



Thomas More Chambers

The Coronavirus Job Retention Scheme – Update

This article should be read in conjunction with my initial article on this subject [The Coronavirus Job Retention Scheme - FAQs by Employers](#) dated 14 April 2020.

Introduction

The online portal for claiming grants under the Government's Coronavirus Job Retention Scheme has gone live today, 20 April 2020. The relevant link is at '[Claim for wages through the Coronavirus Job Retention Scheme](#)'.

The Coronavirus job Retention Scheme guidance was updated on 15 and, in particular, 17 April 2020. This article identifies the most important updates and, where necessary, explains them.

Length of Scheme

The length of the Scheme has been extended from three to four months, starting from 1 March 2020. The guidance states that the Scheme may be extended further if necessary.

Employer eligibility

The initial guidance stated that employers would be eligible to apply for grants under the Scheme if they had created and started a PAYE payroll scheme on or before 28 February 2020. This has now been extended. Employers who created and started PAYE payroll schemes between 28 February and 19 March 2020 are now eligible. 19 March 2020 was the day before the Coronavirus Job Retention Scheme was announced.



Employee/worker eligibility

Initially to be eligible, employees or workers had to be on the employer's PAYE payroll on or before 28 February 2020. Following publicity about employees and workers who were excluded from the scheme due to the fact that they started work or changed jobs after 28 February, the eligibility date for employees and workers has been moved to 19 March 2020.

Such employees and workers, however, must have been notified to HMRC on a Real Time Information (RTI) submission on or before 19 March 2020. This means that a RTI submission notifying payment in respect of the employee or worker must have been made on or before that date.

Agreeing to furlough employees

The original guidance stated that employers should discuss with their staff and make any changes to the employment contract by agreement.

The guidance on this issue has been expanded. In order to be eligible for the grant, employers must confirm in writing to their employee or worker that they have been furloughed. There needs to be a written record of this communication which must be kept for at least five years. The employee or worker does not have to provide a written response to the employee written communication.

In the context of the requirement for the employer to provide a written communication to the employee or worker confirming that they have been furloughed, the guidance states that "if this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS." The meaning of this sentence is unclear. It is unclear as to whether it relates merely to the requirement for the employer to provide a written communication to the employee or worker that they have been furloughed or whether it applies to the more general requirement that changes to the employment contract should be made by agreement. It is also unclear as to what the consequences are if an employer does not obtain consent from an employee or worker to the written communication or to changes to the employment/worker contract that "are consistent with employment law".



Multiple employers limitation

The updated guidance states that if an employee has had multiple employers over the past year, has only worked for one of them at any one time and is being furloughed by their current employer, their former employer or employers should not re-employ them, put them on furlough and claim for their wages through the Scheme.

Presumably this restriction is meant to prohibit the reemployment and furloughing of already furloughed employees and workers whose employment with a former employer ended on or after 28 February 2020 and who obtained new employment on or before 19 March 2020.

Fraudulent claims

The Coronavirus Job Retention Scheme is susceptible to abuse. In particular, unscrupulous employers may make claims in relation to employees and workers that have been allegedly furloughed yet continue to work for them (either full time or in a reduced capacity). Such claims would clearly breach the “no work” restrictions set out in the guidance.

The Government and HMRC are aware of this problem and have addressed it in the updated guidance.

The guidance states that HMRC will check claims made through the Scheme. Payments may be withheld or need to be repaid in full to HMRC if the claim is based on dishonest or inaccurate information or found to be fraudulent.

Further, HMRC has put in place an [online portal](#) for employees and the public to report suspected fraud in the Scheme.

HMRC also retains the right to retrospectively audit all aspects of an employer’s claim. The updated guidance imposes a requirement that employers should retain all records and calculations in respect of their claims. These records must include details of the amount claimed for each furloughed employee and worker and the period for which each employee and worker is furloughed and a claim made under the Scheme.



It is likely that employers who commit significant abuses of the Scheme will, in addition, face criminal prosecution.

How to calculate a claim

The Government has produced detailed guidance as to how employer's should calculate 80% of an employee's wages, National Insurance contributions and pension contributions before submitting a claim under the Scheme. This guidance can be found [here](#).

Holiday pay

The issue of holiday pay for furloughed employees and workers has been addressed in the guidance for calculating 80% of an employee or worker's wages.

This guidance makes it clear that furloughed employees can take holiday whilst on furlough.

Furloughed employees and workers continue to accrue holiday leave entitlement in the normal way.

The guidance states that the employer and employee can agree to vary holiday leave entitlement as per the furlough agreement but also makes the point that almost all workers have an entitlement to 5.6 weeks of statutory paid annual leave each year and workers cannot be given less than that amount.

The guidance states that the Working Time Regulations (WTR) require that holiday pay be paid at the worker's normal rate of pay or, where the rate varies, it be calculated on the basis of the average pay received by the worker in the previous 52 working weeks. If a furloughed worker takes holiday, therefore, the employer must pay their usual holiday pay in accordance with the WTR.

Employers will therefore be obliged to pay additional amounts over and above the JRS grant (80% of wages up to a maximum of £2,500 per month) to workers who take paid holiday



leave whilst on furlough as such workers will be entitled to their normal rate of pay whilst on paid holiday leave.

The guidance reminds employers that they have a statutory right to restrict when leave can be taken if there is a business need.

In relation to bank holidays, the guidance states that where the worker usually works on bank holidays then the employer can agree that this is included in the grant payment. Where the worker usually takes the bank holiday as leave then the employer will either have to top up their usual holiday pay or give the employee a day of holiday in lieu.

The guidance states that the issue of holiday pay during furlough will be kept under review.

How to make a claim

Claims are to be made online. The guidance makes it clear that claimants should use online support and should not contact HMRC unless it is absolutely necessary. Any questions should be directed to the employer's agent, representative or the Government's Web chat service.

In relation to the information that employers must provide when making a claim, the updated guidance states that employers can also provide the payroll/employee number for the furloughed employees. This, however, is stated to be optional.

The updated guidance sets out different approaches for the submission of claims where an employer is seeking to furlough less than 100 staff or 100 or more staff.

Where the employer has less than 100 furloughed staff, it will be required to enter details of each employee that it is claiming for directly into the system. This information will include their name, National Insurance number, claim period, claim amount and (optional) payroll/employee number.

Where the employer has 100 or more furloughed staff, it will have 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 file should include the following information for each furloughed employee: name, National Insurance number, claim period, claim amount and (optional) payroll/employee number.

The updated guidance makes the point that HMRC cannot provide to furloughed employees and workers details of claims being made by their employers on their behalf. The guidance asks employers to keep employees and workers informed and answer any questions that they might. The guidance also asks employers to inform furloughed employees and workers not to contact HMRC.

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The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues arising from the Coronavirus crisis. If you need such assistance, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at cbrown@thomasmore.co.uk.

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