PEOPLE: JOB RETENTION SCHEME AND PENSIONS (UK)

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Legal Briefings

The Coronavirus Job Retention Scheme ("CJRS"), opened for claims on 20 April. Originally due to end on 31 May, then 30 June, the Chancellor announced on 12 May that it will remain in place and available to all sectors through to the end of October 2020. New rules, which will apply from 1 July 2020, will introduce greater flexibility. Employers that have submitted a claim in respect of their employees for periods ending on or before 30 June 2020 will be able to continue using the scheme and they will be able to bring furloughed employees back on reduced hours. Employees will continue to receive at least 80% of their wages subject to the £2,500 per month cap, but employers will be required to start sharing the cost of the scheme.

The CJRS sets out the terms on which employers can claim reimbursement for a proportion of employee earnings (and does not alter employment rights as such). Claims can only be made where someone who was on the employer's PAYE payroll **on or before 19 March 2020** is "furloughed" for a minimum period of 3 weeks (the cut-off date was changed from 28 February on 15 April). The scheme closed to new entrants from 30 June. Employers will now only be able to furlough employees that they have furloughed for a full three-week period prior to 30 June (with the exception of employees returning from statutory parental leave or returning military reservists). This means that the final date by which an employer can furlough an employee for the first time was 10 June in order for the full three week period to be completed by 30 June.

Guidance for employers on the CJRS first published by HMRC on 26 March has since been updated several times (and divided into separate web pages) and changes continue to be made; the current version of the various pages (together the "**Guidance**") is available here and there is also a Step-by-step guide on making a claim. HMRC has also published guidance for employees ("Employee Guidance").

On 15 April ,the Treasury published a Direction and Schedule (referred to in this guide as "the first Direction and Schedule" pursuant to powers under the Coronavirus Act 2020 setting out the legal framework for the CJRS. A further Direction and Schedule (referred to in this guide as "the second Direction and Schedule") was issued by the Treasury on 25 June 2020. The second Direction and Schedule modify the first Direction and Schedule to reflect the changes to the scheme that will apply in respect of claims made for periods starting from 1 July onwards (note: references in this guide to "the Schedule" refer to the first Schedule as amended by the second Schedule).

HMRC's guidance has also been updated to reflect the changes including those that apply in relation to flexible furloughing the new cost-sharing requirements and the new rules for making claims.

Although some issues have been clarified by more recent iterations of the Guidance, there remain unanswered questions and some inconsistencies between the Guidance and the Schedule. In theory the Schedule should take precedence over the Guidance. However, in reality HMRC is likely to refer to its own Guidance in the first instance. Employers do not need to provide any supporting evidence for claims up front and, given HMRC's limited resources, it seems likely that efforts to audit claims retrospectively will focus primarily on identifying deliberate fraud (e.g. claiming for employees who continue to work) rather than looking to claw back claims where an employer has followed the HMRC's own Guidance but arguably not complied with the Schedule. The original Direction does contemplate the possibility of further amending Directions and of course the HMRC Guidance could be updated further so this should be kept under review.

This briefing provides an overview of the CJRS and examines the pensions-related elements of the scheme. It should be read alongside the separate briefings produced by our employment team, which consider:

- how the CJRS works and the key employment law issues connected with the scheme, and
- other key employment issues arising in relation to the Covid-19 outbreak, including sickness and self-isolation, health data, homeworking, holiday and other issues.

We will update these briefings as and when further information becomes available.

For more information on latest developments in relation to the CJRS and the impact of Covid-19 more generally, check out our employment blog and our UK pensions blog.

WHICH EMPLOYERS CAN ACCESS THE SCHEME?

The CJRS is open to any employer with a UK bank account and a PAYE payroll scheme that was created and started on or before 19 March 2020 (changed from 28 February 2020), including businesses, charities, recruitment agencies and public authorities. The Guidance notes that employers who receive public funding for staff costs are not expected to furlough their staff, but there is no reference to this in the Schedule. Employers must also have enrolled for PAYE online.

The Guidance confirms that the CJRS can be accessed by individuals who employ others (e.g. nannies) where the payroll conditions are met and by administrators (although administrators would only be expected to access the CJRS "if there is a reasonable likelihood of rehiring the workers", for example after the sale of the business).

From 1 July 2020, the scheme will only be available to employers that have previously used the scheme in respect of employees they have previously furloughed.

CAN EMPLOYERS ACCESS THE CJRS ONLY AS AN ALTERNATIVE TO COVID-19 RELATED REDUNDANCIES?

The first Schedule stated that the purpose of the CJRS is "*to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease*". The second Schedule has extended this and makes clear that "*integral to [this purpose] is that amounts paid to an employer pursuant to a CJRS claim are used by the employer to continue the employment*" *of employees in respect of whom the claim is made* "*whose employment activities have been adversely affected*" by Covid "*or the measures taken to prevent or limit its further transmission*".

The Schedule also provides that no claim may be made "*if it is abusive or is otherwise contrary to the exceptional purpose*" of the CJRS.

Prior to 1 July claims can only be made for a "*furloughed employee*", defined as an employee who:

1. has been instructed by the employer to cease all work in relation to their employment, and

2. who has or will have ceased all work for the employer (directly or indirectly, or for a person connected with the employer) for at least 21 calendar days - such instruction must have been given "*by reason of circumstances arising as a result of coronavirus or coronavirus disease*".

From 1 July onwards claims can only be made for a "*flexibly-furloughed employee*", defined as an employee who:

1. is a qualifying employee (see the response to question 3 below for further details)

2. has been instructed by the employer to cease all work in relation to their employment or not to work the full amount of their usual contractual hours - such instruction must have been given "*by reason of circumstances arising as a result of coronavirus or coronavirus disease or measures taken to prevent or limit its further transmission*"

3. has ceased all work for the employer during the CJRS claim period or who does not work the full amount of their usual contractual hours during the CJRS claim period, and

4. there is a furlough agreement in place (that satisfies the requirements of the Schedule) for the period covered by the CJRS claim period.

Therefore, any decision to furlough must be causally connected with circumstances arising due to the pandemic, but it is not a condition that furloughed employees would otherwise have been made redundant.

Recent iterations of the Guidance emphasise that HMRC will check claims made through the CJRS and that payments may be withheld or need to be repaid in full to HMRC if the claim is based on dishonest or inaccurate information or found to be fraudulent. The Guidance stresses that dishonest or deliberately fraudulent claims "*put our essential public services and the protection of livelihoods at risk during these challenging times*". It also notes that an online portal has been created for employees and the public to report suspected fraud. Similar additions have been made to Employee Guidance, which states that the CJRS is part of a collective effort to protect people's jobs and urges employees to report abuses (such as the employer not paying the grant received to the employees, asking employees to work whilst on furlough, or making a backdated claim to include periods when an employee was working).

It is worth noting that an employer submitting a claim online is required to confirm that the claim is "*for costs of employing furloughed employees arising from the health, social and economic emergency resulting from coronavirus*" *and* "*in accordance with the HMRC's published guidance*"*.*

Employers also need to bear in mind reputational issues when determining whether it is appropriate to access the CJRS.

WHAT WILL THE SCHEME COVER?

Until 31 July 2020, employers can apply for grants of 80% of furloughed UK employees' gross monthly earnings, subject to a cap of £2,500 a month, *plus* the associated Employer National Insurance Contributions (NICs) and minimum automatic enrolment employer pension contributions on that wage, provided they keep the individual on payroll. The CJRS will cover the cost of earnings backdated to 1 March 2020, if applicable.

Claims should only cover the period from when an employee finishes work and starts furlough, and not from the date of the decision or when the employee is written to confirming their furloughed status.

The employer must pay the employee at least the lower of 80% of earnings or £2,500 (less legally required deductions for income tax and employee NICs). The employer can choose to top up earnings above this level but is not obliged to do so (and employer NICs and employer pension contributions on any top-up amount cannot be reclaimed). Any more generous employer pension contributions above the maximum amount claimable under the CJRS (which is based on 3% of qualifying earnings) also cannot be reclaimed, nor can the cost of other benefits (so some employers may seek to agree with the employee, as a condition of furlough, that certain benefits are paused where this gives rise to a cost saving). Equally, the Apprenticeship Levy and Student Loans should continue to be paid and cannot be reclaimed.

From August 2020, the level of the grant will be slowly tapered as lockdown measures are eased and people return to work:

- in August, the government will pay 80% of wages up to a cap of £2,500 but employers will be required to pay employer NICs and pension contributions for the hours the employee does not work (in addition to those that relate to the hours that an employee does work)
- in September, the government will pay 70% of wages up to a cap of £2,187.50 for the hours the employee does not work. Employers will be required to pay employer NICs and pension contributions and 10% of wages to make up 80% total up to a cap of £2,500, and
- in October, the government will pay 60% of wages up to a cap of £1,875 for the hours the employee does not work. Employers will be required to pay employer NICs and pension contributions and 20% of wages to make up 80% total up to a cap of £2,500.

From 1 July, employers will be permitted to bring employees that have been furloughed back to work for any amount of time and any shift pattern. Employers will be required to cover the cost of an employees' wages and the associated employer NICs and pension contributions for the hours that the employee works, while still being able to claim the CJRS grant for their normal hours not worked. In addition, the cap that applies to the amount that can be claimed under the CJRS will be reduced to reflect the proportion of the employee's usual contractual hours during which they have not worked.

Earnings paid during furlough remain subject to the usual income tax and other deductions (including any employee pension contributions). However, where an individual pays for benefits via a salary sacrifice arrangement, deductions for these benefits cannot be taken from the furlough salary to the extent that this would take the individual's furlough pay below the minimum amount payable under the CJRS. Care will need to be taken in how this underpin is applied where an employee who is furloughed and who pays pension contributions by way of salary sacrifice returns to work on reduced hours on or after 1 July.

The method of calculating the "reference salary" (used to calculate the 80% (subject to the cap) which must be paid and can be reclaimed) varies depending upon an individual's circumstances and, in particular, where they are a "fixed rate employee" or on variable pay. Further details are set out in our employment briefing on the operation of the CJRS.

The position as to what payments should be included in the calculation has evolved over time. The 26 March Guidance stated that fees, commission and bonuses should not be included. The 4 April version altered this, stating that employers can claim for "*any regular payments [they] are obliged to pay*" including "*past overtime, fees and compulsory commission payments*" but excluding "*discretionary bonus (including tips) and commission payments and non-cash payments*". This was reworded again, focussing on regular payments which the employer is obliged to pay, "i*ncluding regular wages [paid] to employees, non-discretionary overtime, non-discretionary fees, non-discretionary commission payments and piece rate payments*". Payments where the employer is under no contractual obligation to pay are excluded, for example tips, discretionary bonuses, and discretionary commission payments. Non-cash payments and non-monetary benefits are also excluded. The Schedule provides that "*regular*" salary or wages excludes "*conditional payments*" and benefits in kind, and only includes payments which arise from "*a legally enforceable agreement, understanding, scheme, transaction or series of transactions*". It can include pay that varies according to the business's performance, the employee's contribution to the business's performance, the employee's performance of employment duties, or otherwise at the employer's discretion but only where pursuant to such a legally enforceable arrangement.

The Schedule and the Guidance were initially not entirely clear on whether the intention was to exclude regular overtime payments (which are "*conditional*" on working in excess of contractual hours), particularly if the overtime is not compulsory on the part of the employee and/or guaranteed by the employer. That question was finally addressed in the 14 May update to the Guidance. This states that non-discretionary payments only include payments which an employer has a contractual obligation to pay and to which the employee had an enforceable right, but notes that when variable payments are specified in a contract and those payments are always made, then those payments may become non-discretionary. The Guidance goes on to provide that payments for overtime worked are non-discretionary for the purposes of the CJRS when the employer is "*contractually obliged to pay the employee at a set and defined rate for the overtime that they have worked*". The focus is therefore on whether the employer is obliged to pay specifically for overtime hours worked and it does not matter whether the overtime itself is compulsory and/or guaranteed.

The requirement to pay the national minimum wage (NMW) does not normally apply where a furloughed employee is not working. However, if employees are required, for example, to complete online training courses while they are furloughed, then they must be paid at least the NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised; this will be particularly relevant for apprentices. In addition, the NMW rules will apply to any hours worked where a furloughed employee returns to work on reduced hours on or after 1 July. The annual increases to NMW rates took effect on 1 April 2020.

An online calculator is available to assist with calculating the more straightforward CJRS claims and HMRC intend to add more employment situations to the calculator in due course. For the more complex situations, employers are referred to the examples given here.

WHICH EMPLOYEES CAN BE COVERED BY THE SCHEME?

Employers can only claim for employees who were employed on 19 March 2020 and **on the employer's payroll on or before 19 March 2020** on any type of employment contract. The Guidance and Schedule clarify that being on payroll for these purposes means that a real time information (RTI) submission notifying payment in respect of the employee to HMRC must have been made on or before 19 March 2020. The RTI submission deadline means that some employees put on payroll between late February and mid-March will still not be covered by the CJRS, particularly if payroll is only run monthly.

The scheme is closed to new entrants from 30 June (with two limited exceptions). From this point onwards, employers will only be able to make a claim in respect of “qualifying employees”, which means an employee who:

- ceased all work for a period of 21 calendar days or more beginning on or before 10 June 2020 and in respect of whom the employer has made a CJRS claim for a period ending on

or before 30 June 2020 (employers will have until 31 July to make any claims in respect of the period to 30 June)

- returns from statutory family leave, or
- is an armed service reservist employee.

The CJRS covers full-time and part-time employees, employees on agency contracts, employees on flexible or zero-hour contracts and apprentices – anyone paid through PAYE.

Many questions can arise depending on the individual circumstances of particular employees. These are covered in our employment briefing on the CJRS.

NO WORK FOR EMPLOYER

Until the end of June 2020, the CJRS only applied where employees do no work for (i.e. do not provide services to or generate revenue for) the employer directly or indirectly, nor for a company linked or associated to the employer. During this initial period the CJRS could not be used to cover the wages of employees whose hours or pay have been reduced. The employee could be required to do training provided it is not used by the employer to generate revenue or for the provision of services. For more details of what constitutes “training” for these purposes read our employment briefing. Employees could also undertake

volunteer work for a different organisation (on 14 May a clarification was added that an employer cannot furlough an employee and then ask them to 'volunteer' for the employer in the same or a different role).

From 1 July, employers will be permitted to bring employees that have been furloughed back to work for any amount of time and any shift pattern. Where employers do this, they will be required to cover the cost of an employees’ wages and the associated employer NICs and pension contributions for the hours that the employee works, while still being able to make a claim under the CJRS in respect of the employee’s contractual hours not worked.

Calculating the pay due to and making claims under the CJRS in respect of partially furloughed employees will not be straightforward. Keeping track of and calculating the pension contributions and other benefits payable in respect of a partially furloughed employee will also be complex. To avoid these difficulties some employers may instead decide (where the nature of the work allows this) to bring back some of their previously furloughed staff on full-time basis while leaving other employees on furlough and then switch the furloughed and non-furloughed staff every few weeks using a rota system.

DOES AN EMPLOYER NEED TO CONTINUE PAYING PENSION CONTRIBUTIONS ON BEHALF OF A FURLOUGHED EMPLOYEE?

Yes, where an employer has a defined contribution or money purchase pension scheme it will need to continue to pay pension contributions on behalf of any furloughed employees who are active members of that scheme.

Up to 30 July 2020

For the period up to and including 30 July 2020, an employer can claim the cost of its pension contributions under the CJRS up to **the lower of**:

(a) the contribution payable by the employer in respect of the employee to a registered pension scheme for the relevant CJRS period, and

(b) 3% of the part of the gross earnings paid to an employee in a pay reference period to the employee that are:

i. more than the lower limit for qualifying earnings in that pay reference period (which is equivalent to £520 per month or £120 per week for the 2020/21 tax year), and

ii. not more than the amount of gross earnings claimable by the employer under the CJRS in the same pay reference period.

The amount determined under paragraph (b) is equivalent to 3% of the 'qualifying earnings' payable to an employee in the relevant pay reference period (but where qualifying earnings is capped at the maximum amount claimable in respect of gross earnings under the CJRS).

For the purposes of determining which of sub-paragraph (a) or (b) above is lower:

- the same duration of relevant CJRS period and pay reference period should be used to compare the amounts under sub-paragraphs (a) and (b)
- whichever sub-paragraph produces the lower amount shall be used for the purposes of determining the amount of the CJRS claimable pension contribution, and
- the duration of the period used to compare sub-paragraphs 8.9(a) and 8.9(b) is not required to be identical to the period for determining the actual amount of the employer's claimable pension contribution under the CJRS.

An employer can only claim this amount to cover its employer pension contributions even where it pays contributions that are higher than this, which may be the case where, for example:

- an employer pays minimum auto-enrolment employer contributions by reference to basic pay or all earnings (rather than qualifying earnings), or
- an employer pays higher than the minimum auto-enrolment contribution rates for some or all of its staff.

In this scenario, if the employer continues to pay pension contributions at this higher rate in respect of any furloughed employees it will have to meet the cost of the additional employer contributions over and above the amount that can be claimed under the CJRS.

In addition, employers that pay pension contributions on a basis other than 3% of qualifying earnings will have to calculate what 3% of the qualifying earnings of furloughed staff is (up to the amount of gross earnings claimable under the CJRS) and maintain a record of this, so that they can claim this amount back via the CJRS. This will need to be done alongside the pension contribution calculation which would ordinarily be run as part of the payroll process.

From 1 July 2020, furloughed employees can return to work on an ad-hoc or a part-time basis. Employers will be required to cover the cost of the employer pension contributions (and employer NICs) payable in respect of an employee for any hours worked. These contributions will need to be paid at the usual rate (i.e. ignoring any reduction to the employer contribution rate that applies during furlough) and based on the employee's normal (i.e. non-furloughed) pensionable salary.

From 1 August 2020

In any event, on and from 1 August 2020, the amount of support provided under the CJRS will be tapered and employers will be required to cover the full cost of employer pension contributions (and employer NICs) even for hours not worked from 1 August onwards. Where an employer has agreed to pay a lower contribution rate while an employee is on furlough they will only be required to pay contributions based on that lower rate while an employee remains on furlough. However, if a furloughed employee returns to work part-time, the employer will need to ensure that:

- employer and member pension contributions for any hours worked are calculated by reference to the contribution rate that would ordinarily apply (i.e. ignoring any reduction

in the employer and employee contribution rates that applies during furlough) and based on the employee's normal (i.e. non-furloughed) pensionable salary, and

- employer and member pension contributions for hours not worked continue to be calculated by reference to the rate and on the basis that applies under the furlough agreement put in place with the relevant employee.

Keeping track of and calculating the pension contributions payable in respect of a partially furloughed employee is likely to be complex. This complexity will increase where the individual normally pays their pension contributions via a salary sacrifice arrangements.

To avoid the complexity associated with partially furloughed employees, some employers may instead decide (where the nature of the work allows this) to bring back some of their previously furloughed staff on full-time basis while leaving other employees on furlough and then switch the furloughed and non-furloughed staff every few weeks using a rota system.

ARE PENSION CONTRIBUTIONS PAID BY REFERENCE TO AN EMPLOYEE'S NORMAL SALARY OR THEIR FURLOUGHED SALARY?

Employer and member pension contributions to a defined contribution scheme are calculated in accordance with the rules of the scheme and the terms of an employee's contract of employment. Therefore, an employer will need to check these to see whether the employer and member pension contributions that fall due to be paid during furlough (for normal hours not worked) must be calculated by reference to the pay that the employee actually receives during furlough, the employee's normal pay or some other amount.

Where an employee is furloughed and their salary is reduced during furlough this will feed through automatically into the calculation of employer and member pension contributions where these contributions are calculated by reference to the pay an employee actually receives. Even where the reduction in salary will feed through automatically, from an employee relations perspective, and to ensure clarity, it would be advisable to record this in each employee's furlough agreement by making clear that pension contributions in respect of normal hours not worked will be based on the pay received during any period of furlough and not the employee's normal pensionable salary (where this is the case).

Pay for statutory holiday during furlough should follow the general principle that workers are paid what they would have earned if they had been at work and working. Therefore, employers that are only paying workers the 80% government furlough grant will need to top up the employee's pay themselves to take account of any holiday pay although they can use the grant towards discharging their holiday pay obligations. Accordingly, where an employee's furlough salary will be less than their normal salary their pay may vary from one pay period to another during furlough where holiday is taken. This will impact on the amount on the amount of pension contributions payable in respect of the employee.

Where a furloughed employee returns to work on reduced hours on or after 1 July 2020, the employer and member pension contributions payable in respect of any hours worked should be calculated by reference to the contribution rates that would ordinarily apply (i.e. ignoring any reduction that applies to the employer and member contribution rates during furlough) and based on the employee's normal (i.e. non-furloughed) pensionable salary.

WHERE AN EMPLOYER PAYS MORE THAN THE AUTO-ENROLMENT MINIMUM CONTRIBUTION RATE MUST IT CONTINUE TO DO SO?

Where an employer currently pays pension contributions that are greater than 3% of qualifying earnings, it will need to continue to do so unless it agrees to pay pension contributions at a reduced rate during furlough as part of the furlough agreement agreed with the employee.

Where an employer is considering reducing employer and member contribution rates as part of a furlough scheme it should:

- ensure that any reduction in contribution rates is included in the written furlough agreement signed by the employee (as any reduction is likely to constitute a change to an individual's contract of employment)
- notify the trustees of its pension scheme or its pension provider of the planned change and confirm that contributions can be paid on the reduced basis proposed
- where necessary, amend the rules of its pension scheme to permit/reflect the revised contribution rates, and
- consider whether the proposed change needs to be discussed and/or agreed with trade unions or other staff representatives.

DOES THE EMPLOYER HAVE TO CONSULT AFFECTED EMPLOYEES?

Ordinarily, an employer with at least 50 members of staff is required to consult affected employees for a minimum of 60 days before it can reduce employer contributions to a DC scheme. Where an employer fails to do this the Pensions Regulator can impose a fine of up to £50,000 in respect of each breach. In addition, it could also be argued that this constitutes a breach of the relationship of trust and confidence between employer and employee which could ultimately render the change void.

As far as the requirement to consult affected staff is concerned, the Pensions Regulator has confirmed that it will not take regulatory action in respect of failure to consult where:

- an employer has furloughed staff for whom it is making a claim under the Coronavirus Job Retention Scheme
- the employer is proposing to reduce the employer contribution to its DC scheme in respect of furloughed staff only (for staff who have not been furloughed the existing pension contribution rate will continue to apply)
- the reduced contribution rate for furloughed staff will only apply during the furlough period, after which time it will revert to the current rate, and
- the employer has written to affected staff and their representatives to describe the intended change and the effects on the scheme and on your furloughed staff.

This regulatory easement will be maintained until 30 September 2020. In light of this regulatory easement, we think that the courts would be slow to find that a failure to consult in these circumstances amounted to a breach of the duty of trust and confidence where the employee has voluntary signed a furlough agreement recording the change.

Where the employer contribution rate is being reduced during furlough (for example, to the automatic enrolment minimum) the employer should consider whether the minimum member contribution rate should also be reduced during furlough. The scheme rules may need to be amended to permit this. Any changes to an employee's contribution rate should also be reflected in the furlough agreement.

WHAT HAPPENS IF A FURLOUGHED EMPLOYEE RETURNS TO WORK ON REDUCED HOURS?

Any reduction in the employer and member contribution rate that is agreed as part of a furlough agreement will not apply to any hours worked by a furloughed employee who returns to work on reduced hours on or after 1 July 2020. A formal change to the individual's contract of employment would need to be made to reduce the pension contribution rates that apply in respect of hours worked by a furloughed employee. Where applicable, a 60 day consultation process would also need to be undertaken in respect of any such change as the Regulator easement would not apply in this scenario.

CAN AN EMPLOYEE SUSPEND THEIR PENSION CONTRIBUTIONS DURING FURLOUGH?

The automatic enrolment legislation does not allow individuals to suspend their automatic enrolment pension contributions. Therefore, if an individual wants to stop paying pension contributions while they are furloughed they would need to opt-out of or leave their pension scheme in the usual way. If an individual does this it is likely that employer contributions to the scheme would also cease (unless the scheme is a non-contributory scheme). However, it should be remembered that an employer cannot pressure or induce individuals to opt-out. Where an individual opts-out or leaves their scheme:

- they may not be able to re-join the scheme immediately when they return to work, and
- they may lose their entitlement to other benefits that are linked to scheme membership (such as life assurance benefits).

Employers and pension scheme trustees/providers should take steps to ensure that individuals are aware of these consequences before they opt-out of or leave their scheme.

Instead of opting out of or leaving their scheme, employees may be able to make savings by reducing their contribution rate, where they currently pay contributions at a higher rate than the minimum required under the scheme's rules. This may in turn reduce the amount of employer contributions that are payable, for example, where an employer pays matching contributions (and will continue to do so during furlough).

Where the employer contribution rate is being reduced during furlough (for example, to the automatic enrolment minimum rate) the employer should consider whether the minimum member contribution rate under the scheme should also be reduced during furlough. The scheme rules may need to be amended to permit this. Any changes to an employee's contribution rate should also be reflected in the furlough agreement.

Where an individual pays pension contributions via a salary sacrifice scheme their employer may need to cover the cost of those contributions during furlough in addition to the standard employer contributions (see question 8 below).

DOES THE POSITION CHANGE IF AN EMPLOYEE PAYS PENSION CONTRIBUTIONS BY WAY OF SALARY SACRIFICE?

Yes. Where an employee who is furloughed pays pension contributions via a salary sacrifice arrangement there are a number of additional issues that need to be considered.

REFERENCE SALARY

Firstly, under the CJRS an individual's reference salary for the purposes of determining the amount that can be recovered is their post-salary sacrifice salary where they participate in one or more salary sacrifice schemes. Therefore, where an individual pays pension contributions (or purchases other benefits) via a salary sacrifice scheme the employer would only be able to claim back a maximum of 80% of their post-sacrifice salary (subject to a cap of £2,500) under the CJRS.

PENSION CONTRIBUTIONS

In addition, HMRC has confirmed that where there is a salary sacrifice scheme, the full grant (based on the post-sacrifice salary) must be paid to the employee in money and cannot be used to pay for the provision of any benefits provided through salary sacrifice schemes (including pension contributions). Consequently, where an employee will only be paid the amount recoverable under the CJRS during any furlough period, their employer would need to meet the cost of any pension contributions that would ordinarily be deducted from their salary at its own expense during that period. The cost of other salary sacrifice benefits to which the individual is entitled may also need to be met by the employer.

Where an individual's employer has agreed to top up their salary during furlough, the cost of any salary sacrifice pension contributions (and any other salary sacrifice benefits) that would ordinarily be taken from the employee's salary could be taken from the top-up. However, the individual's furlough salary could not be reduced below the amount recoverable under the CJRS and so the employer would still be required to meet the cost of these pension contributions (and the other salary sacrifice benefits) to the extent that they cannot be covered in full by the top-up.

Where an employer may be required to cover the cost of employee pension contributions and/or other salary sacrifice benefits during furlough it should consider whether to cap such contributions/benefits or prevent employees from increasing these during the furlough period. Whatever position is reached, it should be documented in the furlough agreement.

Calculating the employer and employee pension contributions payable during furlough where an individual normally pays their contributions via a salary sacrifice arrangement can be complex. The Pensions Regulator has published some guidance to assist with this. The guidance contains worked examples to illustrate:

- how employer and employee pension contributions should be calculated during furlough where employee pension contributions are normally paid by way of salary sacrifice, and
- how to calculate the amount that can be claimed in respect of the employer pension contributions under the CJRS.

The Regulator’s guidance does not cover the situation where an employer is topping up a furloughed employee's furlough salary and, therefore, it assumes that an employer will be picking up the full cost of the employee's salary sacrifice pension contribution. Clearly that may not always be the case, given that where an employer is topping up the furlough salary of its employees some or all of the employee's salary sacrifice contribution may be covered by the top-up. However, the guidance is still relevant in this scenario as it sets out the principles that ought to be followed to calculate the contributions due and the amount recoverable under the CJRS many of which will apply even where a topped-up furlough salary is being paid.

Care will also need to be taken when calculating the employer and employee pension contributions and also the amount that can be reclaimed by the employer under the CJRS where an employee who is furloughed and who pays their pension contributions by way of salary sacrifice begins to work again on reduced hours on or after 1 July 2020.

LIFE EVENT

Separately, HMRC has said in its Guidance that Covid-19 counts as a life event. This means that an individual can opt-out of a salary sacrifice arrangement, if the relevant employment contract is updated accordingly (e.g. as part of the furlough agreement, or a separate side letter). However, doing so may not benefit the employee because it will not increase the reference salary that is used to calculate their furlough pay (as this is based on their historic salary levels prior to 19 March 2020). Some or all of the cost of the salary sacrifice benefits may also be payable by the employer during furlough in any event. So care should be taken where an employer plans to communicate with its employees to inform them that they can opt-out of any salary sacrifice arrangements that are already in place.

MUST A FURLOUGHED EMPLOYEE BE AUTOMATICALLY ENROLLED IF THEY BECOME ELIGIBLE DURING THE FURLOUGH PERIOD?

Yes, the auto-enrolment requirements continue to apply during furlough. This means that if an individual becomes eligible to be automatically enrolled into a qualifying pension scheme during furlough (for example, because they have recently started working for an organisation or because they turn 22 and they are in receipt of earnings in excess of £833 per month) they would need to be automatically enrolled in the usual way. Having said that, an employer can postpone the requirement to automatically enrol an individual by up to three months when an individual first becomes eligible to be automatically enrolled. In order to do this an employer must give an individual written notice which contains certain prescribed information.

Where an employer postpones the requirement to automatically enrol an individual by three months it would not be required to automatically enrol the individual during the furlough period, where this period is less than three months. However, the individual retains the right to opt-in to a qualifying pension scheme during the postponement period and, if they do this, they would need to be enrolled into the scheme and the employer would need to pay contributions (which would need to be at least equal to the auto-enrolment minimum level) on their behalf.

Assuming the employee has not opted in, the employer would be required to automatically enrol the individual at the end of the postponement period and start paying at least the minimum auto-enrolment employer contributions on their behalf, if they still meet the automatic enrolment eligibility criteria at that time.

If the individual is no longer eligible at the end of the postponement period (e.g. because their pay has dropped back below the qualifying threshold) they do not need to be automatically enrolled at that time. Instead their employer will need to monitor their eligibility on an ongoing basis in every subsequent pay period, as usual.

The effect of reducing a furloughed employee's pay may mean that they will not meet the criteria to be automatically enrolled into a pension scheme during the furlough period, even though they would have become eligible had they been paid normally. In these circumstances, when the individual's pay increases at the end of the furlough period or as a result of returning to work on reduced hours, their employer must continue to assess them and then enrol them (or postpone them) when they first become eligible.

The Pensions Regulator has published guidance on how automatic enrolment operates during furlough. The Regulator's website also contains further details of how postponement works and the information that must be included in a postponement notice.

DO THE AUTOMATIC RE-ENROLMENT REQUIREMENTS STILL APPLY DURING FURLOUGH?

Yes, employers may be required to automatically re-enrol furloughed employees who have previously opted-out of the employer's pension scheme and who are eligible to be automatically re-enrolled, if the employer's automatic re-enrolment date falls during the furlough period.

An employer's first automatic re-enrolment date is three years after its automatic enrolment staging date (i.e. the date on which the auto-enrolment duties first applied to that employer). Subsequent re-enrolment dates fall three years after an employer's last re-enrolment date. However, an employer can defer its re-enrolment date by up to three months after the third year anniversary of its staging date/last re-enrolment date. Therefore, an employer may be able to defer its re-enrolment date until after the furlough scheme has come to an end.

HOW DOES THE CJRS IMPACT OTHER SALARY-RELATED BENEFITS SUCH AS LIFE INSURANCE OR INCOME PROTECTION?

It is possible that other salary-related benefits, such as life assurance benefits and permanent health insurance cover, could be impacted where an individual's salary is reduced during any furlough period. Whether or not they are will depend upon the terms of the relevant scheme and/or any insurance policies applicable to such schemes.

Employers should check the position with their brokers/insurers in the first instance and flag any impact on coverage to affected employees.

Where the benefits payable under any salary-related schemes would be reduced where an individual's salary is reduced, an employer should consider whether any such salary-related benefits should continue to be payable by reference to an individual's normal salary (as opposed to the furlough salary) during furlough.

Where the intention is that any salary-related benefits will continue to be calculated by reference to an individual's normal salary during furlough, it may be necessary to amend the rules of the relevant scheme and/or update any underlying insurance policies to give effect to this.

Once again, whatever decision is taken the position should be reflected in the furlough agreement entered into by each employee.

TIMING AND PROCESS FOR CLAIMS

The CJRS was originally put in place for at least three months from 1 March to 31 May 2020. The Treasury has since confirmed that the CJRS will remain in place and be available to employers in all sectors through to the end of October, but from July there will be greater flexibility. In particular, employers currently using the scheme will be able to bring furloughed employees back part-time. Employees will continue to receive at least 80% of their wages subject to the £2,500 per month cap, but employers will be required to start sharing the cost of the scheme moving forwards (as outlined in this briefing).

Employers can upload claims through the HMRC online portal and grants should arrive in employer bank accounts within six working days.

From 1 July the scheme will only be available to employers that have previously used the scheme in respect of employees they have previously furloughed. In addition, from 30 June onwards employers will only be able to make a claim in respect of an employee that they have furloughed for a full three-week period prior to 30 June (with limited exceptions). This means that, generally speaking, the final date by which an employer can furlough an employee for the first time will be 10 June, in order for the current three-week furlough period to be completed by 30 June. Employers will have until 31 July to make any claims in respect of the period to 30 June.

As a result of the changes being made to the CJRS from 1 July, claim periods will no longer be able to overlap months meaning employers who previously submitted claims with periods that overlapped calendar months will no longer be able to do this after that date.

For more information on how to make a claim, the periods that can be claimed for and the information required to submit a claim, check out our employment briefing on the operation of the CJRS.

More on Catalyst //

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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LEGAL NOTICE
