FURLOUGH AND THE CORONAVIRUS JOB RETENTION SCHEME

This guidance is subject to change in accordance with updated government guidance. This factsheet was last updated on 20.04.20 to incorporate the updated government guidance published on 09.04.20; the further government updates to the guidance published on 15.04.20 and 20.4.20 (https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme) and The Coronavirus Act 2020 Functions of HMRC (Coronavirus Job Retention Scheme) Direction dated 15.04.20 (which sets out the legal framework for the Scheme):


Under the Coronavirus Job Retention Scheme (CJRS), which opened for claims on 20 April 2020 and remains open until 30 June 2020, unless further extended, all UK employers will be able to access support to continue paying part of their employees’ salary for employees who are furloughed by reason of circumstances resulting from the coronavirus epidemic.

Eligibility

All UK businesses that employ staff that were both on their PAYE payroll and notified to HMRC on an RTI submission on or before 19 March 2020 are eligible for the CJRS (with the exception of most public sector organisations – see below 3rd bullet point). In other words, a sole trader, partnership, limited company or limited liability partnership can claim the CJRS grant. HMRC guidance has also confirmed that eligible businesses include:

- recruitment agencies (for agency workers paid through PAYE)
- charities
- public authorities (although note that the government “expects” that only in a small number cases will the CJRS be appropriate for use by public authorities; for example where organisations (and their employee costs) are not funded by the government and whose staff cannot be redeployed to assist with the coronavirus response. This also applies to non-public sector employers who receive partial or total public funding for staff costs. The Treasury Direction that sets out the legal framework for the CJRS is silent regarding the restrictions on claiming for employees whose wages are publically funded, so it is not clear at this stage how this government expectation applies in practice, how it is to be enforced in respect of the CJRS or how this impacts on other public grants received for services those employers provide.

Government guidance published on 17 April 2020 has been issued for early years’ child care providers who are employers (such as nursery schools) in relation to claiming under the CJRS where they receive early years’ public funding which pays part or all of staff salaries, which is available here: https://www.gov.uk/government/publications/coronavirus-covid-19-financial-support-for-education-early-years-and-childrens-social-care/coronavirus-covid-19-financial-support-for-education-early-years-and-childrens-social-care

This guidance states that those childcare providers can only furlough staff and claim through the CJRS where they meet certain conditions and can only claim in respect of the proportion of the paybill which is privately funded (e.g. through the fees parents pay for childcare beyond the free entitlements, rather than funded through the government’s free entitlements (or ‘DSG income’).

- On 15 April 2020, the government extended the CJRS to staff that are on the employer’s PAYE payroll on, or before, 19 March 2020 and have been notified to HMRC via a RTI submission by that date (the previous cut-off date was 28 February 2020). Employees that were employed as of 28 February 2020 and on the PAYE payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer after that
and prior to 19 March 2020, can also qualify for the CJRS if the employer re-employs them and puts them on furlough.

Claims under the CJRS can be backdated to 1st March 2020.

The Definition of a Furloughed Employee

Previous government guidance referred to employees being eligible for furlough where they would otherwise have been “laid off” (meaning made redundant). This is no longer the case as the CJRS has been widened to benefit eligible employees who cannot carry out any work due to the wider effects of the current coronavirus epidemic.

The legal framework for the CJRS states that an employee is a furloughed employee if-

a) the employee has been instructed by the employer to cease all work in relation to their employment (and the employer and employee have agreed in writing (which may be by email also) that the employee will cease all work in relation to their employment),

b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

In other words the employer’s decision to place an employee on furlough can be pursuant to the wider circumstances of the coronavirus epidemic (for example where employees need to shield, or look after dependants due to the circumstances of the epidemic); and not only where those employees would otherwise be redundant.

Unlike the Treasury Direction, the government guidance does not expressly require a written furlough agreement, but states that to be eligible for the CJRS grant, employers must provide written confirmation to their employee that they have been furloughed. The guidance states that this should be done in accordance with employment law considerations (e.g. by invoking an existing lay off clause and confirming to the employee any provisions to apply during furlough and/or seeking consent to temporarily vary the employment contract during furlough where necessary, or seeking consent to furlough where there is no existing lay off clause). The guidance states that there needs to be a written record of the confirmation that the employee has been furloughed, but the employee does not have to provide a written response. It is not yet clear how this fits with the Treasury Direction regarding the requirement for a written agreement to cease work but it is likely that provided the employee is instructed to cease work in accordance with employment law provisions, this would satisfy the employee’s eligibility for the CJRS grant, subject to them meeting the other eligibility requirements. A record of this communication must be kept for five years.

How to access the CJRS

Employers will need to:

- designate affected employees as ‘furloughed workers,’ and notify their employees of this change - changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation.

- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal (HMRC will set out further details on the information required). HMRC will then pay the employee costs via BACS payment to a UK bank account.

- Employers can only submit one claim at least every 3 weeks, which is the minimum length of time an employee can be furloughed for at any one time. In other words, employees cannot be furloughed for less than 3 weeks at a time.
Employers need to provide the following to make a claim via HMRC from 20 April 2020:

1. The bank account number and sort code for HMRC to use when paying the claim.
2. The name and phone number of the person in the business for HMRC to call with any questions.
3. The Self-Assessment UTR (Unique Tax Reference), Company UTR or CRN (Company Registration Number).
4. The name, employee number and National Insurance number for each of the furloughed employees.
5. The total amount being claimed for all employees and the total furlough period, using the amounts in the payroll. For employers with 100 or more furloughed staff, they will need to upload a file with information for each employee using the following file types (.xls, .xlsx,.csv & .ods).
6. Employers (or their agents) will also need to sign up for a Government Gateway account if they do not already have one.

It is easier to calculate the figures in advance, so that these can be inputted into the 3 fields for the 80% wage calculation, the employer’s National Insurance Contribution and the employer’s pensions contribution figure.

Details of the information needed to make a claim can be found here: https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme


An online calculator is available for calculating the furloughed wages to be claimed, although this currently only applies to fixed salaried employees.

Where employers use an agent who is authorised to act for them for PAYE purposes (such as an accountant), the agent will be able to make a claim on the employer’s behalf. Employers are advised to ensure that HMRC have been notified of their authorized agent for PAYE purposes so that the same agent can be used to submit the CJRS claim.

Where employers use a file-only agent (i.e. that files the employer’s RTI return but doesn’t act for the employer in other matters), they won’t be able to make a claim on the employer’s behalf and the employer will need to ensure they have the information listed above from them to make the claim themselves.

On submission of the claim, a note should be made of the claim reference number provided, or the confirmation should be printed out, as the user will not receive an email confirmation of the claim submitted. A copy of the calculations used for the claim should be retained also, particularly as HMRC can later audit the claims.

HMRC has confirmed that claims submitted will be paid within 6 working days.

As stated above, HMRC has confirmed that HMRC will retain the right to retrospectively audit all aspects of CJRS claims made.

Where employees believe the CJRS is being abused by their employer (because, for example, employees are being required to carry out work during furlough for their employer) they may report this to HMRC via an online hotline.

**Record keeping**

To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. For this purpose, the date of furlough will be the date they commenced furlough, rather than the date of any agreement to furlough. A record of this communication must be
kept for five years. The government has indicated that it may retrospectively audit employers who have claimed under the CJRS and may claw back wages paid under identified fraudulent or erroneous claims. Please note also that for employers that take on new starters that have additional employment and are furloughed by their other employer, the new employer should ensure their employee completes the starter checklist form for PAYE and that the employee completes ‘Statement C’ of the form (https://www.gov.uk/government/publications/paye-starter-checklist).

Payment to Employers

HMRC will reimburse 80% of furloughed workers’ wage costs, up to a cap of £2,500 per month, which equates to the UK’s median salary of £30,000 per year. This cap does not include employer pension contributions and national insurance contributions on the furloughed wage. HMRC will also meet the national insurance costs and pension costs on the furloughed wage as an additional amount to be claimed through the CJRS. The employer pension contributions that can be claimed are only in respect of the mandatory employer contribution through the automatic enrolment scheme of 3% of income above the lower limit of qualifying earnings.

Employers cannot claim for additional National Insurance or pension contributions employers make where they chose to top up their employee’s salary, or any pension contributions employers make that are above the mandatory employer contribution. Businesses that require short term cash flow support may be eligible for a Coronavirus Business Interruption Loan.

As the payment to employers under the CJRS is a grant rather than a loan, it will not have to be repaid to the government at any time.

Payment to Employees

- Employees that have been furloughed will receive 80% of their salary (less the usual income tax and National Insurance deductions) up to a cap of £2,500.
- Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

The Pensions Regulator has published guidance reminding employers that their automatic enrolment duties continue to apply, including re-enrolment and re-declaration duties. This is the case regardless of whether staff are still working or are being furloughed under the CJRS: https://www.thepensionsregulator.gov.uk/en/covid-19-coronavirus-what-you-need-to-consider/automatic-enrolment-and-pension-contributions-covid-19-guidance-for-employers

This guidance states that the Pensions Regulator will not take regulatory action where the requirement cannot be complied with under pensions legislation to consult on certain changes for a minimum period of 60 days, including where there is a proposed decrease in the employer contribution, (which applies where the employer has at least 50 employees), where the change applies in respect of furloughed staff and only applies during furlough.

- Employees that have more than one employer can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.
- Employees on sick leave or self-isolating, or shielding where they are extremely vulnerable and have been notified to do so in accordance with public health advice and unfit for work should get Statutory Sick Pay (or contractual sick pay, unless this has been renegotiated). It appears from the government guidance that employees may remain on furlough and receive furloughed wages whilst sick, unless the employer has chosen to pay Statutory Sick Pay rates during the sickness period (please see below guidance on sick leave during furlough), albeit the Treasury Direction states that employees cannot receive furloughed wages during the first period of sick leave where the employee is eligible to receive SSP instead. Whilst the updated government guidance
on 15 April 2020 has clarified that employees can take annual leave whilst on furlough, it is silent on whether or not 80% of the annual leave pay which is paid during furlough can be reclaimed as wages via the CJRS. It is likely, however, that annual leave pay can be claimed at 80% via the CJRS.

- Employees who have been furloughed can engage in voluntary work without risking their pay.

**Company directors who are on the PAYE payroll of their company**

As office holders, salaried company directors are eligible to be furloughed and claim their wages through the CJRS. This also applies to salaried individuals who are directors of their own personal service company (PSC). Government guidance states that where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed. Where one or more individual directors’ furlough is so decided by the board, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned. Therefore, company directors and others, such as their spouses who are also drawing a salary via PAYE and who have been on the payroll on or before 19 March 2020 and sent HMRC an RTI submission notifying their PAYE payment on or before 19 March 2020, can claim for loss of salary via the CJRS in the same way as any other employee. They would not be able to claim for loss of dividends under the CJRS, of course and government guidance states that those that pay themselves a salary and dividends through their own company would not be covered by the Self-employment Income Support Scheme in respect of that income. However, a condition of furloughing is that the individual must not undertake work of any kind for the company as an employee during furlough. Government guidance states that company directors should also not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company as a condition of claiming under the CJRS. Company directors may, however, continue to carry out their company statutory duties, such as preparing Companies House and HMRC filings during furlough.

**Calculation of wages for Furloughed Workers**

- For salaried employees (whether full or part-time), the employee’s actual salary including regular contractual pay elements before tax, as in their last pay period prior to 19 March 2020 (where an employee has been paid for a whole pay period) should be used to calculate the 80%. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. “Regular” is defined by HMRC as those payments which are not conditional on company or personal performance (e.g. commission or bonus payments), unless the payment arises from “a legally enforceable agreement, understanding, scheme, transaction or series of transactions”.

A worked example for a salaried furloughed worker whose gross salary is at or above £2,500 (and therefore capped at £2,500) would be as follows:

<table>
<thead>
<tr>
<th>Gross Payment:</th>
<th>£2,500.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer NI:</td>
<td>£243.98</td>
</tr>
<tr>
<td>Employer Pension:</td>
<td>£59.40</td>
</tr>
<tr>
<td>Total grant available (that can be claimed from HMRC):</td>
<td>£2,803.38</td>
</tr>
</tbody>
</table>

If, based on previous government guidance, the claim was calculated based on the employee’s salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020) employers can choose to still use this calculation for their first claim under the CJRS.
**Employees whose pay varies**

Whilst the government guidance does not expressly state this, these will include zero hour employees and workers and those who receive variable contractual pay elements such as overtime, contractual commission and contractual bonuses that can be claimed under the CJRS.

If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, employers can claim for the higher of either:

- the same month’s earning from the previous year
- average monthly earnings from the 2019-20 tax year up to the day before they were furloughed.
- If the employee has been employed for less than a year, employers can claim for an average of their monthly earnings since they started work up to the day before they were furloughed.
- If the employee has been employed for less than a month, employers should use a pro-rata for their earnings so far to claim for 80% up to the day before they were furloughed.

**Past Overtime, Fees, Commission, Bonuses and non-cash payments**

Previous government guidance stated that fees, commission and bonuses were excluded from pay that could be claimed from HMRC. The government changed its guidance on 4 April 2020 to state that employers can claim for any regular payments that employers are obliged to pay their employees i.e. regular contractual payments. This includes wages, past overtime worked (prior to furlough), fees and compulsory commission payments. These amounts can be claimed for at 80% of their cost subject to the £2,500 cap. Where employers are not topping these payments up to 100%, as this would amount to a variation of contract, employees’ consent would be required to withhold the full payment. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

**Benefits in Kind and Salary Sacrifice Schemes**

The reference salary for claiming under the CJRS 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 also not be included in the reference salary (the reference salary is the post salary-sacrifice amount as of 19 March 2020). Where the employer provides benefits to furloughed employees, this should be in addition to the wages that must be paid under the terms of the CJRS (to the extent these contractual payments are not validly varied as a temporary variation of contract).

The government guidance updated on 9 April 2020 states that all the grant received to cover an employee’s subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme. In other words, the lower, post salary sacrifice salary, should be used for the purposes of a claim under the CJRS and the employer must pay any ongoing benefits, including through a salary sacrifice scheme, itself, unless these benefits are contractually varied.

Normally, an employee cannot switch freely out of a salary sacrifice scheme unless there is a ‘life event’. HMRC agrees that the coronavirus epidemic counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly i.e. where the salary sacrifice scheme is varied as a temporary variation of contract in accordance with the employee’s agreement.

HMRC guidance on salary sacrifice schemes, which includes guidance on changing the terms of a salary sacrifice arrangement is available here: [https://www.gov.uk/guidance/salary-sacrifice-and-the-effects-on-paye](https://www.gov.uk/guidance/salary-sacrifice-and-the-effects-on-paye)
Returning to Work from Statutory Leave

Government guidance confirms that claims under the CJRS for employees returning from statutory leave, which includes maternity leave, paternity leave, shared parental leave, adoption leave, sick leave and parental bereavement leave, should be calculated against their salary, before tax, not the pay they received whilst on statutory leave.

As set out above, claims under the CJRS for those on variable pay, returning from statutory leave should be calculated using the higher of the:

- same month’s earning from the previous year; or
- average monthly earnings for the 2019-2020 tax year.

Employees that are paid the National Minimum Wage

The HMRC guidance confirms that Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for the hours they are working.

Therefore, furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW. In other words, employees whose pay is equal to the NLW/NMW rate would receive 80% of the NLW/NMW rate whilst on furlough.

However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that can be claimed under the CJRS.

Please note the increase in the NMW rates from April 2020, although the NMW increase will not be reflected in the reference salary for the CJRS claim as the reference salary predates the April increase in the NMW for most claims.

Volunteer Work During Furlough

A furloughed employee can take part in volunteer work, if it does not provide services to or generate revenue for, or on behalf of the employer or any organisation associated with or linked to the employer. The employer can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if the work or volunteering opportunities are in line with public health guidance.

Consultation for Furlough

Where there is no existing contractual right to place employees on lay off or short-time working, employers will require employees’ consent for them to be placed on furlough as this will amount to a variation of contract. Where they do not agree, employers may decide to consult with those staff for redundancy.

Government guidance states that, “if sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment”. Strictly speaking, unless an employer is required to consult collectively under the terms of a collective or workforce agreement when proposing to vary contractual terms, the requirement to consult collectively is only triggered where there is a “proposal to dismiss” at least 20 staff within a period of 90 days, (in this case, should they fail to agree to the terms of the furlough proposed). Individual consultation for redundancy should be followed where fewer than 20 employees are placed at risk of redundancy within a period of 90 days (a shorter redundancy process may be followed, where appropriate, where employees have less than 2 years’ service).
Terms and Conditions of Employment During Furlough

Employers may wish to consider asking employees to be placed on furlough to agree to a claw back and deductions from wages clause. This is to apply in the event that the employer is unable to reclaim the reduced wages paid during furlough from HMRC, or where HMRC later asks for the furloughed wages to be repaid to HMRC following an audit and the employer wishes to recover this from the employee, including from future wages. The employer may additionally or alternatively require the employee to agree to a deferment of wages until the furloughed wages have been paid to the employer by HMRC (although the employer is required to declare to HMRC when making a CJRS claim that the furloughed wages claimed for will be paid to the employee in the next payroll at the latest). Please see our template Letter to Employee Assigning them to Furlough, for an example of this.

Sick Leave During Furlough

The Treasury Direction states that employees cannot be placed on furlough at the time they are receiving SSP or the employer is liable to pay them SSP. Furlough can commence after the SSP period has ended.

The government guidance which was updated on 9 April 2020 states that where furloughed employees become unfit to work during furlough, employers can choose whether or not to move these employees onto Statutory Sick Pay (SSP) or to keep them on furlough, at their furloughed rate of pay.

Where a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary while they are receiving SSP. Employers are required to pay SSP themselves, although may qualify for a rebate for up to 14 days of SSP where the employee is sick due to having coronavirus symptoms, is self-isolating due to someone in their household having coronavirus symptoms, or shielding in accordance with a public health notification as an extremely vulnerable person and cannot otherwise work from home. Where employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for these costs through the furloughed scheme. Where employees are sick and thus unfit to work whilst on furlough but their sickness is not related to furlough, as employers cannot reclaim SSP paid for non-coronavirus related incapacity, employers may choose to ‘top up’ their SSP to their furloughed rate of pay and continue to reclaim the employee’s furloughed wages during the period of sick leave whilst they remain on furlough.

Whilst Statutory Sick Pay rates cannot be reduced, where employers offer contractual (enhanced) sick pay, it should be confirmed whether or not the enhanced element of sick pay (over and above Statutory Sick Pay) will be reduced by 20% during furlough.

Annual Leave During Furlough

Government guidance was updated on 17 April 2020 to make clear that employees can take annual leave during furlough. The updated government guidance states in respect of annual leave pay that “employers will be obliged to pay additional amounts over the grant” which clarifies that employers can claim for annual leave pay at 80% under the CJRS. It remains the case that an employer may refuse a worker's holiday request by serving a counter-notice. The employee must be given at least as many calendar days before the date on which the leave is due to start as the number of days which the employer is refusing.

Furlough is subject to existing legislation and the existing terms of the employee’s contract (to the extent they are not varied by the employee agreeing to any variation of contract to apply during furlough leave). Accordingly, as employment legislation defines a ‘week’s pay’ for the purpose of certain statutory entitlements including statutory annual leave (a ‘week’s pay’ is essentially the employee’s ‘normal pay’), statutory annual leave should be paid at the employee’s normal salary rather than at the reduced salary, whether or not taken whilst on furlough leave. Where employees
are entitled to additional annual leave in excess of the 5.6 weeks’ statutory annual leave, the additional contractual annual leave may be paid at 80% of the employee’s salary subject to the employee agreeing this as a temporary variation of contract. The employer may also seek the employee’s agreement that the additional contractual annual leave entitlement will not accrue during furlough leave (statutory entitlements, including statutory annual leave entitlements will continue to accrue during furlough regardless).

Please note that The Working Time (Coronavirus) Amendment Regulations amend the Working Time Regulations 1998 (WTR 1998) by permitting the carry-over of any untaken statutory annual leave in respect of the 4-week annual leave entitlement only, where it was not reasonably practicable for the individual to take it in the leave year “as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)”. Carried-over leave may be taken in the two leave years immediately following the leave year in respect of which it was due. Employers will only be able to require a worker not to take carried-over leave on particular days where they have a "good reason" to do so (this is undefined). Regulation 14 of the WTR 1998 is also amended to ensure a worker will be paid in lieu of any untaken carried-over holiday where their employment is terminated before they have had a chance to take it.

The additional 1.6 weeks’ statutory annual leave entitlement (i.e. over and above the 4 weeks’ basic annual leave entitlement) may only be carried over where the contract of employment or other 'relevant agreement' permits this.

Employers should exercise caution in serving notice on employees to take their 4-week statutory annual leave during furlough (by giving twice as much notice as the period of annual leave the employee is required to take), as doing so (whilst not expressly prohibited) would appear to go against the grain of the Working Time (Coronavirus) Amendment Regulations that permits carry over of the 4-week annual leave entitlement to another leave year due to the effects of the coronavirus. Although this issue has not yet come before the courts for determination but could be subject to legal challenge in future, doing so may also be contrary to the Working Time Directive where employees cannot fully engage in rest and relaxation during the 4-week annual leave period due to the personal restrictions placed on them during the current coronavirus epidemic; particularly for those who are required to apply more rigorous shielding in accordance with public health advice and are advised not to leave their home.

Where employees have been given notice of redundancy or stopped working for their employer on or after 28 February 2020

Some employers may already have issued notice of redundancy to some staff before the CJRS was announced. Where employees are still employed (i.e. are on notice) employers may wish to contact them as soon as possible to offer to retract notice and place them on furlough leave instead, with a view to not needing to make that employee redundant (and thereby avoiding the requirement to pay redundancy pay). Whilst the employee will need to agree to this, in the circumstances it is likely that most employees would welcome this. HMRC guidance has confirmed that the CJRS also covers employees who were made redundant after 28 February 2020, if they are rehired by their employer (although there is no obligation for employers to offer re-employment in this circumstance). This is provided that the employee was on the employer’s payroll as at 28 February and had been notified to HMRC on an RTI submission on or before 28 February 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 28 February 2020.

Employers will need to decide whether or not to contact employees who have recently been made redundant due to business circumstances brought about by the Coronavirus epidemic to offer re-instatement on the same terms and conditions, or re-engagement on alternative terms and conditions of employment. This would be offered on the basis that they will be assigned to a period of furloughed leave. There is no legal obligation to do so, however. Employers may decide to offer re-employment to only some of those ex-employees that have recently been dismissed for redundancy, in which case, where the dismissal took place within the previous 3 months, employees not offered
re-employment may be more likely to appeal their redundancy dismissal if in time to do so, or bring an unfair dismissal claim to challenge the original redundancy dismissal.

As the previous dismissal decision would still stand in this circumstance (unlike in the case of a successful appeal by the employee against a redundancy dismissal decision), this would break continuity of service for statutory purposes. However, the employer could agree to re-instate on existing terms and conditions and could agree to recognize continuity of service for contractual purposes (e.g. in respect of any contractual benefits, over and above statutory benefits, that require a minimum length of service). Alternatively, the employer could offer re-engagement on alternative terms and conditions.

The government updated their guidance on 4 April 2020 to include in the category of former employees who can be furloughed and their wages claimed for through the CJRS, not only employees who were dismissed due to redundancy on or after 28 February 2020, but also employees who 'stopped working' for their employer. Re-employment and placing on furlough is subject to the employer’s agreement. In deciding whether to offer to re-employ with a view to placing the individual on furlough, employers would want to consider whether or not it would benefit the business to re-employ the individual, bearing in mind the reason why the contract was originally terminated. Employers should also bear in mind HMRC’s stated intention to claw back fraudulent or erroneous claims and the fact that government guidance on this issue is not clear in terms of when the employee is said to have stopped working for a reason that is related to the coronavirus epidemic. Where employers choose to re-employ in this circumstance and pay furloughed wages, they are advised to use a claw back clause in the furlough agreement. There is certainly no obligation on the employer to re-employ an individual and/or to furlough them in this circumstance.

**Shielding Employees**

The updated government guidance dated 4 April 2020 stated that employers can claim for furloughed employees who are shielding in line with public health guidance (or need to stay home with someone who is shielding) if they are unable to work from home and they would otherwise be at risk of redundancy. This refers to individuals who are following more stringent social distancing measures due to being very vulnerable. The government guidance was updated again on 9 April 2020 to remove the requirement that those employees otherwise be at risk of redundancy if they are not furloughed due to the wider stated purpose of the CJRS.

The Sick Pay (General) (Coronavirus Amendment) (No.3) Regulations 2020 came into force on 16 April 2020. These provide that extremely vulnerable individuals who have been notified to shield in line with public health guidance are entitled to SSP subject to meeting the other eligibility requirements for SSP. Whist shielding employees who were already furloughed prior to 16 April 2020 can continue to receive furloughed wages, the government guidance has not yet been updated to take account of these new Regulations, so it is not yet clear if employees who are entitled to SSP under these Regulations would be excluded from being placed for the first time on furlough from 16 April 2020 in accordance with the wording of paragraph 6.3 of the Treasury Direction; or whether the employer would still have the option to furlough shielding employees from this date in accordance with the government guidance. It is likely that the employer continues to have the choice whether to pay SSP to employees who are entitled to SSP or to furlough them and pay furloughed wages, but clarity on this point would be welcome.

**Employees with caring responsibilities**

Employees who are unable to work because they have caring responsibilities resulting from coronavirus (e.g. because they need to look after children due to school closures) can be furloughed.
Apprentices

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed.

However, apprentices must be paid at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage as appropriate for all the time they spend training (rather than the reduced 80% of wages). This means the employer must cover any shortfall between the amount they can claim for their wages through this scheme and their statutory minimum wage. Guidance is available for apprenticeships which are affected by the coronavirus epidemic: https://www.instituteforapprenticeships.org/response-to-covid-19/

Do Employers have to make up the 20% Short-Fall in pay for those workers on furloughed leave?

Where employers are able to rely on existing lay off clauses, there is no legal requirement to obtain consent to a reduction in salary during the leave period (as employees in this circumstance do not have any contractual right to pay when on furloughed leave, which is essentially a period of lay off). They would receive pay at 80% of their current contractual salary whilst they are on leave in accordance with the CJRS. There is no contractual obligation to top up the 80% pay to the employee’s contractual pay rate that would otherwise apply if they were not on leave. However, where there is no contractual right for the employer to place employees on lay off, employers will need their employees’ consent to place them on furloughed leave and to reduce their salary by 20%, unless new legislation is introduced which gives employers the statutory right to place workers on furloughed leave under the terms of the Scheme.

Do Employees have the right to be placed on furloughed leave?

Employers must designate employees as ‘furloughed workers’ by telling HMRC. As in the case of lay off, there is no entitlement for employees to insist that they be placed on this leave if the employer decides there is work for them to do. In other words, employers are not required to place their employees on furlough. However, employees that are placed on furlough cannot undertake any work for their employer during the minimum 3-week furlough leave, even on a reduced hours basis, or intermittent basis.

Can the Employer ‘rotate’ employees on furlough leave and employees who are working where there is reduced work?

Designating some staff as furloughed workers but not others may lead to resentment between staff who are perceived to be sat at home “doing nothing” whilst receiving 80% of their salary while some staff are required to continue working. For this reason, employers may decide to draw up a set of fair and non-discriminatory criteria according to business needs to decide who will be selected for furlough leave, to ensure this is in accordance with the implied term of mutual trust and confidence (although there is no legal requirement to do so). Alternatively, employers may need certain employees to carry out work between periods of furlough leave, such as employees who are on call out. For this reason, employers may decide to operate a staff rota system between periods of furlough leave and periods of work. Government guidance confirms that employees must be placed on furlough leave for a minimum period of 3 weeks at a time. Further government guidance has confirmed that employees may be placed on furlough leave under the CJRS more than once, subject to spending a minimum 3-week period on furlough leave in each leave period. This means that the CJRS will allow for employers to, say, alternate groups of working and furloughed employees to vary groups of workers or individual employees on furloughed leave or attending work at any time. Alternatively, one period of furlough leave can follow straight after an existing furlough period.

As HMRC guidance has confirmed that employees must remain on furlough leave for a minimum period of 3 weeks, this means that employers cannot cut short the furlough leave to shorter than 3
weeks, even if business circumstances subsequently change whilst the employee is on furlough and the employer now requires the furloughed worker to return to work before the end of the 3-week period. For this reason, employers may need to consider carefully which employees they assign as furloughed workers if there is a possibility they may need them to return to work during the first 3-week period of furlough leave.

Employees on statutory leave, such as maternity leave, will continue on statutory leave (they would have no right to remuneration, except for maternity etc. pay in those circumstances).

**Can Employees work for another employer when furloughed, including a new employer?**

Yes. The updated government guidance dated 4 April 2020 states that, where the employee’s contract of employment permits, the employee may undertake other employment (with a different or new employer) while their current employer has placed them on furlough. This will not affect the grant that the employer can claim under the CJRS. The employee will need to be able to return to work for the employer that has placed them on furlough if they decide to stop furloughing the employee, and the employee must be able to undertake any training the employer requires them to undertake while on furlough. The new employer should ensure they complete the starter checklist form for PAYE with their new employee and the employee should complete ‘Statement C’ of the form ([https://www.gov.uk/government/publications/paye-starter-checklist](https://www.gov.uk/government/publications/paye-starter-checklist)). Any activities undertaken while on furlough must be in line with the latest Public Health guidance during the coronavirus outbreak.

**What about employees that employers have inherited following a TUPE transfer?**

The government guidance, which was updated on 9 April 2020, closes a previous loophole by confirming that a new employer is eligible to claim under the CJRS in respect of the employees of a previous business who transferred to their employment after the relevant date (which is now after 19 March 2020) if either a business has changed ownership after that date and its employees are protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) or where 2 or more PAYE schemes have been brought together for the same legal entity after that date (PAYE business succession). Unfortunately, the change in the relevant date creates uncertainty for TUPE transfers that took place between 28 February and 19 March, which in the government guidance dated 9 April 2020 would have been covered.

The government has introduced a similar scheme for the self-employed who are similarly impacted by loss of earnings due to the coronavirus epidemic. This scheme is set to come into existence in June 2020: [https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme](https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme)


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