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Coronavirus job retention scheme

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Making it work

Key points

- The job retention scheme applies only to employees who have been furloughed.
- Employees who are working at home or reduced hours are not eligible.
- The minimum period of furlough is three weeks.
- The scheme does not override employment law – an employee has to agree to being furloughed.
- The grant is 80% of the employee's regular wage subject to a limit of £2,500.
- A new portal for employers to claim their grant.
- Personal service companies fall within the scheme but it may be problematic to meet the conditions.

On 20 March the chancellor introduced the coronavirus job retention scheme (CJRS) which, in headline terms, gives support to employers to enable them to keep paying employees who have no work to do. The announcement was short on detail and there has been much speculation – some of it ill informed – about how the scheme will work.

At the time of writing (30 March) some details have emerged, although there are still questions to be answered. Nevertheless, there is enough to cover the key elements of the scheme as I understand them. Inevitably, in a fast-moving situation, some elements of this article may have been superseded by the time you read it. The most up-to-date information is on the HMRC website or on the Tolley Covid-19 microsite (<https://covid19.tolley.co.uk>).

What the scheme isn't

Let's get two fundamental misunderstandings out of the way first. The first is that this is a general subsidy for all wages and salaries: it isn't. It will apply only to employees who have been furloughed. More detail on what this involves follows but, in essence, it means employees who have stopped working because there is nothing for them to do. Second, this is not a scheme for the government to pay salaries directly to employees. The responsibility to pay employees remains with the employer. The CJRS is a subsidy to employers to help them meet those wage costs.

Now we can look at some of the detail. There are three key questions:

- Who gets it?
- How much do they receive?
- How do they obtain it?

Who gets it?

We need to look both at the employer and the employee. As far as the former is concerned things are fairly straightforward. The scheme is open to all employers. The chancellor stated that eligibility is open to 'any employer in the country, small or large, charitable or non-profit'. There were some initial concerns that it was only open to companies, but that is not the case. It is available for sole traders and partnerships as well. There is an open question as to whether the scheme will also apply to branches of non-resident companies, because it is not immediately obvious whether a branch is a 'UK organisation', which is the term used in the HMRC guidance.

The scheme definitely applies to public sector organisations but HMRC expects that it will not be widely used in that sector, since most public sector employees remain in employment providing essential public services. HMRC's guidance states that is open to employers 'with a PAYE scheme'. It is conceivable that there may be a few employers who do have employees – such as family members – but do not have a scheme because of levels of pay. It is not clear whether they will be eligible if they subsequently set up a scheme.

What is meant by furlough?

Things start to become complicated when we look at employees. The scheme is potentially available for full and part-time employees, employees on agency contracts and those on flexible or zero hours contracts. But it will apply only to employees who have been furloughed. These are people who have been asked to stop working but who remain as employees.

Furlough is not a common term in the UK, and I assume that it has been used here to distinguish it from redundancy or dismissal. An employee who has been furloughed remains on the payroll but must do no work for the employer. This seems to be an absolute prohibition – there is no *de minimis*. Somebody who is working at home or is working reduced hours has not been furloughed and will not be eligible. The guidance states that employees 'cannot undertake work for or on behalf of the organisation. This includes providing services or generating revenue'.

Staff will be permitted to study while they are furloughed but if they are required to complete online training courses by the employer, they must be paid at least the national minimum wage for the hours they spend on training. HMRC's guidance should be studied for other circumstances, such as how it affects employees on maternity or sick leave. It will be for the employer to certify that an employee has been furloughed.

The rules work on an employment-by-employment basis. If an employee has two employments they can be furloughed from one and continue to work on the other one. There appear to be no special rules for related employments.

Flexibility

A question that has been clarified is whether employees can be moved in and out of furlough. For example, if a company has six employees but there is only enough work for three of them will it be possible able to arrange for two groups of three employees to work alternate weeks?

The answer is no. The minimum period of furlough is three weeks. It appears that it will be possible to move people back to work after the three-week period and put other employees on to furlough, but it will not be possible to do it over a shorter interval. But, as with many aspects of this scheme, there is no definitive guidance on the point.

Respecting employment rights

Nothing in this scheme overrides employment law. Unless the contract has specific provisions which allow the employer not to pay employees if there is no work, employees remain entitled to receive what is specified in their employment contract. Normally, if there is no work to do an employee would be made redundant and be eligible for redundancy pay. Furloughing has been devised as an alternative to redundancy. It will allow individuals to be paid and remain as employees even when they have no work to do.

An employee has to agree to being furloughed – it is not something which can be imposed unilaterally. In most cases, no doubt, employees will agree to their being furloughed if the alternative is to be made redundant and have no wage, but they still have to agree. The rules are clear on this. I am not an employment lawyer so am not in a position to give detailed advice in this area, but it is important that clients understand that they cannot act unilaterally.

Similarly, normal rules about consultation and collective bargaining will continue to apply. In these exceptional circumstances, employers will have to make their own decisions on the extent to which they can, in practice, comply in full with their employment law obligations.

There have been suggestions that, when the crisis ends, employers could face claims from employees that their employment rights were not properly respected when they were being furloughed. Whether this will happen who knows, but the warning signs are there. Let's hope that there are no ambulance chasers ready to jump on this but I fear that there may be.

Decisions on furloughing can be taken on an individual-by-individual basis: there is no requirement to apply the same treatment to every employee. But again, the employment law position should be taken into account. To take an extreme example, I do not think it would be possible to select only female employees for furlough and retain all of the male employees on normal working. Again, how much employers can realistically do in a fast-moving situation is open to question.

Cut-off date

The scheme is open to employees who were on the payroll on 28 February 2020, although it

will only be payable in respect of periods after staff have stopped working. If somebody who was on the payroll on 28 February ceased employment after that date there is no eligibility for CJRS because the employee will not be on furlough: they will have ceased employment.

However HMRC has said that if somebody was made redundant after 28 February it will be possible to rehire them and place them on furlough in order that they can be eligible under the CJRS. This is not compulsory and will be a matter for individual decision by the employer. In some cases, employees will have been furloughed in mid-March, before the detailed rules were published. I assume that there will need to be some apportionment of March salaries to cover the pre and post furlough period but, again, that is not clear.

How much does an employer receive?

Having determined whether an employee is eligible under the CJRS the next question is how much money is available from the government. Again, it must be stressed that what is received is a grant to the employer who retains responsibility for paying the employee.

In headline terms, the government grant will be 80% of the employees' regular wage up to a cap of £2,500. We will look shortly at how the cap works, but first, I will concentrate on what is meant by regular wage.

For employees earning a regular wage the figure is simple – it is the salary before tax that was in place on 28 February 2020. For these purposes fees, commissions and bonus are not included – we do not yet know about payrolled benefits and other non-standard items. So if an employee was earning £25,000 a year, their regular wage will be one-twelfth of that – £2,083 a month. Everything within the CJRS is expressed in monthly amounts, so if employees are paid weekly their wages will need to be annualised and then divided by 12.

As far as we can see the scheme is pegged to 28 February so any wage increases that took effect in March or later will have no impact on the amount reimbursed (but see below). It is unlikely that many ordinary employees will have been given pay rises since 28 February, but the rule is presumably there to prevent people artificially increasing pay (say in a small family company) to obtain higher grant funding. That may not stop people trying and I have read of cases where agents or payroll staff are being pressed to create or restate February salaries for family members. This is not acceptable but, in such extraordinary times, it may be more difficult than usual to convince clients that they cannot do this.

What about employees whose pay varies? Here, life becomes more complicated. The advice is that when an employee has been employed for a full 12 months before the claim, the employer can claim for the higher of:

- the same month's earnings for the previous year; or
- average monthly earnings from the 2019-20 tax year.

This is difficult to understand, particularly the reference to 'the same month's earnings'. But my understanding is that, for each claim the employer makes it will be necessary to look back at the earnings for the same month in the previous year. Take the case of an employee whose average earnings for 2019-20 were £1,500 a month but whose actual earnings were £1,200 in April 2019 and £1,800 in May 2019. As I interpret it, the CJRS claim in April 2020 is based on £1,500 (average higher than actual) whereas for the May 2020 claim the figure is £1,800 (actual is higher than average). But I stress that is my interpretation of the guidance and, until HMRC has published further details (which it has said it will do), there remains a question over whether this is the correct way of looking at things or whether, after the amount of compensation has been set, it remains static for the duration of the scheme.

If the employee has been employed for less than a year, the employer can claim an average

of their monthly earnings since they started work. I read that as a rolling average which will change each month until there is a full year. So, a pay rise given in April 2020 to an employee who started on 1 January 2020 would be taken into account, because it would increase the rolling average. I am not sure that is really what is intended because it seems to open some possibilities for manipulation, so again my interpretation may be wrong. But remember the overriding rule that, to be eligible, an employee must have been on the payroll on 28 February so this particular quirk would not allow businesses to put entirely new employees on the payroll to manipulate figures. Nevertheless, HMRC needs to clarify exactly what is meant here. The last thing that any of us want is for loopholes to be left open for exploitation.

If the employee started in February 2020 a pro rata of their earnings 'so far' is to be used. Once they have been employed for more than a month, the normal rules will presumably kick in.

How much is payable?

Having calculated the 'regular wage' the grant will be 80% of that subject to a limit of £2,500 (see below for National Insurance and other employment costs). So if the regular wage is £2,000, the grant will be 80% – £1,600. If the regular wage is £4,000, the grant will be £2,500.

Again, it must be stressed that this is the amount of the grant, not the amount that the employer will pay. Unless the employee has agreed to take a lesser amount the employer should pay the normal wage. If the employer and employee have agreed that, as a condition of being put on furlough, the employer will pay only £1,600, that amount can be paid instead. Again I would expect that in reality the agreement will be based on 'take it or leave' but the principle is clear. The employee must receive at least 80% of the regular wage – if it were any less then the employer would be making a profit which is clearly not the intention.

This 80% has confused some people. There have been suggestions that employers reduce pay to 80% and that HMRC would then reimburse 80% of that. Equally, some people have suggested that the employer pay the 80% and HMRC would reimburse the employee the other 20%. Those are incorrect. It is better to think of the payroll and reimbursement as two completely different issues – the employer pays the employee the agreed amount through the payroll, accounting for tax and National Insurance in the normal way, and then makes a claim from HMRC under a separate process.

National Insurance and pensions?

When the scheme was announced it was unclear whether the maximum amount of reimbursement as set out above was inclusive of employer National Insurance contributions. It has now been clarified that the employer can also claim for employer contributions and minimum automatic auto enrolment contributions.

The guidance is not clear on this but the following is an example of how I understand the calculation would work.

Anne has an annual salary of £3,000 a month. She is contracted out of auto-enrolment. The monthly payroll costs for her are:

Salary	£3,000
Employers' NIC (£3,000 – £719) = £2,281 @ 13.8%	£315
Total employment costs	£3,315

It has been agreed that Anne will be placed on furlough and she has agreed to be paid 80% of salary.

First we look at salary. Compare 80% of £3,000 with £2,500. 80% of £3,000 is £2,400. This is lower than £2,500 so we can use that figure. We then look at the employer's National Insurance on the revised salary of £2,400.

That is £232 ($£2,400 - £719 = £1,681 @ 13.8\%$). The employer can thus obtain a grant of:

Revised salary (80% of normal salary)	£2,400
National Insurance on revised salary	£232
Total	£2,632

Note that this exceeds £2,500 but that is not a problem. It is only the salary element of the grant which is capped at £2,500.

This is a straightforward example but it has taken some time to work out exactly what is intended. I fear that in practice it will be much more difficult when variable pay and non-standard elements in the pay package have to be considered.

How does the employer get the money?

The final element in the jigsaw is how the employer will obtain the grant from HMRC. Again it should be stressed that this mechanism is entirely separate from the payroll process, which works in the normal way. HMRC has set up a new process for making claims but, as far as we can see, this will not be linked directly to HMRC's PAYE software. The new claims portal will not be open until the end of April at the earliest, so there will be gap between the operation of the March (and perhaps) April payroll and the receipt of funds from HMRC. Payroll must still be operated in the normal way and PAYE and National Insurance accounted for as usual. Again, I would imagine that many employers will be reluctant to pay the PAYE and National Insurance on the March payroll in the knowledge that it will be some weeks before they get the grant, but the legal position is clear.

HMRC states that the following information must be provided with each claim:

- employer PAYE reference number;
- the number of employees being furloughed;
- the claim period – start and end date;
- amount claimed (per the minimum length of furloughing of three weeks);
- bank account and sort date; and
- contact name and sort code.

It will be for the employer to specify the amount to be claimed – HMRC will not do the calculations. HMRC will however have the right to audit all aspects of a claim. How it will do this operationally remains to be seen.

A couple of features are worth noting here. First, the claim period is not linked to the employer's pay period. An employer can make a claim every three weeks. Given that the amounts under the scheme are calculated by reference to months, it is difficult at this stage to

see how this will operate in practice. The first claim will be retrospective to 1 March 2020.

Second, employers are going to have to put systems in place to identify workers on furlough and to calculate the amount which is due under any claim. I suspect in many cases that work will fall on accountants and tax advisers. It can readily be appreciated that, even in the simplest cases, there are a number of wrinkles to the calculation – for employers with a workforce of any size on variable pay the complications are going to be immense.

Personal service companies

There has been much discussion of how personal services companies (PSCs) fit into the various compensation schemes. HMRC has made it clear that individuals operating through PSCs are not eligible for the self-employment scheme. Such companies are within the scope of the CJRS, but there are two major problems.

First, the scheme applies only to employees who have been furloughed. It is not easy to see how an individual operating through a PSC could furlough themselves and do no work for the company at all. Surely making the claim for the CJRS would be work and thus make the claim invalid. Even if this point could be overcome – and I am sure that it will be the subject of debate as to whether such an individual can be furloughed but still carry out directors' duties – there is the fact that most PSCs structure payments around a small salary and top-up dividends. Since only the salary can be taken into account, the amounts claimable under the CJRS are likely to be minimal.

Personal service company owners are between a rock and a hard place because neither scheme really deals with their particular position. Whether that is justifiable in policy terms is a matter of debate which I will not discuss here. But I imagine that many advisers will be having difficult conversations with their PSC clients and face accusations of depriving them and their families of much needed support because of the 'scheme you put me into'. Even though, as will often be the case, such individuals will still have benefited financially from being a PSC over the life of their business despite not being eligible for grant support, it may be difficult for them to accept the underlying calculations rationally.

Where are we now?

I do not envy HMRC's task in coming up with this scheme. Trying to get a process of this complexity up and running in a short time must be a nightmare. There is clearly a tension between making an arrangement easy to operate and targeting support at the right people.

There is also the ever-present threat of fraud and abuse. However much we might deplore it, people will undoubtedly try to exploit the system, not only on an individual basis but through organised cyberattacks of the type we have seen for tax credits and other part of the system.

So it is not surprising that some aspects are not clear and that many questions remain unanswered. We will follow up this article as matters become clearer, but I hope that readers find this preliminary analysis, warts and all, to be helpful in what is an incredibly stressful time for all of us.

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