

April 2020

Employment – 20:20 vision

Providing clarity and insight on employment law matters

Coronavirus Job Retention Scheme (CJRS) – 4 April 2020 updates



The government on 4 April 2020, published further guidance on the CJRS. To read our previous updates, click [here](#).

Clarifications since the last update

1. The CJRS is not limited to employees who otherwise would have been made redundant but is open to any employee provided that:
 - their **employer** had created and provided a PAYE payroll scheme on or before 28 February 2020 and the employer had enrolled for PAYE online; and
 - the **employee** was on PAYE on 28 February 2020.
2. **Limb (b) workers** – non-employees who satisfy the definition of ‘worker’ – who are paid through PAYE can be furloughed.
 - Limb (b) workers, who pay tax on trading profits through self-assessment, may be eligible for the self-employed income support scheme – announced 26 March 2020. See our note on the scheme [here](#).
3. **Umbrella companies** – individuals who are employed by their own umbrella company can be furloughed by their umbrella company.
4. The government has now confirmed that employees can start a new job whilst on furlough – meaning they could earn 80% (or more) of their old salary and 100% of their new salary. This must be allowed under their employment contract or the old employer must agree to waive this.
5. **Training** – The latest guidance says that ‘*furloughed employees should be encouraged to undertake training*’. Training can therefore be carried out as in the course of doing so, employees do not provide services to, or generate revenue for, or on behalf of their employer.
 - When undertaking training, furloughed employees are entitled to be paid at least their appropriate national minimum wage. For most employees, this will fall well within their furlough payments but if not, employers will be required to ‘top-up’ to provide the additional wages.

Clarifications to salary definition

- What is included:** Wages, past overtime (e.g. compulsory guaranteed overtime), fees (now included as they were excluded in the last guidance) and compulsory commission payments (i.e. contractual commission). This can only be in reference to commission from past sales, as furloughed employees cannot complete new sales, as they cannot work while on furlough. In any event, this is subject to the £2,500 cap.
 - Employers will also be able to claim the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on the subsidised wage.
- What is excluded:** Discretionary bonuses, tips, discretionary commission payments, benefits in kind or benefits provided through salary-sacrifice schemes. This means that benefits such as health insurance or pension contributions cannot be reclaimed or included in 80% of salary.

Placing employees on furlough

- Employers must notify employees that they are being furloughed in writing and keep a record of this for **5 years**. This is for anti-fraud purposes and HMRC have stated they will check claims retrospectively and claw back sums that should not have been claimed.
- Include date that the employee finishes work/furlough starts – this can be a date prior to date of your agreement with employees
- Employees must be placed on furlough for a minimum of 3 weeks at a time.
- Employees can be rotated on and off furlough – provided they are furloughed for a minimum of 3 weeks each time.

Many areas remain unclear

- Annual leave** – Still no word on this in the guidance published to date – can employees take annual leave during furlough, and if so, what should be paid. Our view, until there is guidance to the contrary, is that holiday can be taken during furlough. The safest approach on holiday pay, for now, is to pay what you did pre furlough.
- Director's duties** – The guidance confirmed that directors can be furloughed and during this time they cannot do any work other than their '*statutory duties*'. It has not been clarified what exactly is meant by their statutory duties e.g. filing annual return with Companies House and attending the AGM, but can they do more needs to be clarified.
- TUPE** – It is still unclear whether employees who TUPE into a business after 28 February 2020, are covered by the scheme – based on the current guidance it appears unlikely.

Further thoughts

If an employee was made redundant or they stopped working for you (e.g. an employee leaves the business for a new job which then falls through) after 28 February 2020, the guidance has confirmed they can re-join, be placed on furlough and then made redundant/leave at a later date. If an employer is minded to do this, then it should approach this situation with caution for the reasons below and only then with a carefully drafted letter. Points to note:

- Until the scheme is up and running, which will not be until the end of April 2020 (at the earliest) the employer will still be responsible for funding salaries.

- HMRC have indicated they will be rigorous in their reviews and will claw back any money paid out on fraudulent claims.
- Employees who are brought back may build up 2 years continuity of employment.

For more information, please do get in touch with Paul Reeves, Leanne Raven, Charlotte Varela or your usual Stephenson Harwood contact.

We have a dedicated Covid-19 team of employment lawyers keeping up to date on the latest developments and who are available to answer any questions you may have. You can find more information [here](#).



Paul Reeves

Partner

T: +44 20 7809 2916

Email: [Paul](#)



Leanne Raven

Professional support lawyer

T: +44 20 7809 2560

Email: [Leanne](#)