scheme has been extended by one month, the scheme is now in place for four months, beginning 1 March 2020. At present the scheme will be terminated at the end of June 2020, however this could be extended again. Do be mindful that the minimum furlough is three weeks, this is also relevant in the run-up to 30 June 2020.

Fraudulent Claims – reporting online

- HMRC has put in place an online portal for employees and the public to report suspected fraud in the Coronavirus Job Retention Scheme, in particular two areas are receiving attention, the prohibition on working during furlough and employers remitting the entire grant to furloughed employees. Details of the portal are yet to be released.

Employees you can claim for – on PAYE payroll on or before 19 March 2020

- Employees and individuals on a variety of contracts are eligible, however they must have been on the PAYE payroll scheme and have been notified to HMRC on an RTI submission on or before 19 March 2020.
- This change from 28 February 2020 assists those new starters and departing employees who fell between the cracks albeit the requirement relating to the RTI submission will exclude many new starters where the employer operates a month-end payroll.
- Employees who were made redundant or left employment after the 28 February 2020 can be re-employed and placed on furlough from the date they were dismissed. This applies as long as the employee was on the payroll on 28 February 2020.

Statutory Sick Pay

- Employees placed on furlough do not qualify for SSP, however an employee on SSP or shielding in line with government guidance may be placed on furlough, in which case the employee would be classified as a furloughed employee and entitled to furlough pay.

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Unpaid Leave

- If an employee started unpaid leave, due to the effect of COVID-19 after 28 February 2020, they can be placed on furlough instead and receive at least 80% of their regular wages, up to the monthly cap of £2500.
- If an employee went on unpaid leave on or before 28 February, they cannot be placed on furlough until the date on which it was agreed they would return from unpaid leave. An employee is either on an arranged period of unpaid leave or on 'furlough', they can't be on both at the same time. An employer can only claim through the Scheme for an employee who has been placed on 'furlough'.

Training - does that count as work?

- Furloughed employees can engage in training, as long as in undertaking the training the employee does not provide services to, or generate revenue for, or on behalf of their organisation or a linked or associated organisation.
- Where training is undertaken by furloughed employees, at the request of their employer, they are entitled to be paid at least their appropriate national minimum wage for this time. Where employees are placed on furlough, and the above training is not requested there is no requirement to meet the NMW or NLW as the employees are on a leave of absence.

Agreement to Furlough – records and calculations to be kept for five years

Recent guidance, dated 20 April 2020 states the following:

- Employers must confirm in writing to their employee that they have been furloughed
- If 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.

Whilst initial guidance stated employees were to be notified of being furloughed in writing, the Directions took the requirement a stage further stating the employee and employer must agree in writing that the employee will cease all work in relation to the employment. This prompted a flurry of update letters seeking this exact agreement. What then is required given the conflicting guidance and Directions? Ideally, any change (which is not provided for in the employment contract) to the employment terms and conditions should be in writing, with the employee providing the written consent. Where this has not been possible the risk will crystalize where the claim is either rejected by HMRC initially or following audit, or where subsequently an employee claims a deduction in wages. In regards to the agreement that the employee will cease work while furloughed, the Directions still state this to be a requirement and should be sought where possible, though subsequent guidance does seek to rectify this.

The Portal

- HMRC's [portal](#) went live on 20 April 2020 and new guidance details how to calculate the 80% of the employees' wages (HMRC will not make that calculation).
- The Directions at 7.4 and 7.5 leave room for discussion about what precisely should be included but in brief the guidance states the grant will be calculated on regular, contractual pay, such as wages, compulsory commission and past overtime. The calculation will not

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include discretionary commission (including tips) payments or bonuses, non-cash payments, benefits in kind or salary sacrifice schemes.

Annual Leave – long awaited confirmation

- HMRC employee guidance confirms that holiday entitlement continues to accrue during furlough, however agreement can be made to vary holiday pay entitlement as part of the furlough agreement.
- Holiday can be taken whilst on furlough and, 4 weeks' of the entitlement, must be at the normal rate of pay or where the rate varies, calculated on the average pay received in the past 52 weeks in line with the Working Time Regulations.
- It remains unclear whether employees can be required by their employer to take annual leave while furloughed, though it appears reasonable requests are permissible. It is hoped that there will be further clarification.

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