

## Question and Answers on the Coronavirus Job Retention Scheme (CJRS) 5

### November 2020 – 30 April 2021

#### **Q Is the CJRS now extended?**

A Yes. The government first announced in the summer that the CJRS introduced in the early Spring would be extended until the end of October 2020 and we all thought “that was that”, but then it was announced it was being extended again during **November UK** lockdown, and within days of that announcement we were told it would continue until **March 2021 and now they have extended it to the end of April.**

#### **Q So how does the extended Scheme work?**

A Let us remind ourselves of the summer changes first.

#### **Q Ok, so what changes were introduced in the summer?**

A From 1 July 2020 to the end of October, employers could bring employees, previously on furlough, back to work on a part- time basis. “Flexible Furloughing”. This was then a month earlier than previously expected. The grant and the £2,500 cap on the furlough grant was reduced in proportion to the hours then worked. I have drafted agreements for clients utilising these changed rules. It is not just desirable, but vital, to have such written agreements in place.

#### **Q What were the other material changes then?**

A In **July** employees continued to receive the 80% of their current wages, capped at £2,500 a month and subject to PAYE and National Insurance contributions. All paid for by the State. However, for payments made to furloughed employees **from 1 August**, employers had to pay Employer's NI and pension contributions (these costs were reimbursed). **From 1 September**, employers had to contribute towards the salaries of their furloughed staff - 10% of wages (up to £312.50) plus employer national insurance and pension contributions and minimum mandatory employer pension contribution (3% of an employee's income above £520 per month). From **1 October** 20% of wages (up to £625) were paid with the government's contribution reduced to 60%.

#### **Q So what about now?**

A The unexpected extension of CJRS into November 2020 was more generous than the scheme during October (after which it was meant to be wound down). It goes back to the State paying the full 80% salary for the employees on furlough rather than 60% (with businesses in October having to pay the extra 20% of wages).

#### **Q And now the Scheme has quickly been extended beyond the possible end of lockdown on 2 December?**

A Yes, pushing the USA election coverage to one side for a moment and a claimed U Turn by some but (to others) a responsive reaction to the new spike of covid cases. So, it will carry on until 30 April 2021 although with a review (which I take to be as to its terms only e.g. at what rate will the government contribution be made at).

#### **Q Who is covered ?**

A All employees regardless of whether they are on full-time, part-time, agency, flexible or zero- hour contracts, but they must have been on the payroll by 30 October 2020. They do not need to have been furloughed before. They can also take on other jobs while placed on leave if it does not breach the rules of their existing contract of employment . As has been happening with “flexible

furloughing” since the summer. Flexible furlough agreements usually set out clear parameters as , naturally, employers would not normally anticipate an employee working elsewhere within their normal employment contracts.

**Q Can an employer rehire those previously made redundant ?**

A Yes but only if recently dismissed for redundancy. Employees who were employed and on the payroll on 23 September who have since been made redundant or stopped working afterwards can be re-employed and join the CJRS.

**Q How will it work in practice now ?**

A While the government updates the system, employers will submit their wage claim to the government and be refunded afterwards. After that, they will be paid upfront to cover the cost. But employees must be paid even if the employers are still waiting for a refund.

**Q Are self-employed individuals or workers, who are not employees, eligible for the furlough scheme?**

A No. The self-employed still have their own scheme with different rules. But a grant for self-employed workers, covering November to January, is rising from 55% to 80% of trading profits.

**Q What about employees on maternity leave?**

A The government guidance says that employers can claim for enhanced maternity pay through the furlough scheme. This suggests that employers can furlough employees on maternity leave. If an employee on maternity leave agrees to be furloughed, then an employer will be able to reclaim their SMP in the normal way and be able to claim for any enhanced contractual pay on top through the furlough scheme. Currently, employers can reclaim 92% of SMP (or 103% if they qualify for Small Employers’ Relief). Employers cannot claim the 8% balance of SMP through the furlough scheme.

**Q What about employees from outside the UK on work visas?**

A All foreign nationals are eligible if legally working in the UK and paying UK PAYE. Employers can furlough employees on all categories of a current work visa.

**Q What does an employer pay an employee on flexible furlough for the hours they are working?**

A For worked hours, they will need to pay whatever is due under the employee’s contract (so on a pro rata basis) and be responsible for all tax and NICs due on those amounts. Pay cuts can be agreed but not unilaterally imposed.

**Q Must all furloughed employees do some work to continue to claim the grant?**

A No, flexible furloughing is only an option. Employees can continue full furlough arrangements now until the end of March 2021 albeit contributing to the cost.

**Q Is there a minimum/maximum number of working hours for employees on flexible furlough?**

A No, and it is expected this can change from week to week and by agreement between employer and employee. Another sensible provision in a flexible furlough agreement.

**Q Can employees put themselves on furlough?**

A No. The employer needs to designate them as furloughed. And specify the main terms and conditions upon which the employee will cease all work in relation to their employment or work part time. Records need to be kept at least 5 years.

**Q Can employers ask employees to undergo training while furloughed?**

A Yes. In fact, the guidance says that furloughed employees should be encouraged to undertake training.

**Q Can an employee refuse to consent to an extension of furlough?**

A Yes. Many employers still do not realise this, but written agreement is needed though this can be presumed from an employer giving written details an employee agrees with/accepts. And the alternative for most who are asked to furlough, but refuse, is likely to be a redundancy and, further, one which cannot be easily challenged as an unfair dismissal.

**Q But a redundancy is still only a “potentially fair” dismissal, right? And so, a proper procedure needs to be followed?**

A Yes although Covid will obviously make it easier for employer to justify many redundancies. And employees with under 2 years’ service (or just coming up to that) have no normal unfair dismissal rights and are not entitled to a statutory redundancy payment either. Currently £538 for each full year of employment incidentally (half again on top of that for those years where the employee was over 41 years of age). A low sum but tax free.

**Q But subject to process an employer can make employees redundant under the scheme?**

A Yes. The government previously indicated that the CJRS was an alternative to redundancy, lay-off or unemployment. However, the guidance for employees also says that employees can be made redundant while on furlough and the employee guidance says that “your employer can still make you redundant while you are on furlough or afterwards”. So, whilst employers should not be abusing the scheme employees can be dismissed through redundancy whilst furloughed.

**Q And so to be clear, an employer can give notice to an employee on furlough be it for redundancy or some other reason?**

A Yes. However, if so, employee wages need to be paid in full for *statutory* notice even though only 80% is reimbursed. And making payments in lieu will have to be reconsidered because such a payment will not be covered by the scheme. In other words, the dismissed employee should be asked to “work” out notice on furlough / garden leave.

**Q Can redundancy pay be paid by the CJRS?**

A No.

**Q Wouldn’t a redundancy be an unfair dismissal if made before the end of April 2021 given the affected employee(s) could have been furloughed?**

A This is a question that will be raised in further ET claims. There are 2 schools of thought. One says that the scheme is there to protect jobs and so a redundancy should be delayed, using the scheme to assist. The other says the State should not be responsible for keeping someone in employment if their job is definitely redundant. And of course the employer still has ongoing costs under the furlough scheme. On balance, as long as the employer has thought about it as part of pre redundancy consultation, I think the better argument is that an employer’s refusal to carry on furloughing an otherwise redundant employee would not, in itself, make a redundancy an unfair dismissal.

**Q But what about contractual notice pay?**

A The Employment Rights Act 1996 ( Coronavirus, Calculation of a Week's Pay Regs 2020 ) seek to ensure that, for those furloughed employees whose employment is terminated, the calculation of their *statutory* entitlements relating to termination is based on their normal pay rather than on their furloughed pay. But if the contractual notice provided for a dismissed employee is at least one week more than statutory minimum notice the employer can probably pay a lower (80%) rate

of pay for such contractual notice periods which exceed the statutory minimum by at least one week. But can do so only in respect of furloughed employees serving out their notice but not actually working .

**Q It sounds complicated , can you give an example where an employer can save money?**

A So let us assume that a Mr. Donald Trump ( well , why not , it is not forBidden) had been employed by WHO ( who else ?) on 3 months' notice and they decided to dismiss him on November 1 after only a year of service in the Uk . And he had been on furlough leave over the whole summer . He would get one week at full pay ( his minimum statutory notice ) along with any accrued holidays ( let us assume that is one more week ) and then the rest of the 3 months ( in our example some 2.5 months ) would be due only £2,500pm ( the cap ) or 80% of his monthly pay ( whichever is lower and so that is £2,500 for anyone earning over £37,500 pa) .Provided he is on garden leave for this period.

**Q But this will not apply to many ?**

A No, in most cases notice pay , as with redundancy pay, must be paid in full . But even then , with notice pay employers can use the CJRS to get 80% ( as it stands ) back from the State for employees who are dismissed provided they remain on furlough leave and are not paid in lieu of notice .That is the key point to take from this discussion perhaps.

**Q But such dismissals may still lead to claims arising out of loss of employment?**

A Not contractual ones but maybe statutory ones depending on the circumstance and primarily for employees with over 2 years' continuity of service. For instance a redundancy is not necessarily a fair dismissal . Normal rules of fairness apply ( under Section 9894) ERA 1996 if this is of interest and assuming there is a genuine redundancy and so a *potentially* fair dismissal .

**Q Can an employer make some people redundant and furlough others?**

A Yes. The guidance clearly says that you do not need to place all employees on furlough.

**Q Can an employee be forced to work out their notice whilst furloughed?**

A Yes, although an employer will have to make up their salary to 100% of normal pay. If the individual refuses to work without good reason, then the employer will have no obligation to pay the / any remaining notice pay.

**Q What if the employee goes on sick leave?**

A The employer may be able to limit the pay to SSP, but this is a complex area where advice is needed.

**Q What if there is a worry about the employee's conduct for this period if they are asked to work on when they know they are to exit the business?**

A Most contract of employment give considerable flexibility as to what an employee is asked to do and at what location and restrictions can be imposed in many cases to e.g. protect company confidential information. However, if the risk/problem is are deemed to be insurmountable then the garden leave route is the way to go.

**Q Can employees be forced to take holiday during notice.**

A In most cases, yes. See below for some Q and A on holidays which answers this question more fully in the context of other holiday queries.

**Q Will notice pay include Tronc payments?**

A Discretionary payment are not due to employees who are furloughed nor are they due as part of notice pay. So Tronc is only payable where this sum amounts to contractual wages and , in most

businesses , this is not the case, which is why they are not (controversially and some say unfairly given tips are expected and a significant proportion of employee earnings for most restaurant workers) able to be included in furlough payments claimed back from the government.

**Q Will employees continue to accrue continuous service during furlough?**

A Yes.

**Q And holidays?**

A Yes because they remain employed. Employees will retain their right to 5.6 weeks' annual leave under the Working Time Regulations.

**Q But can an employer make employees take accrued and accruing holidays during furlough?**

A Yes under the current rules and provided notice is given, twice as much as the holiday to be taken. So, if a 1-week holiday is required from 25 November 2020 notice must be given on or by 10 November. Employers are asked under the CJRS to be considerate about insisting on employees taking holiday whilst on furlough leave but that is a moral not legal requirement.

**Q Can an employer instead ask them to carry over holiday to a new holiday year?**

A Yes up to 4 weeks of unused holiday and up to 2 holiday years ahead.

**Q So back to the question anticipated before - Can an employer make an employee take owed holidays during any period of notice?**

A Yes if there is enough notice period for this employer demand to be effected. And if so, there should be no excess cost involved so it is financially advantageous to an employer. Take an employee on 4 weeks' notice and with 2 weeks accrued holiday to take in that time. Let us assume they are dismissed during furlough leave and immediately asked to take accrued holiday during notice all "served" during furlough leave. This is legal and the real, as in "extra", cost of this to the employer, will only be 20% of 4 weeks' pay. The same excess cost if no holiday was taken/deemed to be taken during the notice period. Because notice pay must be paid for anyway. Of course many employees would wish to be more caring to their employees (and pay then accrued holiday pay anyway at least in part) but the point is, it is up to the employer. There also remains a slight question mark over how much control an employer has in respect of the first 4 weeks of employee holiday which has yet to be tested by the courts.

**Q So how are/could the 4 weeks of holiday mandated by the EU treated differently than the 1.6 extra weeks prescribed by UK legislation?**

Q As inferred above the jury is out on this but it is likely that employers have more flexibility with the 1.6 weeks e.g. in paying that holiday at the furlough rate rather than the full rate if agreed by the employee.

**Q So does this mean employers can pay holiday at a lower rate than normal pay?**

A Perhaps so if the employee is taking holiday during furlough and it is part of the period between his or her first 4 weeks and 5.6 ( or more if the contract provides for longer notice ) weeks. But the safer position is that holiday pay is always paid in full.

**Q Do employers have to top up wages for those employees who are on furlough but not receiving the minimum wage?**

A No. Workers are only entitled to the National Minimum Wage for the hours they are working. If on furlough and only getting , say, 80% of Minimum Wage this is not against the Working Time Regulations/CJRS provisions.

**Q How does an employer calculate regular wages?**

A For salaried employees, employers must use the actual salary before tax. For employees whose pay varies (for example because they work different hours each month), an employer must use and can claim for the higher of either the same month's earnings from the previous year or average monthly earnings from the 2019-20 year. If an employee with variable pay has been employed for less than a year, the employer can claim for an average of their monthly earnings since the employee started work. The government guidance makes clear that no grant will be declined, or repayment sought based solely on the choice of pay calculation used by the employer, provided a reasonable choice of approach is taken.

**Q What about sick workers?**

A The guidance says that employees who are currently off sick can be still be furloughed for business reasons. This applies primarily to long-term sickness absence. In which case the employee would then no longer receive sick pay and should be paid the same as other furloughed employees. This may benefit the employee (if they only had SSP beforehand) and may benefit the employer (if the employees were being paid their normal wages whilst sick).

**Q But what if the Employer wants to only pay SSP?**

A They can do so, harsh as this may sound. SSP is currently (only) £95.85 a week. If an employee becomes sick while on furlough, it is up to the employer to decide whether to move them onto SSP (subject to the employment contract terms) or to keep them on furlough. If the employee remains on furlough, the employer can continue to claim their salary through the furlough scheme. If the employee is moved onto SSP, the employer will just have to pay this.

**Q So if SSP is paid an employer cannot recover this sum from the State?**

A The answer is generally "no". There is no blanket right to claim SSP through the furlough scheme but employers with fewer than 250 employees the CJRS " small company definition eg such companies do not have to provide a covid impact statement etc. ) can use the new Coronavirus Statutory Sick Pay Rebate Scheme which will repay up to two weeks' SSP for employees who are unable to work because they have coronavirus, cannot work because they are self-isolating at home or are shielding in line with public health guidance.

**Q If an employee is self-isolating but not ill themselves does this count as the employee being sick?**

A Yes. Makes the holiday to Spain and returning to the UK to quarantine even less attractive to many!

**Q What practical advice would you give to Employers now?**

**A** Businesses will need to decide which jobs are essential during November lockdown and onwards and of those jobs, which ones can be done from home. Most companies assessed this during the first lockdown and working from home methods put in place that should now be resurrected. Client meetings should be (continue to be) via video conferencing or telephone. Everyone will be more flexible on agreeing to this now, at least until after December 2. Businesses will need to establish what happens if the offices are not occupied for a month – facilities cover, security, telephone lines, emergencies, and post etc. Insurers should also be notified if the offices will not be occupied.

**Q What about staff Briefings?**

**A** A good idea for many businesses. If they do this, I suggest the business brief all staff via whichever video conferencing platform that they are using and have a separate additional briefing for managers. I also suggest that they update the company website so that clients are kept up to date.

The initial staff briefing might include:

- Whether the office will close
- Which jobs will be working from home
- Which jobs will be furloughed
- Business meetings
- IT cover and any IT requirements
- How the post will be managed
- Telephone enquiries
- Booking holiday
- Ringing in sick
- Emergencies

**Q Anything else?**

**A** Well, keeping in touch with staff will be important as they will have queries that they need answered and you will need to keep morale up. Perhaps a weekly all staff briefing? Businesses will also need to make decisions about business travel and whether any decisions need to be taken about travel to and from the UK. And decide what they are going to do about holidays especially with Christmas imminent when (if!) this second lockdown ends. At least the CJRS goes to the end of March, past its first anniversary and not really an occasion to celebrate, but a lifeline for many.

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***Disclaimer***

***Like all employment issues, and especially the sometimes complex and relatively new CJRS rules and evolving government guidance, it is difficult to give general guidance as opposed to advice on individual situations. The advice above, believed to be correct as of November 5 2020, should not be relied upon without getting such specialist advice, on any particular question arising, whether from me or another adviser.***



