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COVID-19: Coronavirus Job Retention Scheme (furlough)

Please note, this guide is based on government guidance only which is subject to change, without such changes necessarily being flagged up. This guidance does not constitute legal advice.

This guidance will touch upon the topics and questions discussed during our webinar on 30th April 2020. To request a copy of the presentation slides, please email hina@partnerslaw.co.uk

Support and guidance

- The COVID-19 pandemic is continually changing and the government and Acas advice for employers is being updated as the situation develops.

- Employers should keep track of the guidance for employers from the following sources:
    - Government Guidance for employees, employers and businesses in providing advice about coronavirus (COVID-19).
    - ACAS Guidance on Coronavirus (COVID-19): advice for employers and employees.

COVID-19: Coronavirus Job Retention Scheme (furlough)

As a result of the economic impact of the COVID-19 pandemic, the government has introduced the Coronavirus Job Retention Scheme (CJRS). The scheme is intended to avoid redundancies by alleviating the pressure on employers to continue paying wages in full during the crisis period.

The scheme applies in respect of employees who have been "furloughed", meaning that they have been put on a period of leave during which they are not required to work (although they will be able to return on a part-time basis from August 2020). The scheme itself does not directly change the employment relationship between employer and employee. Rather, it allows the employer to agree with employees that they will be put on temporary leave of absence (furlough), and then allows the employer to recover a proportion of pay from HMRC in respect of employees on that leave. Given that the reimbursement that employers can seek per employee is limited (to the lower of 80% of wage costs or £2,500 per calendar month, plus employer national insurance contributions and employer auto-enrolment pension contributions on the furlough pay), it is anticipated that many employers will seek to amend the contracts of those put on furlough to match the level of reimbursement that can be obtained.

The scheme is backdated to 1 March 2020 and will remain open until the end of October 2020.

Which employers are eligible for reimbursement?

The scheme is open to an employer who:

- Had a UK PAYE payroll scheme registered on HMRC's real time information (RTI) system for PAYE on 19 March 2020 (previous guidance referred to 28 February 2020 but this was amended to 19 March 2020 by the update to the guidance published on 15 April 2020).
- Have enrolled for PAYE online.

- Have a UK bank account.

This includes businesses, charities, recruitment agencies with agency workers paid through PAYE, and public authorities.

Where a company is in administration, the administrator will be able to access the CJRS. However, it is expected that an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers in light of, for example, an anticipated sale of the business.

Which employees are covered?

The scheme covers the individuals detailed below, whether they are employees or workers, provided that they were on a UK employer's PAYE payroll and notified to HMRC on an RTI submission on or before 19 March 2020.

An employer can claim in respect of the following:

- Full-time employees.
- Part-time employees.
- Employees on agency contracts.
- Employees on flexible or zero-hour contracts.
- Apprentices (provided that they are paid at least the applicable apprenticeship national minimum wage (NMW) rate for all the time they spend training).

Where an employee has more than one job, their employments are treated separately for the purposes of furlough, and the reimbursement cap applies to each employer individually.

Employees on fixed term contracts can be furloughed.

Which workers are covered?

The 4 April 2020 update to the Employers' CJRS guidance clarified that some individuals who may not be employees under employment law will be eligible for the CJRS.

It provides that the grant can be claimed for the following groups, if they are paid via PAYE:

- Office holders (including company directors).
- Salaried members of limited liability partnerships (LLP).
- Agency workers (including those employed by umbrella companies).
- "Limb (b) workers".

Does the employee have to be at risk of redundancy to be covered by the scheme?

The Treasury direction provides that the purpose of the scheme is to *"provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."*(paragraph 2.1) and that an employee

is a furloughed employee if *"the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease"* (paragraph 6.1(c)).

The precise circumstances in which an employer can put employees on furlough and claim reimbursement through the CJRS were previously unclear due to inconsistencies between the various pieces of guidance and previous references to redundancy and lay-off. The Treasury direction appears to clarify that a redundancy situation is not a pre-condition for access to the scheme. It suggests that, provided there is a connection between putting employees on furlough and the consequences of COVID-19, the purpose of the scheme will be met. When using the portal to make a claim, employers are required to confirm that they are claiming *"costs of employing furloughed employees arising from the health, social and economic emergency resulting from coronavirus".*

This is consistent with the updates to the Employers' CJRS guidance. It states that the scheme is designed to *"help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy"*. However, it goes on to state that all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus. It therefore suggests that there is no specific requirement for furlough to be offered as an alternative to redundancy or lay-off, provided that the employer's operations were affected by COVID-19 and the application to the CJRS is a consequence of that.

The fact that employers are entitled to re-engage employee who stopped working for them after 28 February 2020 for reasons other than redundancy also supports the conclusion that a redundancy situation is not a prerequisite for qualifying for reimbursement.

In light of the Treasury direction and updated guidance, it appears that furlough needs to be offered in the context of the impact of the COVID-19 pandemic, but there is unlikely to be a forensic analysis of the circumstances of furlough by HMRC. However, the Treasury direction does provide that no claim may be made where it is abusive or otherwise contrary to the exceptional purpose of the CJRS (paragraph 2.5). Also, the government's Business support: FAQs state that the government will retain the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claims.

Can employees whose employment terminated before or after the scheme was announced be re-engaged by their previous employer and furloughed?

Yes, the Employers' CJRS guidance and the Employees' CJRS guidance confirm that employees who were made redundant or otherwise stopped working after 28 February 2020 can qualify if they meet the eligibility requirement and are re-engaged by their former employer. They will qualify from the date they are put on furlough (Employees' CJRS guidance).

What about employees who had already been given notice of redundancy before the CJRS was announced?

It seems possible under the rules of the scheme for an employer to propose to employees who have been given notice of redundancy but are still employed, that they be put onto furlough instead.

However, unlike employees who are expecting to have a continuing relationship with their employer (and agreeing to a reduction in their pay in order to save jobs), an employee's consent may not be forthcoming where they have already been given notice of termination and are due to be leaving their employment.

The employer would also need to consider the employee's entitlement to statutory notice and whether the aims of the scheme are met if the costs of paying the employee during their notice would be incurred regardless of the pandemic.

Can an employee who resigned before the furlough scheme was introduced and is working their notice be furloughed?

The government guidance does not specifically deal with this issue but it seems possible provided that the employee meets the usual eligibility criteria in terms of start date and timing of RTI submission.

However, this is subject to the following:

- The employee's consent. Unlike employees who are expecting to have a continuing relationship with their employer (and agreeing to a reduction in their pay in order to save jobs), an employee's consent may not be forthcoming where they have already issued notice of their resignation and are due to be leaving their employment.
- The conditions for accessing the reimbursement. The Treasury direction there appears to be a requirement that the costs are incurred because of the effects of COVID-19, and that the employee is furloughed because of circumstances arising as a result of the pandemic. This will not necessarily apply in every situation where an employee who resigned before the scheme was introduced is working their notice. It is questionable whether the aims of the scheme are met if the costs of paying the employee during their notice would be incurred regardless of the pandemic.

Can employees on statutory family leave be furloughed?

Yes. The Employers' CJRS guidance, Treasury direction and the 80% guidance make it clear that an employee can be on statutory family leave and furlough at the same time. The employer can claim through the CJRS in respect of enhanced contractual family leave pay. However, this is subject to the following caveats:

- The requirement that the employer is paying the employee at least £2,500 or 80% of salary each month still applies. This means that, where the contractual entitlement to pay during the leave is less than that, the employer may not be able to claim from the CJRS. The employer could increase the contractual entitlement to the minimum level for reimbursement, but it is possible this could be regarded as an abuse of the scheme.
- Where a woman started the unpaid part of her additional maternity leave (after 39 weeks) before 28 February 2020, she will not be able to be furloughed until the date when her maternity leave was due to end.
- Women who are in receipt of maternity allowance rather than statutory maternity pay cannot be furloughed whilst on maternity leave (Employers' CJRS guidance). They are

entitled to end their maternity leave early under the normal notice provisions, but they are not eligible for furlough until their notice to return from maternity leave early has expired and their maternity leave has ended.

What steps must employers take to put employees on furlough?

Employers will need to:

- Decide which employees to designate as furloughed employees.
- Notify furloughed employees of the intended change.
- Consider whether it needs to consult with employee representatives or trade unions.
- Agree the change with the furloughed employees. Most employment contracts will not permit an employer to reduce an employee's pay, provide them with no work and change their employment status, without agreement. However, faced with the alternatives, which are likely to be unpaid leave, lay-off or redundancy, the majority of affected employees are likely to agree to be placed on furlough. It is possible for an unambiguous clause allowing for pay to be varied to be an effective method of changing terms without the need for consent, but this is likely to be relatively rare and is not without risk.
- Confirm the employees' new status and obtain their consent in writing, including confirmation that the employee will cease all work in relation to their employment before their furlough period commences. This is an eligibility requirement for accessing the subsidy, and a record must be kept of this correspondence for five years (Employers' CJRS guidance). Ideally, the employer should advise how long it expects furlough to continue, however, this may be difficult in the current climate. Employers may wish to put employees on furlough for an initial period, subject to review.
- Submit information to HMRC about the employees that have been furloughed and their earnings through the online portal. Employers must keep records and calculations in respect of their claims, including records of the amount claimed for each furloughed employee and the period for which they are furloughed (Employers' CJRS guidance).
- Ensure that the employees do not carry out any further work for that employer or any associated employer or business while they are furloughed.

Can an employer rotate furlough between its employees?

The Employers' CJRS guidance states that employees must be furloughed for a minimum of three weeks. This is in keeping with the current requirements for as many people to avoid leaving their homes as much as possible. The Treasury direction clarifies that three weeks means 21 calendar days.

Since employers are likely to receive many requests or volunteers to be placed on furlough, it is likely to assist employee relations for employers to be able to move employees on and off furlough, subject to that minimum three week period, so that no employee feels that they have been unfairly denied the opportunity to take furlough. The guidance confirms that employees can be furloughed multiple times, subject to the minimum three consecutive week period.

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Can an employee work for another employer?

Yes, the update to the guidance on 4 April 2020 confirmed this point.

However, until the beginning of August 2020, the employee cannot do work for the employer seeking the reimbursement during furlough, and it cannot ask them to do work for another linked or associated business. From August 2020, the employee can continue to return to work on a part-time basis.

The employee's contract of employment will continue during furlough so any enforceable restrictions on working elsewhere during employment will continue to apply. However, in the circumstances, employers may consider relaxing any such restrictions to allow employees to take up a role with a non-competing business with their prior consent.

If a furloughed employee starts work for another employer, they should confirm their furloughed status in Statement C of the PAYE starter checklist it completes for the new employer. The furloughed employee will need to be able to return to work for the employer that has furloughed them, and undertake any training that employer requires of them during furlough.

Can employees on furlough do volunteer work?

Yes, the Employers' CJRS guidance has clarified this point. This assumes that the volunteering in question is not for the employee's employer and being used to circumvent furlough but receive reimbursement of wages in the period before August 2020. That would likely be regarded as fraud and the government has explicitly identified the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claims.

Employees are also encouraged to report the employer if they are being asked to work whilst on furlough, or if they otherwise become aware of fraudulent behaviour relating to the scheme.

Can employees on furlough undertake training?

Yes, training is expressly provided for in both the Employers' CJRS guidance and paragraph 6.8 of the Treasury direction.

However, the Treasury direction has created uncertainty in terms of the precise circumstances in which training is permitted.

The guidance provides that training can take place provided that it is not used by the employer to generate revenue or for the provision of services, effectively circumventing furlough.

The Treasury direction is significantly more limited. It provides that that the employee must cease all work in relation to their employment and the only exception in this context is where training activities are "directly relevant" to the employee's employment. This limited exception is in direct contradiction with the stated intention in the guidance that "furloughed employees should be encouraged to undertake training", and seems contrary to the principle of ensuring a flexible workforce once the crisis period subsides. However, employers are likely to be cautious about offering training during furlough unless it is clear that it is direct relevant to their role given that the Treasury direction is likely to take precedence where there is a direct contradiction between it and

the guidance. Offering training which does not fall into that category could have the effect of bringing furlough to an end and limiting access to the CJRS.

On 12 May 2020, in the press release announcing the extension of the CJRS to the end of October 2020, the government stated that it will be exploring ways in which furloughed workers who wish to do additional training or learn new skills are supported to do so.

Do disciplinary and grievance proceedings have to be paused while an employee is on furlough?

In early May 2020, Acas published Disciplinary and grievance procedures during the coronavirus pandemic which states that existing employment law and the Acas Code of Practice on Disciplinary and Grievance Procedures (the Acas Code) continue to apply during the COVID-19 pandemic. The guidance notes that it is for an employer to decide if it would be fair and reasonable to carry on with, or start, a disciplinary or grievance procedure while an employee is furloughed, social distancing and other public health guidelines are being followed, or an employee is working from home. It suggests some practical measures that employers can take, depending on whether a workplace is open or not. The guidance expressly states that, for most disciplinary and grievance meetings held by video, there will be no reason to record the meeting.

The guidance states that a furloughed employee can take part in a disciplinary or grievance investigation or hearing as:

- The subject of proceedings (it expressly mentions employees who raise a grievance or are under investigation in a disciplinary procedure, which is presumably intended to catch attendance at a disciplinary hearing as well as an investigation meeting).
- A chairperson or notetaker.
- An interviewee or witness.
- A companion.

However, the guidance provides that the participation must be voluntary (an individual must be "doing it out of their own choice") and take place in accordance with current public health guidance.

It is unclear how the Acas guidance can be read compatibly with the HMRC guidance and the Treasury direction in relation to the participation of an investigator, chairperson or notetaker who is furloughed at the relevant time. The Treasury direction makes it a condition for accessing the CJRS that furloughed employees cease all work in relation to their employment during furlough (paragraphs 6.1 and 6.2). The Employers' CJRS guidance states that a furloughed employee cannot provide services to the employer during furlough.

There is a strong argument that acting as an investigator, meeting chairperson, notetaker or even potentially a witness could amount to "work" for the purposes of paragraph 6.1 of the Treasury direction. Where employees are requested to participate in a disciplinary or grievance investigation or hearing they are usually doing so as part of their role, and it is difficult to see how they could not be regarded as providing a service to the employer by performing those duties. The fact that the Acas guidance provides that participation must be voluntary is unlikely to assist because, even if the employee is willing to do the work during furlough without additional remuneration, this is unlikely to take it outside of the meaning of work and providing services. If that were the case then it would be relatively simple for employers to circumvent the scheme by furloughing employees and then requesting that they "voluntarily" continue to perform parts of their role.

Accordingly, following the Acas guidance could mean that an employer is unable to claim for reimbursement of an employee's wages under the CJRS and employers should exercise caution in relying upon this aspect of it.

The requirement for an employee's participation in a grievance or disciplinary procedure to be voluntary is also difficult to reconcile with the nature of disciplinary proceedings, where an employee's attendance would rarely be characterised as being "out of their own choice".

The Acas guidance states that, in deciding whether the procedure can still be carried out in a fair and reasonable way, the employer should consider:

- The individual circumstances and sensitivity of the case, for example if it needs to be dealt with urgently, or if it would be dealt with more fairly when people are able to return to the workplace.
- If anyone involved has a reasonable objection to the procedure going ahead at that time.
- Whether everyone involved has access to the technology needed to attend video meetings.
- Whether anyone involved has a disability or other accessibility issues that might affect their ability to use video technology, and whether any reasonable adjustments might be needed.
- Whether any witness statements or other evidence can be seen clearly by everyone involved in the meeting.
- Whether it is possible to fairly assess and question evidence given by people interviewed in a video meeting.
- Whether it is possible for those involved to get hold of all the evidence needed for the investigation or hearing, for example, records or files that are kept in the office.
- Whether it is possible for the person who is under the disciplinary investigation or who raised the grievance to be accompanied during the hearing.
- There may be other practical difficulties that an employer should consider including:
- Does the employee have somewhere quiet and private in which they can participate in the meeting?
- Can the timing of the meeting be adjusted to reflect the employee's childcare or other commitments and ability to have a quiet space to participate in the disciplinary?

Will it be an unfair dismissal if an employer makes someone redundant rather than placing them on furlough?

It is difficult to determine whether an employment tribunal would find such a dismissal to be unfair at this stage. In accordance with the test for reasonableness under section 98(4) of the ERA 1996, it will depend on the particular circumstances of the case, including the size and resources of the employer. For example, whether the employer makes the decision to make the employee redundant rather than furlough them before or after the scheme has commenced, and the financial position of the employer, are likely to be relevant circumstances. There will be cases where an employer cannot afford to furlough employees at this stage and pay the 80% of salary until HMRC has set up the scheme and reimburses it. While those employers could ask for the employees to agree to defer payment until it is reimbursed by HMRC, some employees will be unwilling to agree to this, or not be in a financial position to do so. In those circumstances, it may be fair for an employer to dismiss for redundancy.