

Furlough – The Final Update?



On 15 April 2020, the UK government has introduced a fourth incarnation of the CJRS guidance together with the Treasury Direction (the Direction) which should be treated in the same way as any other employment legislation.



What is the CJRS?

The CJRS is a temporary scheme designed to help UK employers whose operations have been severely affected by COVID-19 to retain their employees and protect the UK economy. However, the government recognises different employers will face different impacts from COVID-19.

What is a “Furloughed Employee”?

The Direction defines a “furloughed employee” as someone who qualifies, subject to the applicability criteria below, if furlough occurs by “reason of circumstances arising as a result of coronavirus or coronavirus disease”. This is, in our view, a very broad definition.

Applicability

Applies to all UK employers (including businesses, charities, recruitment agencies (agency workers paid through PAYE), individuals, and public authorities) who have a PAYE payroll scheme, (which was created or started before 19 March 2020), have enrolled for PAYE online (this can take up to 10 days), and who have a UK bank account.

The employer can claim under the scheme in respect of the following employees:

- full-time employees;
- part-time employees;
- employees on agency contracts;
- nannies if subject to PAYE;
- foreign nationals working in the UK and subject to PAYE as grants under the scheme are not counted as access to public funds (however, be aware of potential sponsor compliance issues for Tier 2 sponsored foreign nationals);
- employees on flexible or zero-hours contracts; and
- apprentices.

The employees must have been on the employer's payroll on or before 19 March 2020 and also were notified to HMRC on an RTI submission on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020.

Please also note:

- employees that were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on a RTI submission on or before 28 February) and were made redundant or stopped working for the employer after this date and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough (even if this is after 19 March 2020);
- employees who were already on unpaid leave on or before 28 February 2020 cannot be furloughed;
- employees on sick leave or self-isolating, as a result of COVID-19 are, subject to other eligibility conditions applying, entitled to Statutory Sick Pay but an employer can decide to furlough them for business reasons. If an employee is furloughed during sick leave, they are no longer entitled to Statutory Sick Pay;
- employees who are shielding in line with public health guidance (or need to stay home with someone who is shielding) can be furloughed;
- employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed. For example, employees that need to look after children can be furloughed;
- employees are permitted to undertake employment with a different employer while on furlough leave. However, they cannot work for a different employer if the employer is linked to their employer;
- employees can be furloughed multiple times (i.e. brought back to work and then furloughed again) provided furlough leave is taken in minimum blocks of 21 calendar days;
- statutory directors can be furloughed. Their duties during furlough leave are limited to a duty or other obligation arising from an Act of Parliament relating to the filing of company's accounts or provision of other information relating to the administration of the director's company;

- employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme; and
- employees that transferred under TUPE or a PAYE business succession, or under a payroll consolidation after 19 March 2020 can be furloughed.

As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE:

- office holders (including company directors);
- salaried members of Limited Liability Partnership;
- agency workers (including those employed by umbrella companies); and
- limb (b) workers (i.e. self-employed people who are engaged by employers and paid on PAYE).

The scheme is a temporary scheme open in this current form for at least five months from 1 March 2020 to 31 July 2020. The government has recently announced that the scheme will continue for the period 1 August 2020 to 31 October 2020 but with greater flexibility to support the furloughed employees transition back to work. We shall prepare a separate QuickGuide on the flexible 1 August 2020 -31 October 2020 scheme once further details are provided by the UK government.

Furlough Means No Work!

For the employee to become a "furloughed worker" there must be no work on behalf of the employer or any linked or associated organisation of the employer. This includes providing services or generating revenue.

An employee working on reduced pay or on reduced hours will not be eligible for this scheme.

Furloughed employees can undertake voluntary work or training as long as it does not provide services or generate revenue for the employer or any linked associated organisation of the employer.

The national minimum wage rules do not apply to those employees who are furloughed, unless the employer requires them to undertake online training.

How to Implement Furlough Leave

- Changing the status of staff to “furloughed” remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation between the employer and the employee.
- The employer will need the employees express agreement in writing (this can be an electronic form such as an e-mail) that they agree to cease all work in relation to their employment. This is a legal requirement, as per the Direction, to be able to claim the grant payments from HMRC. Where the employer has not been able to obtain the employees express agreement in writing, as there is no requirement by law for the agreement in writing to predate the period of furlough, our view is that it is open to employers to seek, or continue to seek, the written agreement of the furloughed employees. A record of this communication must be kept for five years.
- The process will involve consultation with affected staff. Employers need to be aware that it may become necessary to engage collective consultation processes if 20 or more employees could be furloughed.
- Furlough leave must be taken in minimum blocks of 21 calendar days to be eligible for funding. Employers can rotate furlough leave amongst employees, provided each employee is off for a period of at least 21 calendar days.

Once Employees are “Furloughed Workers”

- The Employer will need to continue to pay its furloughed staff. This may be subject to negotiation between the employer and its staff (e.g. pay at the furlough rate or pay full salaries as normal).
- Employers can receive a grant from HMRC to cover either 80% of an employee’s actual wages or £2,500 per month, whichever is the lower, plus the associated employer national insurance contributions and minimum auto-enrolment employer pension contributions on that subsidised wage.

- The usual monthly wage costs will include regular payments the employer is obliged to pay their employees. This includes past overtime, fees and compulsory commission payments.
- However, discretionary commissions, bonuses (including tips), non-cash benefits (e.g. taxable benefits in kind), and any voluntary employer auto-enrolment contributions above the minimum auto-enrolment employer contributions are not included.
- Employees during furlough leave will retain their employment status. They will continue to accrue holiday entitlement and, at the conclusion of the furlough leave, will have the same rights as they did previously, including Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and redundancy payment.

Using the HMRC Portal

HMRC expect the online application portal to be ready on 20 April 2020 with the first grant payments being made by 30 April 2020. The aim is that payments will be made within 4-6 working days of submission of the data to HMRC via the portal. This is to allow HMRC a small chance to test for fraudulent claims.

To claim, the information required is as follows:

- Employer ePAYE reference number;
- Number of employees being furloughed;
- National Insurance Numbers for the furloughed employees;
- Names of the furloughed employees;
- Payroll/employee number for the furloughed employees (optional);
- The Employer Self-Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number;
- The claim period (start and end date);
- The amount claimed (per the minimum length of furloughing of 3 weeks);
- Employer bank account number and sort code;
- Employer contact name; and
- Employer phone number.

If the employer has fewer than 100 furloughed staff the employer will be asked to enter details of each employee the employer is claiming for directly into the system - this will include their name, National Insurance number, claim period and claim amount, and payroll/employee number (optional).

If the employer has 100 or more furloughed staff the employer will be asked to upload a file with the information rather than input it directly into the system. HMRC will accept the following file types: .xls .xlsx .csv .ods

The employer will also need to:

- calculate the amount it is claiming; and
- have the furlough leave agreement in writing for each furloughed employee (see “How to Implement Furlough Leave”) and must retain a record of the letter/ agreement for a period of five years.

HMRC will check the claim, and if the employer is eligible, pay it to the employer by BACS to a UK bank account.

If the employer uses an agent who is authorised to act for the employer for PAYE purposes, they will be able to make a claim on the employer's behalf.

If the employer uses a file only agent (who files the employer's RTI return but doesn't act for the employer on any other matters) they won't be authorised to make a claim for the employer and the employer will need to make the claim. The file only agent can assist the employer in obtaining the information the employer needs to claim (which is listed above).

How to Calculate the Amount Claimed

For full-time or part-time employees on a salary, it will be 80% of their actual wages (up to a maximum of £2,500 per month) before tax, as stated in their last pay period prior to 19 March 2020. If, based on previous guidance, the employer has calculated its claims based on the employee's actual wages as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020) the employer can choose to still use this calculation for their first claim.

For employees whose pay varies, the employer can claim for the higher of either:

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

If the employee has been employed for less than 12 months, an employer can claim for 80% of their average monthly earnings since they started work until the date the employee is furloughed. If the employee has been employed for less than a month, a pro-rata for their earnings so far should be used, and claim 80%.

Tax Treatment

Payments received by an employer under the scheme are made to offset these deductible revenue costs. They must therefore be included as income in the employer's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.

Employers can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

Individuals with employees that are not employed as part of a business (such as nannies or other domestic staff) are not taxable on grants received under the scheme. Domestic staff are subject to Income Tax and National Insurance Contributions on their wages as normal.

Let us Introduce Ourselves



Email: contact@ouryclark.com

Oury Clark London:
10 John Street, London WC1N 2EB

Tel: +44 (0) 20 7067 4300

Oury Clark Slough:
Herschel House, 58 Herschel Street
Slough SL1 1PG

Tel: +44 (0) 1753 551111



Disclaimer: This note does not contain a full statement of the law and it does not constitute legal advice. Please contact us if you have any questions about the information set out above.

What we still don't know

- Whilst annual leave can accrue during furlough, can employees take annual leave when on furlough, and what should they be paid (please note updated ACAS guidance now supports the view that holiday can be taken during furlough)?
- Will there be an Enterprise Management Incentive scheme (HMRC approved employee share scheme) exemption for eligible employees during furlough leave as they will not be working the minimum 25 hours or 75% of their working time (if less)?
- The Direction also raises other practical nuances. It is likely that further guidance or an updated Direction will be required.