

Coronavirus employment law update & FAQs – v.4

Following Rishi Sunak's 3 March 2021 budget the Coronavirus Job Retention Scheme ('CJRS') has been extended until 30 September 2021. This fact sheet sets out the main features of the current scheme and highlights some of the major changes which have taken place during its lifetime.

Disclaimer

The information contained in this update does not constitute legal advice. It's our best assessment of the current position and is in places based on opinion. If you want specific advice, please contact us.

Q & A

1. What are the big changes between the current version of CJRS and the original scheme which was put in place in March 2020?

The biggest change is that CJRS is now a fully flexible scheme. Under the original scheme employees had to be placed on furlough leave on a full-time basis and for a minimum period of 3 weeks. This requirement was changed from 1 July 2020 and employees can now be put on furlough for some of their contracted hours and can be required to work the remainder. Claim periods have been reduced to a minimum of one week which means that employers can change which employees they furlough and for how long on a weekly basis based upon operational need.

The new scheme is extremely flexible and means that employers can respond quickly to the current unpredictable operating environment. It is, however, also more complex and administratively involved and it is vital that employers keep written records of the staff who are being put on furlough and record the hours which are being claimed in each claim period.

2. Have there been any changes in the balance of financial contributions under the scheme?

Yes. The original scheme until 31 July 2020 operated on the basis that employers could claim back 80% of employee salary costs (up to a maximum of £2500) and the associated employer National Insurance contributions (NIC) and pension contributions. The employer would, however, have to fund any wage costs above 80% or above the scheme maximum contribution of £2500 (unless an agreement was reached with the employee to be paid at 80% / £2500 only).

From 1 August 2020 employers could still claim 80% of salary but now had to pay NICs and pension. In September, the amount of salary which could be claimed was reduced to 70% and this was then subject to a further reduction to 60% in October.

From November onwards, the amount of salary which can be claimed has been restored to 80%. However, employers still have to pay NICs and pension on this which means that the current system reflects the arrangements in place on 1 August 2020.

In his budget Rishi Sunak confirmed that the employer contribution will again increase in July 2021 when the government will contribute a maximum of 70% of salary, and again in August 2021 when the government contribution will further reduce to a maximum of 60%. The maximum contribution will remain at this level until the (current) scheduled end date of the scheme on 30 September 2021.

These contributions apply only to the % of the employee's time in which they are on furlough leave. Therefore, if the employee is choosing to use the scheme flexibly, they will have to pay 100% of the employee's salary and employer contributions for the actual time that they are working.

3. Are there any other big changes?

The most significant is probably that from 1 December 2020 it is no longer permissible to use furlough to cover an employee's notice pay. This plugs a loophole where employers were making employees redundant and putting them on furlough during their notice period and underscores that the stated purpose of the scheme is to retain jobs which would otherwise be lost due to the COVID economic downturn.

4. Does this mean that I can only use CJRS where there has been a downturn in work due to COVID?

Yes and no. Whilst this is the stated purpose of the scheme, the evidence to date is that HMRC are prepared to take a relatively relaxed approach on how this is interpreted so it is, for example, a permissible use of the scheme to furlough staff who cannot attend work because they are required to shield or to look after children.

Where HMRC are likely to be extremely strict is on anything that they regard as a deliberate or fraudulent misuse of the scheme. Employers should therefore be extremely careful that employees are not instructed to carry out any work during hours for which furlough is being claimed. HMRC is unlikely to pay out in these circumstances and may even regard the employer's actions as criminal.

It is also worth noting that HMRC will be publishing details of all employers who have accessed furlough and the amounts that they have claimed. It is anticipated that there will be some level of public outcry, when it reveals the amount of funds paid to certain employers.

5. Who can I put on furlough?

Just about anyone who was on the company's payroll as of 30 October 2020. This includes employees, casual and zero hours workers, agency workers and company directors and non-UK workers with a legal right to work in the UK. However, it does not include off-payroll workers including independent contractors and consultants who must access alternative government support.

6. Can I tell employees unilaterally that they are being put on furlough leave?

It is always desirable to obtain the consent of employees to go on furlough leave and it is essential if this involves a reduction in pay. Some employers have been sending out furlough notices that amount to 'deemed consent', with employees implicitly agreeing unless they object otherwise. However this is risky and best practice is to always obtain a written, signed record documenting an employee's consent.

7. What paperwork do I need to put employees on furlough leave?

As an employer, the main document that you need is a letter setting out the basis upon which you are putting the employee on furlough leave. The letter should state the periods of time that the employee is being put on furlough for, the arrangements for their pay during furlough, what they can and can't do whilst on furlough and how and when their period of furlough leave will be ended.

It is important to note that if you are using the scheme flexibly you do not need a separate letter each time the employee undertakes a period of furlough leave. Most employers are using a single letter to confirm the employee's consent to participate in the scheme and are then keeping separate records for each leave period. All records must be kept for 6 years in case of a retrospective audit.

8. Does annual leave accrue during furlough?

Yes. Although there was some uncertainty at the start of the pandemic it has now been confirmed that there is no difference between working time and time on furlough leave in respect of the accrual of annual leave.

9. Can I tell employees to use their annual leave during furlough?

Yes. Again, normal rules apply so employers can specify that leave is taken on particular dates which include during periods of furlough leave. This can be done either by agreement or unilaterally, providing sufficient notice is given (which has to be at least twice the amount of leave to be taken). It is even possible although perhaps stretching the scheme to require employees to take leave exclusively on flexible furlough dates which means that employers can limit the leave which is taken on productive working days.

The only caveat to this is that requiring employees to take a large amount of their leave during a cold winter lockdown is likely to be unpopular and potentially unreasonable. Best practice is therefore to restrict mandatory leave requirements to the proportionate amount which is accrued during the furlough period so that employees have a reasonable leave balance to use during the (hopefully) restriction free and warm summer months.

10. What rate of pay should be paid for annual leave taken during furlough?

It has now been confirmed that employees should receive full pay for any annual leave taken during furlough. This means that if an employer is paying their staff at 80% whilst on furlough they will need to ensure that they 'top-up' the additional 20% for any time designated as annual leave.

11. And what about bank holidays?

Again, normal rules apply. If an employee would usually be off work on a public holiday, then it is permissible for this to be regarded as annual leave provided that the employee receives full pay.

12. How should I select which employees to go on furlough leave?

This is a potential risk area as there can be unhappiness both from those employees who are selected for furlough leave (who may perceive that their selection is unfair or who cannot afford a drop in pay) and those who are required to work (who may be resentful that their colleagues are having paid time off work). There may even be discrimination claims from those who consider that their selection (or non-selection) is in some way related to a protected characteristic such as their gender or disability.

There is no sure-fire way of avoiding these problems but a good first step is to consult in the first instance to find out who actually wants to go on furlough, as it may be attractive for some employees and less so for others, for example those with childcare. If everyone (or no-one) wants to go on furlough, then it is important that there is a non-discriminatory reason why a particular person is selected. This may relate to the particular features of their role and the extent to which they can be covered for a temporary period. The new scheme also allows furlough to be easily rotated so that the leave can be equitably shared out through the workforce.

Whatever decisions are taken it is good practice to keep a written record of these discussions in case of difficulties further on down the line.

13. Can I make redundancies during furlough?

It is still the case that employees can go through a redundancy process whilst on furlough leave so employers can put them at risk of redundancy and hold selection and consultation meetings. As noted above, from 1 December 2020 employers are no longer entitled to claim payment for employees who are working notice. Once employees have been given their notice

employers will therefore have to pay them at full pay (or make a payment in lieu) without recourse to the scheme.

14. Can I furlough workers who are off sick?

This is something of a grey area. HMRC guidance provides that furlough leave should not be used to cover cases of short-term absence but that it is permissible to furlough employees who are currently off sick if there are 'legitimate business reasons' for doing so. It is very clearly permissible to furlough employees who are required to shield (self-isolate) under public health advice.

15. Are employees who are required to self-isolate entitled to statutory sick pay?

In some circumstances. The rules around statutory sick pay (SSP) were amended early in the pandemic so that those who are required to isolate by a public health authority are entitled to SSP. This was later amended to include NHS Test and Trace. Perhaps surprisingly, this does not apply to those who are undergoing a period of quarantine after foreign travel. It also does not apply where the quarantine requirement is imposed through an employer's internal tracing system until the point at which the requirement is confirmed by NHS Test and Trace.

A particular issue which has arisen during the pandemic has been the low level of SSP with anecdotal evidence suggesting that a large number of employees who are required to self-isolate are continuing to work because they cannot pay their mortgages and feed their families on £92 per week. There is now government support available under which employees can apply to have their SSP increased to up to £500 per week for up to 2 weeks although this support is means-tested.

Document pack

We've updated our document pack to include:

1. Email advising employee you want to put them on furlough leave.
2. E-mail advising employee that you want to put them on flexible furlough leave.
3. Email advising employee they must use their holiday during furlough leave
4. Email to employee confirming reduced hours and pay by agreement.
5. Email to employee confirming pay cut by agreement..
6. Furlough leave agreement template.
7. Flexible furlough agreement template.

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