

# Covid-19 & employment

PART I: Furlough & redundancy:  
A handy guide to the guidance (so far)

Georgina Churchhouse & Jeremy McKeown

[Churchhouse@12kbw.co.uk](mailto:Churchhouse@12kbw.co.uk) and [McKeown@12kbw.co.uk](mailto:McKeown@12kbw.co.uk)

# BRIEF OVERVIEW

- ▶ TO BEGIN:A NOTE OF CAUTION
- ▶ WHAT IS THE CJRS?
- ▶ THE BASICS OF FURLOUGH UNDER THE CJRS
- ▶ BENEFITS OF FURLOUGH
- ▶ PITFALLS OF FURLOUGH
- ▶ PRACTICAL CONSIDERATIONS

# TO BEGIN: A NOTE OF CAUTION

# Points to remember - general

- ▶ HMRC guidance is being updated frequently – save a record of the precise iteration relied upon when providing advice (legitimate expectation).
- ▶ The guidance is guidance, not legislation. However, it shows how the Treasury / HMRC intends to interpret the rules.
- ▶ The Treasury Direction (“**TD**”) to HMRC dated 15 April 2020 is the definitive legal document to date (subject to subsequent necessary clarification).
- ▶ The Treasury Direction to HMRC dated 30 April 2020 on the self-employed scheme income support scheme is the definitive legal document to date for the self employed (subject to subsequent necessary clarification).
- ▶ Any updates to this consolidation of the current guidance shall be posted on the I2 King's Bench Walk Employment & Discrimination Page, accessible here: <https://www.I2kbw.co.uk/areas-of-expertise/employment-discrimination/>.
- ▶ The content of this document is correct at 14 May 2020.

## Point to remember – language / definitions

- ▶ Definitions are not always provided within the Guidance.
- ▶ Present guidance on the CJRS from HMRC does not map neatly on to established employment law principles.
- ▶ For example, the scheme describes certain individuals generically as 'employees' when they would otherwise be referred to in employment practice as 'limb b workers' (though note where limb b workers are not paid through PAYE but file a tax return, they will fall outside the CJRS and likely under the self-employed scheme).
- ▶ As such, unless legislation is specifically referred to in the Direction / Guidance, advisors should be very careful not to read-in statutory definitions familiar to employment lawyers in the absence of clarification from the Treasury or HMRC.

# The Direction, Guidance and key sources of information

- ▶ **Treasury Direction (15 April 2020):**
  - ▶ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/879484/200414\\_CJRS\\_DIRECTION - 33\\_FINAL\\_Signed.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION - 33_FINAL_Signed.pdf)
- ▶ **Treasury Direction on the SEISS (30 April 2020)**
  - ▶ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882593/SEISS\\_Direction\\_Final\\_-\\_SIGNED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882593/SEISS_Direction_Final_-_SIGNED.pdf)
- ▶ **Official government guidance:**
  - ▶ <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>
- ▶ **ACAS guidance: advice for employers and employees**
  - ▶ <https://www.acas.org.uk/coronavirus>

# The Direction, Guidance and key sources of information

## ► **Legislation and regulation:**

- The Coronavirus Act 2020.
- The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020.
- The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations (SI 2020/304).
- The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129).

# WHAT IS THE CJRS?

# What is the scheme? – a definition

- ▶ **Definition** from the Guidance:
  - ▶ “*The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at least three months starting from 1 March 2020.*”
- ▶ Power to act? Parliament gave HMRC broad powers (CA 2020, s76):
  - ▶ “*Her Majesty’s Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease.*”
  - ▶ So, not (yet) legislated / formally regulated but derived from HMRC’s broad grant of powers.
- ▶ In effect a government grant to employers promising to repay employers who refrain from dismissing employees, subject to certain thresholds / conditions.

# What is the scheme? - purpose

- ▶ Purpose of the scheme (per Treasury Direction, para. 2.2):
  - ▶ “Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates..” [emphasis added]
- ▶ Any effect the scheme has on employees is essentially collateral.
- ▶ Overarching purpose is to help (encourage?) employers to retain employees in strained economic times rather than make redundancies in the interests of the general economic health of the individuals and the nation.

# THE BASICS OF FURLOUGH UNDER THE CJRS

# Index: the basics

- ▶ What is furlough?
- ▶ Which employers qualify?
- ▶ Which employees qualify?
- ▶ Which non-employees qualify?
- ▶ What can an employer claim?
- ▶ Conditions for and during furlough
- ▶ When and where can an employer make a claim?
- ▶ Can I make a claim under the CJRS if I have already made my employees redundant or placed them on unpaid leave?
- ▶ Can I accrue holiday whilst placed on furlough? And can my employer force me to take annual leave?
- ▶ How long is the CJRS available?

# What is ‘furlough’?

- ▶ A temporary leave of absence from work, usually due to the economic needs of the employer.
- ▶ Novel concept in E&W employment law.
- ▶ No accepted definition in E&W law prior to the current crisis.

# Which employers qualify? (I)

- ▶ Treasury Direction provides a very wide definition:
  - ▶ “Qualifying employers
  - ▶ *3.1 An employer may make a claim for a payment under CJRS if the following condition is met.*
  - ▶ *3.2 The employer must have a pay as you earn (“PAYE”) scheme registered on HMRC’s real time information system for PAYE on 19 March 2020 (“a qualifying PAYE scheme”).*
- ▶ Includes **companies / businesses, charities, recruitment agencies, public authorities** (though, in practice, the Guidance suggests most public authorities will not be furloughing workers as they provide essential services).
- ▶ Employers who **receive public funding for staff costs?**
  - ▶ Generally not eligible (expectation that they use the public funding to continue to pay staff)
  - ▶ Exceptions: where an organisation is not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the scheme “*may be appropriate*” for “*some staff*” (Guidance).

# Which employees qualify? (I)

- ▶ What is a furloughed employee? (TD, para. 6.1)
  - ▶ “An employee is a furloughed employee if-
    - ▶ (a) the employee **has been instructed by the employer to cease all work in relation to their employment,**
    - ▶ (b) the **period** for which the employee has ceased (or will have ceased) **all work for the employer is 21 calendar days or more**, and
    - ▶ (c) the instruction is given **by reason of circumstances arising as a result of coronavirus or coronavirus disease.”**
  - ▶ Clarifies that it is not necessary to show that the employee would otherwise have been made redundant but simply to those those furloughed “by reason of” coronavirus-related circumstances.

## Which employees qualify? (2)

- ▶ There are a number of “gateways” an employer needs to pass through in order to claim payment for furloughing an employee:
- ▶ (A) Initial Administrative Gateways:
  - ▶ 1. Created & started a PAYE payroll scheme on or before 19 March 2020
  - ▶ 2. Enrolled for PAYE online.
  - ▶ 3. Has a UK bank account.
- ▶ (B) Personal Scope Gateways:
  - ▶ 1. Specified types of worker or office holders.
  - ▶ 2. Certain employees who are not working.

# Which employees qualify? (3)

## **GATEWAY I: INITIAL ADMINISTRATIVE GATEWAYS**

- ▶ **I: Created a PAYE payroll scheme on or before 19 March 2020:**
  - ▶ “The employer must have a pay as you earn (“PAYE”) scheme registered on HMRC’s real time information system for PAYE on 19 March 2020 (“a qualifying PAYE scheme”)” (TD, para. 3.2)
  - ▶ “This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020.” (Guidance)
- ▶ **More than one PAYE scheme?** Make a claim for each:
  - ▶ “If an employer has more than one qualifying PAYE scheme-
    - ▶ (a) the employer must make a separate claim in relation to each scheme, and
    - ▶ (b) the amount of any payment under CJRS will be calculated separately in relation to each scheme” (TD, para. 4)

# Which employees qualify? (4)

- ▶ New employees following **TUPE** transfer:
  - ▶ An employer can furlough and claim for staff transferred to it under TUPE or PAYE business succession rules after 28 February 2020 (despite the payroll and RTI submission requirement not being met).
  - ▶ Whilst for the purposes of TUPE an employee is treated as having always worked for the new employer, in practice s/he is has not always been on the PAYE system. Although originally unclear, it has since been clarified that TUPE'd employees are eligible:
    - ▶ “A new employer is eligible to claim under the CJRS in respect of the employees of a previous business transferred after 28 February 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.” (Guidance).
- ▶ Payroll consolidation:
  - ▶ “Where a group of companies have multiple PAYE schemes and there is a transfer of all employees from these schemes into a new consolidated PAYE scheme after 19 March 2020, the new scheme will be eligible to furlough those employees and claim the grants available under the CJRS.” (Guidance).

# Which employees qualify? (5)

- ▶ **2: Enrolled for PAYE online:**
  - ▶ <https://www.gov.uk/paye-online/enrol>
- ▶ **3. Has a UK bank account:**
  - ▶ For practical and anti-fraud purposes
  - ▶ No further guidance on definition

# Which employees qualify? (6)

## **GATEWAY 2: PERSONAL SCOPE GATEWAYS**

- ▶ In effect, means '**does the job I do qualify?**'
- ▶ **Visa / work permit implications?**
  - ▶ The HMRC confirmed that those with certain work visas will not be regarded as breaching their visa conditions if they receive funds under the furlough scheme:
    - ▶ "**Grants under the scheme are not counted as 'access to public funds', and you can furlough employees on all categories of visa.**"
- ▶ **Type of contract:**
  - ▶ Applies to any type of employment contract, including **full-time, part-time, agency, flexible and zero-hour contracts.**
- ▶ **Foreign nationals**
  - ▶ Are eligible to be furloughed.

# Which employees qualify? (7)

- ▶ **Employees with caring responsibilities**
  - ▶ Under section 57A Employment Rights Act 1996, employees are permitted reasonable time off unpaid to provide care in what might be called “emergencies”.
  - ▶ Confirmed in Guidance:
    - ▶ “*Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed.*”
- ▶ **Employees with multiple jobs:**
  - ▶ Can be furloughed for each job.
    - ▶ “*Each job is separate, and the cap applies to each employer individually.*”
  - ▶ Entitled to furloughed payment for the furloughed job whilst continuing to receive normal wages for the non-furloughed job.

# Which employees qualify? (8)

## ► Employees on unpaid leave:

- ▶ “If an employee started unpaid leave after 28 February 2020, you can put them on furlough instead. If you put them on furlough then you should pay them at least 80% of their regular wages, up to the monthly cap of £2500.”
- ▶ “If an employee went on unpaid leave on or before 28 February, you cannot furlough them until the date on which it was agreed they would return from unpaid leave.” (Guidance).

## ► Self-isolating or sick employees:

- ▶ Employers are entitled to furlough employees who are being ‘shielded’ (per public health guidance) or off on long-term sick leave.
- ▶ NB: Public health advice also covers people who live with people who need to shield:
  - ▶ “If you have someone else living with you, they are not required to adopt these protective shielding measures for themselves. They should do what they can to support you in shielding and they should stringently follow guidance on social distancing, reducing their contact outside the home.”
- ▶ Can claim back either SSP or CJRS for any period, not both.

# Which employees qualify? (9)

- ▶ **Becomes sick whilst furloughed?**
  - ▶ Employees retain all statutory rights to SSP so are entitled to at least SSP for period of sickness. It is the decision of the employer whether to move to SSP or continue at furlough pay (per the Guidance).
- ▶ **Short term illness?**
  - ▶ “*Short-term illness or self-isolation should not be a consideration in deciding whether to furlough an employee.*” (Guidance)
  - ▶ If employer wishes to furlough a worker currently off sick, should halt sick pay and classify the worker as furloughed.

# Which employees qualify? (10)

## ► **Apprentices:**

- ▶ Yes, can be furloughed and they can continue to train.
- ▶ Unlike other employees, must be paid the shortfall between furlough payments and the National Minimum Wage / National Living Wage/ Apprentice Minimum Wage.
- ▶ Government separate guidance for apprenticeships:  
<https://www.gov.uk/government/publications/coronavirus-covid-19-apprenticeship-programme-response/coronavirus-covid-19-guidance-for-apprentices-employers-training-providers-end-point-assessment-organisations-and-external-quality-assurance-pro>
- ▶ It allows breaks in learning, encourages training to continue remotely and confirms that the Treasury will not be pausing apprenticeship levy payments for employers.

## ► **Employees on fixed term contracts:**

- ▶ Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee's contract ends because it is not extended or renewed and employer will no longer be able claim grant for them.

## ► **Employees working reduced hours:**

- ▶ “*If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme*” (Guidance)

# Which non-employees qualify? (I)

- ▶ Certain limited categories of worker not usually classed as employees do fall within the furlough scheme as confirmed by the HMRC Guidance.
- ▶ **Office holders and company directors:**
  - ▶ Paid via PAYE.
  - ▶ The furlough, and any ongoing payment during furlough, will need to be agreed between the office holder and the party who operates PAYE on the income they receive for holding their office.
  - ▶ Where the office holder is a company director or member of a Limited Liability Partnership (LLP), the furlough arrangements should be adopted formally as a decision of the company or LLP, noted in the company records and communicated in writing to the director.
  - ▶ TD Directors who pay themselves once a year (typically one-person businesses where most revenue is taken as dividends) are, subject to certain conditions, eligible for furlough.

# Which non-employees qualify? (2)

- ▶ What duties can a furloughed office holder carry out?
  - ▶ Very restrictive interpretation by HMRC – they can carry out “particular duties to fulfil their statutory duties” and may only do the bare minimum:
  - ▶ "*they may do so provided they do no more than would reasonably be judged necessary for that purpose, i.e. they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.*" (Guidance)
- ▶ **Personal Service Company (PSC) directors:**
  - ▶ The same rules as apply to office holders / company directors expressly apply to PSC directors.

# Which non-employees qualify? (3)

## ► **Salaried members of LLPs:**

- ▶ Those who are designated as employees under s863A for tax purposes ('salaried members') under the Income Tax (Trading and Other Income) Act (ITTOIA) 2005.
- ▶ Look to the LLP agreement for the member's rights and duties (or in default to the LLP Act 2000).
- ▶ To furlough a member, the terms of the LLP agreement (or any such agreement between the LLP and the member) may need to be varied by a formal decision of the LLP (for example, to reflect the fact that the member will perform no work in the LLP for the period of furlough, and the effect of this on their remuneration from the LLP).

# Which non-employees qualify? (4)

## ► Agency workers

- ▶ Paid through PAYE (including those employed by umbrella companies) - (s.44, ITEPA 2003 treats agency workers as holding employment with the agency for income tax purposes so paid via PAYE).
- ▶ Furlough should be agreed between the agency, as the deemed employer, and the worker (likely discussed with the client in receipt of the service).
- ▶ Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.

## ► Limb (b) workers:

- ▶ Those paid through PAYE only. Those who file a tax return will fall outside CJRS and within the Self-Employed Income Support Scheme (“**SEISS**”), announced by the Chancellor on 26 March 2020.

# Which non-employees qualify? (5)

- ▶ **Contingency workers in public sector:**
  - ▶ Those who provide services to central government, local authorities etc.
  - ▶ Separate guidance issued (though the substance is similar).
  - ▶ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/877221/PPN02\\_20-Contingent-Workers-Impacted-by-Covid-19-2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877221/PPN02_20-Contingent-Workers-Impacted-by-Covid-19-2.pdf)

## What can an employer claim? (I)

- ▶ Under the scheme the Government will pay a grant of:
  - ▶ **(1) 80% of eligible employees' salary (before tax) capped at £2,500 per month;**
  - ▶ **(2) Minimum automatic enrolment employer pension contributions** on the subsidised wage (up to 3% and provided the employer will pay the whole amount claimed to a pension scheme for the employee as an employer contribution (TD, para. 8.9); plus
  - ▶ **(3) Employer National Insurance contributions** on behalf of their furloughed employees.

## What can an employer claim? (2)

- ▶ **Minimum wage implications** - what if on my normal hours of work my furlough payment ends up being less than the NLW/NMW/AMW?
  - ▶ **The bad news** - when on furlough you are not working so these provisions don't bite. The employer need only pay you 80% of your NMW salary even when that takes the overall pay to below the NMW threshold.
  - ▶ **The good news** – if employees are required to undergo **mandatory training** during furlough, that training time must be topped-up to meet the NMW.
  - ▶ **Special rules apply to apprentices** - Time spent training is treated as working time for the purposes of the minimum wage calculations and must be paid at the appropriate minimum wage. Employers will need to ensure that the furlough payment provides sufficient monies to cover these training hours. Where the furlough payment is less than the appropriate minimum wage entitlement for the training hours, the employer will need to pay the additional wages to ensure at least the appropriate minimum wage is paid for 100% of the training time.

## What can an employer claim? (3)

- ▶ What do we mean by ‘salary’?
  - ▶ Calculated based on the employee’s “**reference salary**” (TD, para 7.1)
  - ▶ “*The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but **disregarding anything which is not regular salary or wages as described in paragraph 7.3**)*” (TD, para. 7.7)
  - ▶ “*In calculating the employee’s reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages.*” (TD, para. 7.3).

# What can an employer claim? (4)

- ▶ “Regular” salary or wages? (TD, para. 7.4 and 8.1):
  - ▶ [7.4] “In paragraph 7.3 “regular” in relation to salary or wages means so much of the amount of the salary or wages as-
    - ▶ (a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),
    - ▶ (b) is **not conditional** on any matter,
    - ▶ (c) is **not a benefit of any other kind**, and
    - ▶ (d) **arises from a legally enforceable agreement**, understanding, scheme, transaction or series of transactions.”
  - ▶ [8.1] “...the payment may reimburse-
    - ▶ (a) the gross amount of earnings paid or **reasonably expected to be paid** by the employer to an employee”
- ▶ INCLUDES: wages, past overtime, fees, deferred payments, compulsory commission payments.
- ▶ EXCLUDES: discretionary bonuses, tips, non-guaranteed commission, benefits-in-kind
- ▶ QUERY – “conditional on any matter” includes conditional upon CJRS paying out?

# What can an employer claim? (5)

## ► Employees on leave:

- ▶ “*The normal rules for maternity and other forms of parental leave and pay apply*” (Guidance)
- ▶ If a furloughed employee is on **maternity / paternity / shared parental leave** or **adoption** leave, you can claim through the scheme for **enhanced (earnings related) contractual pay** for employees who qualify for any of the above.
- ▶ If pregnant and about to start leave?
  - ▶ “*You should start maternity leave as normal. If your earnings have reduced because you were put on furlough or off sick before your maternity leave started, this may affect your Statutory Maternity Pay. The same rules apply to adoption pay, paternity pay and shared parental pay.*” (Guidance)

## ► Members of LLPs:

- ▶ special additional provisions for calculating salary set out in the TD, para. 7.2 and 7.9

# Conditions for and during furlough (I)

- ▶ **No work:**
  - ▶ An employee **cannot do any work which provide services to or generates revenue for, or on behalf of the employer organisation or a linked or associated organisation.**
  - ▶ There does not appear to be any *de minimus* threshold
  - ▶ TD Guidance has clarified that "*Whilst on furlough, employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers.*" So union reps can accompany a colleague during disciplinary or grievance meetings, or redundancy consultation without a breach of furlough arising.

# Conditions for and during furlough (2)

## ► Volunteering:

- A furloughed employee can take part in volunteer work, if it does not provide services to or generate revenue for, or on behalf of your organisation or a linked or associated organisation.
- The organisation can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is **in line with public health guidance**.

# Conditions for and during furlough (3)

- ▶ **By consent:**
  - ▶ Employees cannot be compelled to be furloughed. It is only with their express consent.
  - ▶ Similarly, employers cannot be compelled to furlough.
- ▶ **“In writing”:**
  - ▶ Caused a lot of confusion as to whether the employer needs to merely notify the employee of the decision to furlough in writing (per the plain wording of the first iterations of the Guidance)
  - ▶ Alternatively, does there need to be notification in writing and a written reply consenting from the employee: “...*the employer and employee have agreed in writing*” (per TD, para 6.7).
  - ▶ On its face, TD trumps the Guidance...

## Conditions for and during furlough (4)

- ▶ However, *likely* (though not guaranteed) **there is no need for the employee to consent in writing** owing to:
  - ▶ **6<sup>th</sup> version of the Guidance** (released after the TD): "*There needs to be a written record, but the employee does not have to provide a written response. A record of this communication must be kept for five years.*"
  - ▶ **Letter from HMRC Chief Executive senior staff to Daniel Barnett** (23 April): "*...the employer and the employee must reach an agreement and an auditable written record of this agreement must be retained. It does not necessarily follow that the employee will have provided written confirmation that such an agreement was reached in all cases.*"

# Conditions for and during furlough (5)

- ▶ **On and off furlough / multiple furloughing:**
  - ▶ Employees can be furloughed multiple times **however each separate instance must be for a minimum period of 3 consecutive weeks.**
  - ▶ Failure to furlough for 3 week blocks is likely to deprive the employer of being able to successfully claim the furlough grant for that employee.
  - ▶ Each period of furlough can be extended by any amount of time whilst the employee is on furlough.
- ▶ **Mandatory training during furlough:**
  - ▶ Yes – workers can be required by the employer to attend training, **as long as in undertaking the training the employee does not provide services to, or generate revenue for, or on behalf of their organisation or a linked or associated organisation.**
  - ▶ Employer **MUST** pay / top-up at least National Minimum Wage for the training time.
  - ▶ No express requirement to pay the employee full salary if 80% of their regular salary is already above the NMW threshold.

# When and where can an employer make a claim? (I)

- ▶ The online portal has now opened (as of 20 April 2020). It can be accessed here:
  - ▶ <https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme>
- ▶ In its first full day:
  - ▶ 185,000 firms submitted claims
  - ▶ 1,300,000 were employees reported as furloughed
  - ▶ Total value: £1.5bn.
- ▶ **Important practical information:**
  - ▶ Employer can **make only one claim per claim period** (so should claim for all furloughed employees at the same time)
  - ▶ **Retain records** for the HMRC audit of their claims:
    - ▶ the amount claimed and claim period for each employee
    - ▶ the claim reference number
    - ▶ the employer's calculations

# When and where can an employer make a claim? (2)

- ▶ **What will the employer need to make a claim?**
  - ▶ ePAYE reference number
  - ▶ The number of employees being furloughed
  - ▶ Each employee's NI number
  - ▶ The dates for the start and end of the claim period
  - ▶ The full amount claimed to include employer National Insurance Contributions and employer minimum pension contributions.
  - ▶ Employer bank account number and sort code
  - ▶ Employer contact name and phone number along with additional identifying information
- ▶ If claiming for more than 100 employees, there is an upload in 'file format' option.

## Can I make a claim under the CJRS if I have already made my employees redundant or placed them on unpaid leave?

- ▶ Short answer – yes.
- ▶ Guidance differs slightly if redundant after 28 February or 19 March 2020.
- ▶ In short, if employer made an employee redundant on or after 19 March 2020 they **can be re-employed, furloughed and claimed for**.
- ▶ There is clarification for the period between 28 February and 19 March 2020 (owing to the extension of the eligibility period by HMRC):
  - ▶ “*You can re-employ them, put them on furlough and claim for their wages from the date on which you furloughed them, even if you do not re-employ them until after 19 March 2020 .*
  - ▶ *This applies as long as the employee was on your PAYE payroll as at 28 February 2020, which means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 28 February 2020.”* (Guidance)
- ▶ **Complexities in redundancy law:**
  - ▶ Does an employee **have to repay any payments they received for redundancy?** Not under employment law or the CJRS, however, an employer would be wise to consider asking the employee to agree to do so.
  - ▶ Can an **employer be compelled** to reemploy a redundant (or dismissed) employee? No, but be wary of discrimination claims that may arise if you invite some but not all employees back.

# Can I accrue holiday whilst placed on furlough?

## Can my employer force me to take annual leave?

- ▶ Yes, an employee can accrue holiday whilst on furlough:
  - ▶ “Furloughed employees continue to accrue leave as per their employment contract. The employer and employee can agree to vary holiday entitlement as part of the furlough agreement, however almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below. Employees can take holiday whilst on furlough. Working Time Regulations require holiday pay to be paid at the employee’s normal rate of pay or, where the rate of pay varies, calculated on the basis of the average pay received by the employee in the previous 52 working weeks. Therefore, if a furloughed employee takes holiday, the employer should pay their usual holiday pay in accordance with the Working Time Regulations....” (Guidance)
- ▶ Can my employer force me to take annual leave using regulation 15 WTR?
  - ▶ Unclear, but likely a no in light of:
    - ▶ Proposition that if the purpose of annual leave is to have rest and leisure, a furloughed employee is unlikely to achieve this in a period of lockdown during a pandemic.
    - ▶ Regulation 13 (10) which allows employees to take their leave at another time because it was not reasonably practicable for them to take their leave as a result of the effects of the coronavirus.

# How long is the CJRS available?

- ▶ A temporary scheme backdated to **1 March 2020** at least 3 months with provision to extend if necessary.
- ▶ There have been two extensions:
  - ▶ from 31 May 2020 to the “end of June” (announced on 17 April).
    - ▶ It has been speculated that the reason was to avoid companies considering redundancies of more than 100 employees having to start their collective redundancy consultation period of 45 days at or around the announcement date.
  - ▶ **The current extension takes the scheme to “the end of October”** (announced 12 May).
- ▶ There has been talk about tapering the CJRS to avoid a cliff edge, though the details of when or how have not yet been released.

# BENEFITS OF FURLOUGH

# The benefits?

- ▶ Employers do not have to make employees redundant and thus pay a statutory or contractual redundancy payment or notice payment to those employees who would otherwise qualify. For employees, you are not made redundant at a time of looming recession/depression.
- ▶ Employers have the option as to whether you wish to top up the employee's salary. [On the flip side employees may earn significantly less]
- ▶ Employers have the flexibility, subject to the employees' consent, to place employees on and off furlough in line with businesses needs.

# PITFALLS OF FURLOUGH

# Pitfalls (I)?

- ▶ Choosing who to place on furlough – may lead to discrimination claims.
- ▶ Failure to consider furlough – may lead to unfair dismissal claims
- ▶ The lack of definitive clarify from HMRC as to whether they will seek to recoup furlough pay if the situation does not meet the definition of a redundancy under s139 ERA 1996.
- ▶ Employees may earn less than the NMW under furlough rates.
- ▶ Gaining consent from employees – employers need to be very careful to do this properly and unilaterally place an employee on furlough which would lead to a breach of contract, unlawful deduction from wages claim and may lead to a constructive unfair dismissal claim.
- ▶ HMRC will audit an employer.
- ▶ Employer going into administration or becoming insolvent during furlough.
  - ▶ The guidance states that administrators would not be expected to use the scheme unless there is “a reasonable likelihood of re-hiring the workers”.

## Pitfalls (2)

- ▶ Lack of clarity over whether an employer has to collectively consult when initiating furlough
  - ▶ “*If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procedure agreement to changes to terms of employment.*” (Guidance).
- ▶ Whether an employer can commence collective consultation on proposed redundancies while employees are on furlough leave?

# PRACTICAL CONSIDERATIONS

# Variation and agreement (I)

- ▶ Unless there is an unambiguous clause allowing an employer to unilaterally vary an employment contract, an employer must gain the consent of the employee to place them on furlough. There are two methods of doing so:
  - ▶ individual consent; or
  - ▶ via collective agreement where this is incorporated into the terms and conditions of the employee's contract of employment
- ▶ Probably much safer to simply gain consent, given the lack of consensus in employment law on the issue. If the clause unambiguously covers the changes required by furlough (such as the need not to work and the ability to reduce pay) then this may be an effective mechanism: *Bateman v ASDA Stores Ltd [2010] IRLR 370*

# Variation and agreement (2)

- ▶ Obtaining agreement to furlough from employees during COIVD-19
  - ▶ To be eligible for the grant, employers must confirm **in writing** to their employee confirming that they have been furloughed. The agreement should cover (a) the terms of the arrangement (b) crucially, the level of pay and (c) express provision as to rotating furlough.
    - ▶ Important - if there is a signed agreement consenting to the deduction in wages, under ss13 and 23 ERA 1996 a claim for unlawful deduction of wages cannot be made.
  - ▶ A record of this communication must be kept for **5 years**.
  - ▶ Under s86 ERA 1996, an agreement can be reached between an employer and an employee's representatives that applies to everyone at work where there is a collective agreement incorporated into an individual's contract of employment. A **change to the collective agreement as to furlough will be effective for the whole relevant group** of employees, whether the individual members of staff agree or not, and whether the staff are members of the union or not.

# Re-engagement and payments

- ▶ Re-engagement agreements should deal with (a) whether furlough will be backdated (b) what will happen to termination payments and (c) whether the employment is to be fixed by reference to the continuation of the scheme.
  - ▶ If an employee is re-engaged, their continuity of employment covers both the original and the new period of engagement. But this will be lost if the gap is more than one week, unless one of the provisions in s.212 (3) ERA 1996 applies.
- ▶ The grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme.
- ▶ Where the employer provides benefits to furloughed employees, including through a salary sacrifice scheme, these benefits should be in addition to the wages that must be paid under the terms of the Job Retention Scheme.
  - ▶ HMRC agrees that COVID-19 constitutes a life event that could warrant changes to a salary sacrifice scheme, but as usual, amendments to the contract of employment would require the consent of both parties.

# Tax

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

# Next Time...

- ▶ Drop us a line: [Churchhouse@12kbw.co.uk](mailto:Churchhouse@12kbw.co.uk) & [McKeown@12kbw.co.uk](mailto:McKeown@12kbw.co.uk) with COVID-19 Training in the subject line to let us know which topics you would like training and we shall do our best to accommodate you:
  - ▶ Collective Consultation
  - ▶ Redundancy & Unfair Dismissal
  - ▶ Discrimination issues arising from COVID-19
  - ▶ Health & Safety Detriment & Dismissal
  - ▶ Whistleblowing Detriment & Dismissal
  - ▶ Employers' duties to provide a safe place of work
  - ▶ Unlawful Deductions from Wages Claims
  - ▶ Other (please state)