PEOPLE: JOB RETENTION SCHEME (UK)

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Legal Briefings

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On 29 May 2020 the Chancellor confirmed the extension of the HMRC's Coronavirus Job Retention Scheme ("CJRS"), with new flexibility added for employers to partially furlough employees from 1 July 2020. Employees can now work for any proportion of their usual hours and any shift pattern, with employers paying for the hours worked and claiming a grant for furloughed hours. However, employers can only claim for periods from 1 July 2020 in respect of employees who completed 3 weeks' consecutive furlough starting on or before 10 June (with a few exceptions) and subject to a cap on numbers in one claim period. Employers are required to start sharing the cost from August 2020 until the end of October 2020 when the CJRS will end.

The CJRS sets out the terms on which employers can claim reimbursement for a proportion of employee earnings; the CJRS rules do not alter employment rights themselves.

Guidance for employers on the CJRS first published by HMRC on 26 March 2020 has since been updated several times and divided into separate web pages; it now reflects the rules from 1 July onwards and we have referred to it together as the "**Guidance**" (see links here). HMRC has also published and updated guidance for employees ("**Employee Guidance**"). The third Treasury Direction published on 26 June 2020 attaches a Schedule setting out the legal framework for the CJRS (the "**Schedule**"): part 1 deals with some transitional provisions concerning claims for periods prior to 1 July 2020 (which must be submitted by 31 July 2020 at the latest), and part 2 covers claims for 1 July 2020 onwards.

The pre-July rules were blighted by inconsistencies between the various iterations of the Guidance and the two earlier Treasury Directions setting out the legal framework, making it impossible to predict with certainty HMRC's approach. It is important to remember that this is a Government funding scheme operated by HMRC rather than a piece of legislation; it has had to be designed at speed and issues have had to be addressed on the hoof. In theory the Schedules should be given precedence over the relevant iteration of the Guidance, although in reality HMRC is likely to refer to the Guidance in the first place. 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 on identifying deliberate fraud (eg, claiming for employees who continue to work during furloughed hours) rather than looking to claw back claims where an employer has followed the HMRC's own Guidance but arguably not fully complied with the relevant Schedule.

Claims for periods from 1 July 2020 must comply with the Schedule attached to the third Treasury Direction (whether employees are fully or flexibly furloughed) and thankfully there are now fewer inconsistencies and areas of uncertainty, although some remain and, with them, the difficulty of predicting HMRC's approach. Of course there is also potential for further changes to Guidance and Treasury Directions. We have summarised the main points as set out in the documents current at the time of writing and flagged some of the areas of uncertainty, but it would be prudent for employers to contact HMRC direct to resolve any uncertainties relevant to their particular circumstances.

A separate briefing here looks at other key employment issues arising in relation to the COVID-19 outbreak, including sickness and self-isolation, health data, homeworking, holiday and other issues. 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.

1. Summary of key points

ELIGIBILITY	Claims for period from 1 July 2020 can only be made in respect of employees who have completed 3 consecutive weeks' furlough ending on or before 30 June (subject to a few exceptions). A single claim can only cover the maximum number of employees included in any one claim pre-July 2020 (with some exceptions). Claims can be made in respect of employees under notice of redundancy, but not for pay in lieu of notice and not for statutory redundancy pay. Claims can now be made for fully or flexibly furloughed employees.
AMOUNT OF GRANT	The scheme ends on 31 October 2020. Employees must be paid 80% wages for their furloughed hours (subject to a cap of £2,500 a month or a prorated amount for flexible furlough). This is calculated using a reference salary (for fixed-rate employees, this is the salary as at 19 March 2020). It includes variable payments for overtime, shift work or additional duties provided there is no discretion about how the amount is to be calculated. From 1 August 2020 employers are required to start sharing the cost. For August this means taking over payment of the associated employer NICS and pension contributions, from 1 September 2020 employers must take over 10% of the capped wages in addition, and from 1 October this increases to 20% of the capped wages.
LIMITS ON FURLOUGH	For claims for furlough starting on or after 1 July 2020, there is no longer a minimum period of furlough and employees can work any proportion of their usual hours in any shift pattern. No work can be done during furloughed hours – employees should be brought back from furlough to carry out required tasks before re-furloughing. Employees cannot be on sick leave/unpaid leave and furlough at the same time; they can be on holiday or family-related leave and furlough at the same time (although furlough wages will need to be topped up to full pay during holiday). The CJRS should not be used to fund holiday pay – employees should not be put on furlough for a period simply because they are on holiday for that period.
LIMITS ON CLAIMS	A claim can only cover days within one calendar month and must cover a period of at least 7 days (subject to certain exceptions). Claim periods cannot overlap.
AGREEMENT TO FURLOUGH	An agreement is required in advance of the period for which a claim is made. The agreement need not be written, but must be recorded in writing. (The Guidance is not wholly consistent on this, but the Direction is clear.) It is unclear whether implied agreement or relying on a contractual right is sufficient (where recorded in writing). Furlough agreements put in place for furlough pre-July 2020 may need to be extended or amended. Contractual changes could require fresh collective redundancy consultation.

2. WHICH EMPLOYERS CAN ACCESS THE CJRS?

From 1 July 2020, only employers who have previously claimed under the CJRS prior to 1 July 2020 will be eligible for future grants under the scheme, and only in respect of employees who have previously been furloughed for at least 3 consecutive weeks ending on or before 30 June 2020 (subject to a few exceptions).

The CJRS is open to any entity with a UK bank account and which, at the time of making the claim, has a PAYE payroll scheme that was created and started on or before 19 March 2020 (subject to special provision for TUPE transferees unable to satisfy this condition because they acquired a business or undertaking after 28 February 2020). Employers must also have enrolled for PAYE online. The Guidance notes that employers who are fully funded by public grants are not expected to furlough their staff and that, while administrators can use the CJRS, they are only expected to do so "*if there is a reasonable likelihood of rehiring the workers*", for example after the sale of the business. Earlier versions of the Guidance also noted that the CJRS can be accessed by individuals who employ others (eg, nannies) where the payroll conditions are met; this should still apply even though the reference has been omitted from the current iteration.

Can employers access the CJRS only as an alternative to COVID-19 related redundancies? Can employers claim for employees they plan to make redundant immediately after furlough?

The issue of whether grants under the CJRS are conditional on employers establishing that the purpose of furloughing the individual employees is to avoid their redundancy, or that their business is affected in a specified way, was unclear from the start of the scheme. Originally Guidance suggested that grants were available if the employer's operations were "severely affected", later amended to "affected", while there were also references to all employers being eligible and to the purpose of the scheme being to help employers retain their employees. The Guidance also seemed to envisage furlough as an option for clinically extremely vulnerable or vulnerable employees or parents unable to work from home, without clearly making this conditional on the individual otherwise being made redundant, or on the employer showing its business operations were affected.

The position was clarified by the first Treasury Direction, which 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*". It went on to provide that no claim may be made "*if it is abusive or is otherwise contrary to the exceptional purpose*" of the CJRS, and that furloughed employees must be instructed to cease all work because of "*circumstances arising as a result of coronavirus or coronavirus disease*". This seemed to make clear that the decision to furlough had to be causally connected with circumstances arising due to the pandemic, but it was not a condition that furloughed employees would otherwise have been made redundant. Equally, there was no suggestion that employers intending to make redundancies at the end of the scheme were ineligible to use it.

Unfortunately, the third Treasury Direction muddied the waters once again. Section 2.2 of the Schedule (applicable to claims for periods both before and after 1 July 2020) now provides: "*Integral to the purpose of CJRS is that the 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 CJRS claim is made whose employment activities have been adversely affected by the Coronavirus and Coronavirus disease or the measures taken to prevent or limit its further transmission*." Measures taken to prevent or limit transmission presumably include the Government's shielding and social distancing guidelines and school/childcare closures, seemingly confirming that furlough can be used for clinically extremely vulnerable or vulnerable employees or parents unable to work from home. However, furlough of these and other employees is subject to the requirement that the employer use the grant "to continue the employment" of the relevant employees. This was seized on by some commentators as suggesting that grants cannot be claimed if the employer would not otherwise have made the individual redundant, nor if the employer is intending to, or has given notice to, make the employee redundant at the end of their furlough, on the basis that the purpose requirement is to 'continue employment' more generally and at least beyond the furlough period. If the latter were correct, this would also seemingly exclude claims in respect of employees working out notice of termination for other reasons, including resignation.

One would have expected clearer drafting had this been the intention; it seemed more likely that the rationale for the new drafting was simply to make clear that fraudulent claims should not be made for employees who continue to work during furloughed hours, and that the money should only be claimed in order to keep on payroll employees who are not able to work their full hours for the duration of the furlough period. An employee's employment is "continuing" even while it is under notice of termination. Initially HMRC only confirmed informally that grants can cover employees during their notice periods, then on 10 July the CJRS guidance was updated to make clear that a grant can be claimed in respect of the wages of a furloughed employee who has been given statutory notice of termination, covering the period until the employment ends. On 17 July a reference to cover contractual notice was added. (Oddly, although the employee guidance continues to refer to both statutory and contractual notice, the reference to contractual notice was deleted from the employer version on 3 August; this was presumably a mistake which hopefully will be corrected in due course.) Also see Redundancies and other terminations of furloughed employees.

HMRC does expressly retain the right to retrospectively audit all aspects of any claim with scope to claw back fraudulent or erroneous claims. The Guidance emphasises that HMRC will check claims and that payments may be withheld or need to be repaid if the claim is based on inaccurate information or found to be fraudulent. An online portal has been created for employees and the public to report suspected fraud. The Employee Guidance notes that abuses could include 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. The Finance Act enacted at the end of July provides for a 100% income tax charge on payments under the CJRS (or coronavirus-SSP rebate scheme) to which the employer was not entitled, even where the claim was made in good faith, and which have not been repaid. HMRC is also able to charge penalties in cases of deliberate failure to notify HMRC of a known tax liability by the latest of either 90 days after the grant being received and 20 October 2020. The Finance Act also gives HMRC power to make a company officer jointly and severally liable where the officer has deliberately made a CJRS or SSP rebate claim to which the company was not entitled. This is discussed further in new HMRC guidance here.

Employers will also need to bear in mind reputational issues when determining whether it is appropriate to continue to access the CJRS. There have been media reports that a number of larger employers have pledged to pay back grants on finding that the pandemic's impact on their business has been less severe than anticipated.

3. WHAT WILL THE GRANT COVER?

From 1 July 2020 employees can be fully furloughed or flexibly furloughed, ie they can work for part of their usual hours, for any amount of time and any work pattern. The employer must itself pay for the hours worked and can claim a grant for the furloughed hours. All claims for periods from 1 July 2020, whether for full or flexible furlough, are subject to the third Treasury Direction and Schedule.

Until 31 July 2020 employers can apply for grants of 80% of furloughed UK employees' gross monthly earnings, in respect of the full "**reference salary**" for those fully furloughed and in respect of the furloughed hours for employees who are flexibly furloughed and working only some of their usual hours. This is subject to a cap of £2,500 a month **or a pro-rated cap reflecting furloughed hours for those flexibly furloughed**, *plus* the associated Employer National Insurance Contributions (NICs) and minimum automatic enrolment employer pension contributions on furloughed wages, provided they keep the individual on payroll. The amount claimed for NICs cannot be more than 13.8% of the grant claimed for employee's wages. 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.

For August 2020, the CJRS grant will continue to cover 80% of wages up to the relevant cap (ie, up to £2,500 a month or the pro-rated figure for flexible furlough), but employers must pay the full employer NICs and pension contributions in respect of the grant sum; .

For September 2020, employers must in addition contribute 10% of the capped wages (plus employer NICs and pension contributions) with the government paying 70% of capped wages (ie, up to £2,187.50 or the pro-rated figure for flexible furlough) for the hours the employee does not work (so the employee continues to receive 80% **wages subject to the cap).**

For October 2020, the employer contribution increases to 20% (plus employer NICs and pension contributions) and the government contribution reduces to 60% of capped wages (ie, up to £1,875 or the pro-rated figure for flexible furlough).

The employer can choose to top up earnings to 100% but is not obliged to do so (and Employer NICs and employer pension contributions on any top-up cannot be reclaimed even for July). Any more generous pension contributions above the minimum mandatory employer contribution 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). Grants do not cover the Apprenticeship Levy.

The requirement to pay the national minimum wage ("**NMW**") will normally not apply to furloughed hours during which employees will not be doing any work. 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. The annual increases to NMW rates took effect on 1 April 2020.

Reference salary

The method of calculating the "**reference salary**" (for calculating the 80% referred to above) depends on whether the individual is a "fixed-rate employee" or on variable pay. For both types, the Schedule makes clear that benefits in kind, including where these are in lieu of a cash payment for example through salary sacrifice schemes, are not included in reference salary – it is the post-sacrifice salary that must be used (including where pension contributions are made through salary sacrifice schemes). However, the Guidance notes that HMRC agrees that COVID-19 counts as a life event allowing employees to switch out of salary sacrifice arrangements, if the relevant employment contract is updated accordingly. Our Pensions Team have publishing a briefing covering the pensions aspects of the CJRS and the Pensions Regulator's guidance.

An online calculator is available to assist with calculating claims and employers are also referred to examples in the guidance here. A new example of calculating a claim for a flexibly furloughed employee has been published and the previous examples of calculations have been updated for claims from 1 July 2020.

Fixed-rate employees

The Schedule defines a fixed-rate employee as an employee entitled under their contract to be paid an annual salary (and no other payment) in respect of basic hours determined by the contract, paid in equal instalments per pay period (of a number of weeks or a month) regardless of the number of hours worked in that period, and where the basic hours do not normally vary according to business, economic or agricultural seasonal considerations.

For fixed-rate employees, the reference salary is the rate as at the last pay period ending on or before 19 March 2020. The Schedule also provides that where an employer has paid less than is required under the CJRS (using the 19 March 2020 reference salary), the employer can top this up to the required amount either before making a claim under the CJRS or within a reasonable period after receiving the further amount from the CJRS.

The Schedule provides that, when calculating reference salary, where the reference period used includes:

- unpaid sabbatical or other unpaid leave
- sickness absence during which statutory sick pay is payable or, following that statutory payment period, the employer pays a reduced salary rate
- statutory family-related leave where statutory pay is payable or, following that statutory payment period, the employer pays a reduced salary rate
- shared parental leave (whether or not statutory pay is payable)

then the rate of pay for paid annual leave under the Working Time Regulations ("**WTR**") should be assumed for those periods. In other words, where an individual is furloughed after returning from family-related or sick leave, the calculation of reference salary should assume WTR pay for those periods regardless of any lower or nil pay period.

Variable pay employees

For employees whose pay varies, the reference salary is the higher of the employee's earnings in the same month the previous year or the employee's average monthly earnings for the 2019/20 tax year (or, if the employee has been employed for less than 12 months, an average of the employee's monthly earnings since starting work). The employer must pay 80% of the higher of these, subject to the £2,500 per month cap (pro-rated for flexible furlough).

Non-discretionary payments

The position as to what payments should be included in the calculation was not always clear under the original CJRS, particularly as to which types of overtime pay were to be included. A consistent and settled position was only reached with the second Treasury Direction dated 20 May 2020. The latest Schedule applicable to claims for periods from 1 July 2020 maintains that final position – thankfully no further changes have been made to the relevant provisions.

The Guidance provides that only regular payments which an employer is contractually obliged to make should be taken into account, including regular wages, non-discretionary payments for hours worked including overtime, non-discretionary fees and commission payments, and piece rate payments. In contrast, payments made at the discretion of the employer or a client, where there was no contractual obligation to pay, such as tips, discretionary bonuses and discretionary commission, are excluded. The Guidance expressly provides that if an employee has been paid variable payments due to working overtime, those payments are to be included as long as the payments were non-discretionary, ie, that the employer was "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 Schedule is consistent with this and defines non-discretionary payments (which are to be included in reference salary) as payments which are (i) in respect of overtime, fees, commissions or a piece rate, (ii) made in recognition of the employee undertaking additional or exceptional responsibilities, (iii) made in recognition of the circumstances or time of undertaking the duties, (iv) made in recognition of similar considerations, provided that the method of calculating the amount (whether or not that involves the exercise of a discretion) is set out in a "legally enforceable agreement, understanding, scheme, transaction or series of transactions". So it is now clear that **variable payments for overtime, shift work or additional duties will be included provided there is no discretion about how the amount is to be calculated**.

USUAL HOURS

Where an employee is flexibly furloughed, the employer will need to calculate “usual hours”. This is because the 80% grant available and the monthly cap are reduced to reflect the proportion of “usual hours” that will be furloughed (so if the employee is to work 50% of usual hours, the grant will be half of 80% of usual wages subject to a monthly cap of £1,250).

- For those who are contracted to work a fixed number of hours and whose pay does not vary according to hours worked, the "usual hours" are the **contractual hours as at the end of the last pay period ending on or before 19 March 2020** (treating any periods of annual leave, sick leave or family-related leave during the relevant calculation period as if the employee had been at work).

- For those on variable hours and pay, the "usual hours" are the **higher of either the average number of hours worked in the tax year 2019 to 2020, or the corresponding calendar period in the tax year 2019 to 2020**, including any hours of leave for which the employee was paid their full contracted rate (such as annual leave) and any hours worked as ‘overtime’ where pay for those hours was not discretionary, and excluding from the calculation sick days and family-related leave.

- For piece workers, the same applies as for variable hours workers, but if the hours worked are unknown, the hours should be estimated based on the number of ‘pieces’ produced and the average rate of work per hour.

- "Usual hours" can be calculated for the entire claim period or for each pay period, or part of a pay period, that falls within that claim period - either method is acceptable. Numbers should be rounded up to the nearest whole number if calculating for the entire claim period, and rounded up or down if using a pay period calculation.

Employers will then need to record the actual hours worked and the furloughed hours (ie, usual hours minus worked hours) for each claim period. If a flexibly-furloughed employee takes holiday during furlough, the holiday hours should be counted as "furloughed hours" (enabling an employer to claim the grant in respect of those hours, although note that the employer will need to pay the full normal rate of remuneration for holiday taken – see here). Similarly, leave taken on account of time worked under a flexible work time arrangement (flexi-leave), family related statutory leave, and reduced rate paid leave following a period of family related statutory leave are also treated as furloughed hours. (In contrast, unpaid leave or sick leave cannot be included in furloughed hours as these cannot be claimed for under the scheme.)

The Calculate how much you can claim guidance sets out how to do the rather complicated calculations required, including for flexible furlough and once the employer contributions increase in stages from August to October.

In some cases, employers may have agreed a contractual variation reducing contracted hours (and pay) after 19 March 2020 (given that claims could not be made for flexible furlough prior to 1 July 2020). Because "usual hours" is determined as at the last pay period ending on or before 19 March 2020, this will ignore any reductions to hours agreed thereafter and mean that furloughed hours will include some hours no longer required under the varied contract. In theory that would mean that the furlough grant would pay out in respect of more hours than the employee is actually contracted to work but not working. Not only could this lead to employee relations issues with other employees not in this position, it may also be that employers can't actually validly claim under the scheme as there is a requirement that the amount payable to an employee under their contract is at least equal to the relevant grant. Employers in this situation may wish to consider agreeing variations to return to the contractual hours at 19 March 2020.

4. WHICH EMPLOYEES CAN BE COVERED BY THE CJRS?

For periods from 1 July 2020, the key changes are that:

1. an employer can only furlough an employee for whom a claim has been made in accordance with the original CJRS and who was **previously furloughed for at least 3 consecutive weeks taking place at any time between 1 March 2020 and 30 June 2020** (the "3 week condition"). (This means that the last day an employee could have started their first period of furlough was 10 June 2020. The employee does not need to actually be on furlough on 30 June 2020, as long as they have already completed a furlough period of 3 consecutive weeks.) This condition is subject to a few exemptions set out below. Although the Guidance refers to a requirement that an employee has "successfully claimed" for an employee, the Schedule does not require the claim to have been accepted and paid before a claim can be made under the revised CJRS.

2. the number of employees who can be claimed for cannot exceed the maximum number included in any one claim made for furlough periods prior to 1 July 2020, called the "**high-watermark number**", save that individuals exempt from the 3 week condition are added on to this number. (This could restrict an employer's options where they have used a rota for full furlough, depending on the duration of the rota and their chosen claim periods; for example, where an employer has operated rotational furlough with half the workforce on furlough for 3 weeks and then the other half, it will not be possible to switch to flexibly furloughing all of the workforce for half their usual hours).

The exemption from the 3 week condition covers:

- **employees returning from maternity, shared parental, adoption, paternity or parental bereavement leave** who were on payroll on or before 19 March 2020 and on leave before 10 June 2020

- **armed forces reservists** who were on payroll on or before 19 March 2020 and on a period of mobilisation beginning on or before, and ending after, 10 June 2020

provided the employer has met the 3 week condition for other employees.

Where a **TUPE transfer takes place after 10 June 2020**, so that the transferee would not be able to meet the 3 week condition in relation to transferring employees even if the transferor put the employees on furlough on or before 10 June, the transferee can still claim for the relevant employees from 1 July provided the transferor meets the 3 week condition for those employees (or would have done if the transfer had not occurred). Their number is then added to the transferee's high-watermark number. (The Guidance suggests that the transferor's high-watermark number is applied as a cap to the number that can be added to the transferee's high-watermark number, but this has not been included in the Schedule, which should take precedence).

Similar provisions apply for changes in ownership under PAYE succession rules, transfers from a liquidator, and consolidations of group company PAYE schemes. It is not clear whether service provision changes covered by TUPE but which are not "the transfer of a business or undertaking" are covered – the drafting of the Schedule suggests not, but we understand that the HMRC helpline has suggested they are covered.

The following conditions required under the original CJRS will also need to have been satisfied (in addition to the 3 week condition):

- 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. Claims can be made for employees who satisfy this condition but subsequently are made redundant or stop working for the employer on or after 19 March 2020 (if the employees are re-hired and furloughed). 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 mean that some employees put on payroll between late February 2020 and mid-March 2020 are not covered by the CJRS, particularly where payroll is only run monthly.

- **Employees who were employed as of 28 February 2020 and on payroll** (ie, notified to HMRC on an RTI submission on or before 28 February 2020) but who were **made redundant or stopped working for the employer** on or after that date can

also be covered by the CJRS, if they are rehired and put on furlough (even if this was not done prior to 19 March 2020).

- The re-hiring provisions also apply to individuals on **fixed term contracts**. The Guidance acknowledges that individuals (whether or not on a fixed term contract) whose employment started and ended between 28 February 2020 and 19 March 2020 are not covered by the CJRS.

- With regard to individuals who were re-hired as set out above, it seems that this could include those who resigned or were dismissed for personal reasons, although the CJRS eligibility conditions discussed above would still apply. There was no obligation on employers to rehire staff.

- An employer could furlough and claim for staff transferred to it under a **TUPE business transfer or PAYE business succession** rules after 28 February 2020 (notwithstanding any inability to satisfy the condition of making a RTI submission on or before 19 March 2020). Similar provisions applied for changes in ownership under PAYE succession rules, transfers from a liquidator, and consolidations of group company PAYE schemes. A TUPE transferor was also able to claim under the CJRS for an employee whose furlough did not last the minimum period of 21 days only because of the TUPE transfer, provided the other conditions were satisfied and that the transferee made a furlough claim for that employee for a period beginning immediately after the transfer.

Types of employee/worker covered

- 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. The Guidance expressly notes that foreign nationals can be furloughed and that grants under the CJRS are not counted as "access to public funds", meaning that employees on all categories of visa can be furloughed. Claims can be made in respect of furloughed employees on fixed-term contracts, and employers can renew or extend those contracts during the furlough period without breaking the terms of the CJRS, as long as this is done before the contract would otherwise have ended.

- The Guidance sets out a number of types of worker who are not necessarily employees but for whom claims can be made if they are paid via PAYE. These cover office holders (including salaried company directors and salaried individuals who are directors of their own personal service company), salaried members of Limited Liability Partnerships (where the reference salary will be the LLP member's profit allocations, excluding amounts determined by the member's or LLP's performance), agency workers including those employed by umbrella companies, and "limb (b) workers" (those with a contract to provide work of services personally and not as part of their own profession or business). The Guidance also notes that contractors with public sector engagements in scope of

IR35 may be eligible in some cases. (Note that those who pay tax on their trading profits through Income Tax Self-Assessment may instead be eligible for the Self-Employed Income Support Scheme.) Directors who pay themselves once a year can also access the CJRS subject to certain conditions.

- Employees receiving Maternity Allowance cannot receive furlough pay at the same time and so, if they have agreed to be furloughed, they should give at least 8 weeks' notice of ending their maternity leave early and be told to contact Jobcentre Plus to stop their Maternity Allowance payments. They will not be eligible for furlough pay until the end of the 8 weeks.

No work for employer during furloughed hours

A claim can only be made under the CJRS for hours during which the employee has been instructed by the employer to do, and in fact does, no work for (ie, does not provide services to or generate revenue for) the employer directly or indirectly, nor for a company linked or associated to the employer. The instruction must be given "by reason of circumstances arising as a result of coronavirus or coronavirus disease or measures taken to prevent or limit its further transmission" and there must be a furlough agreement covering the claim period (see here). The employee can do volunteer work (for another employer or organisation) or can take part in training.

The Guidance provides that training can take place provided it is not used by the employer to generate revenue or for the provision of services. The Schedule provides that study or training will be not be regarded as work for the employer if its purpose is to generally improve an employee's effectiveness in the employer's business or the performance of the employer's business, provided it does not (i) otherwise provide a service to the employer/a connected person or their business activities or contribute to those activities or generate income or profit for the employer/connected person, and (ii) directly contribute to any significant degree to the production of goods or services which the employer/connected person intends to supply to a third person for consideration.

What amounts to 'work'

It seems that permitting furloughed employees to carry out small administrative tasks or answer the odd email could prevent an employer claiming reimbursement for these employees under the CJRS. In contrast, employees performing tasks in relation to their own disciplinary or grievance issues, agreeing changes to their own employment contracts, or voluntarily attending purely social catch-ups (with no work-related discussion) should not amount to a breach of the rule for those employees. In our view, there is a distinction to be made between employees' activities in relation to their own disciplinary or grievance issues and managers or others undertaking tasks in relation to another employee's disciplinary or grievance; we consider that the latter would probably be 'work' for the managers involved and also for others, eg giving evidence. (Note that the ACAS guidance on disciplinary and grievance procedures during the coronavirus pandemic used to suggest that such tasks by managers or witnesses would not break furlough rules if "voluntary", but this text disappeared at the end of June 2020.) The lack of clarity as to what activities are permitted without breaking the no-work rule was more problematic under the pre-July 2020 CJRS where furlough had to be full-time and last for 3 weeks consecutively - **now that flexible furloughing is permitted and there is no minimum duration, employers needing employees to carry out short-term tasks can bring furloughed employees back to work for a short period and should therefore adopt this approach.**

The Guidance does provide that furloughed employees can undertake "union or non-union representative duties and activities for the purpose of an individual or collective representation of employees or other workers" (as long as, in doing this, they do not provide services to or generate revenue for, or on behalf of the employer or a linked or associated employer). This is helpful given the possibility that employers may wish to start the information and consultation process for collective redundancies during furlough. Although the amendment is not clearly covering the involvement of individual employees in electing non-union representatives, this should also be permissible. Employers without existing representative bodies may wish to consider starting the election process while employees are on furlough now, to ensure they have representatives in place if and when needed. The amendment also makes clear that employees can accompany colleagues at disciplinary or grievance hearings, or at an individual redundancy consultation meeting, without breaching the terms of the CJRS.

The issue of whether the rules would be breached by employees liaising over and giving evidence in court on behalf of their employer was considered by the County Court in *Fottles v Bourne Leisure*. The judge was of the clear opinion that such activities did not amount to work for the employer for these purposes (and therefore it was not necessary to adjourn a hearing on the ground that the evidence could not be given), but obviously this view will not be binding on the HMRC.

The Schedule provides that the no-work rule will not be breached by a director carrying out statutory duties relating to the filing of company accounts or other information or performing work directly relating to (i) making a CJRS claim in respect of, or (ii) paying wages/salary to, an employee of the director's company. The performance of certain duties as a trustee or manager of the employer's occupational pension scheme is also permitted.

Work for other unconnected employers

The Guidance expressly notes that employers can allow furloughed employees to take on work for other entities. Employers will want to maintain a prohibition on employees working for competitors but may be prepared to expressly permit other work, at least where this is in support of the national effort, in social or health care or other essential services. The Employee Guidance notes that employees who do take on other employment while on furlough will need to be able to return to work for the original employer if they decide to end the furlough and must also be able to undertake any training they require while on furlough.

Where employees work for more than one employer, they can be furloughed for each job and the salary cap applies to each employer separately. However, if an employee has had multiple employers over the past year and only worked for one at a time, and is being furloughed by their current employer, none of the former employers should re-hire, furlough and claim for them under the CJRS.

Employees on leave/absent from work

- The Schedule provides that claims cannot be made in respect of any period of unpaid leave (whether a sabbatical or other unpaid leave) taken by an employee ("**unpaid leave**").

- Under the original CJRS, there was a lack of consistency between the various versions of the Guidance and first and second Treasury Direction concerning whether an employee who was eligible for SSP (which included shielding employees from 16 April 2020) could be furloughed instead, even if not actually claiming SSP, and whether an employee on sick leave (who perhaps is self-isolating or shielding rather than actually ill) can agree to move off sick leave onto furlough. The final position seemed to be that this was possible, and is reflected in the continuing Guidance. The issue is not covered at all in the Schedule to the third Treasury Direction. The Guidance still states that employers can decide to furlough employees who are being shielded or **on sick leave** by moving them off SSP and onto furlough wages (provided the 3 week condition is satisfied).

- Note that shielding was paused on a national basis from 1 August 2020, although those living in local lockdown areas may be required to resume shielding.

- The Guidance is clear that the CJRS is available if employers furlough individuals who are unable to work because they need to **stay home with someone who is shielding** or because they have **caring responsibilities** resulting from COVID-19 such as needing to look after children (provided the 3 week condition is satisfied). Where an employee's role cannot be done from home, parents needing to provide childcare will clearly qualify; there may be more scope for argument where parents can theoretically perform their tasks from home, but find this challenging whilst also providing childcare.

- There is no specific reference in the Guidance to furloughing employees in **clinically vulnerable groups** who were "strongly advised" to follow the social distancing

measures (as opposed to clinically extremely vulnerable employees advised to shield). However, as discussed above, the purpose of the CJRS as set out in the Schedule is to cover those whose "employment activities" have been affected by measures taken to prevent or limit transmission, such as social distancing guidelines. This probably means that, where work cannot be done from home, clinically vulnerable employees and other employees who elect not to attend work due to health and safety fears can be furloughed (subject to the 3 week condition), even if there is work available for them to do.

Employees starting statutory leave after being placed on furlough

The Guidance states that employees still have the same rights at work, including to SSP, parental rights, and the right to claim unfair dismissal or redundancy pay.

Sick leave

The position under the original CJRS was not entirely clear as to whether an employee who becomes 'sick' (including shielding or self-isolating) after being placed on furlough could remain on furlough, enabling the employer to reclaim the full furloughed without deduction of the SSP rate. The current Schedule does not address this issue, leaving employers to rely on the HMRC's Statutory Payments Manual and the Guidance. These provide that employers must choose whether to move these employees onto SSP (in which case a CJRS claim cannot be made for furloughed salary) or keep them on furlough and continue claiming under the CJRS.

Of course in reality, fully furloughed employees may see no benefit in declaring their actual or deemed sickness if there is no incentive to do so (ie, if there is no entitlement to contractual enhanced sick pay during furlough). Employers may want to agree as a condition of furlough that they disapply any contractual sick pay scheme which provides remuneration greater than the furlough entitlement. The position for flexibly furloughed employees may be more complicated, as they will be entitled to SSP on their qualifying days (and from day one if the sickness absence is coronavirus-related) which will include both working and non-working days. An employer will need to pay SSP (plus any contractual enhancement) for working days, but seemingly could choose whether to keep the employee on furlough pay or (unless the furlough agreement provides otherwise) swap to SSP for the non-working days. If they do swap to SSP, employers will need to rectify any CJRS claims submitted in advance of the claim period which turn out to include periods of SSP.

Family-related leave

The Schedule and Guidance envisage that employees can start family-related leave having already been put on furlough and simultaneously with furlough. The pay rate for statutory family-related leave starting on or after 25 April 2020 will be based on the employee's usual earnings rather than the furloughed pay rate.

The Guidance states that employers can claim through the CJRS for enhanced contractual pay paid to employees on maternity, adoption, paternity, shared parental or parental bereavement leave ("**family leave**"). Periods of family leave are to be treated as furloughed hours. The Schedule expressly provides that a claim under the CJRS for reimbursement of wages for any furlough period must be net of the amount of any statutory payments made for family-related leave during that period (employers would then be able to reclaim 92% (or 103% for small employers) of the statutory pay as usual under the relevant statutory payment scheme – see here).

Annual leave and continuity of service

The Schedule does not address the issue of annual leave and continuity of service for furloughed employees.

Given that the contract of employment continues during furlough, it seems clear that holiday will continue to accrue and continuity of service be preserved (meaning that employees could acquire two years' service and therefore entitlement to statutory redundancy pay and unfair dismissal protection) during furlough. The Guidance confirms HMRC's view that annual leave does continue to accrue during furlough, including any contractual enhancement on top of the statutory entitlement (unless there is agreement to vary the contract to remove this enhancement during furlough).

The Guidance also states that employees can take holiday (including bank holidays) during furlough, and that the Working Time Regulations require holiday pay to be paid at the normal rate of pay or, where pay varies, the rate calculated by averaging over the previous 52 working weeks. Although there may be scope for argument in some cases, HMRC's view is that this means the employer should pay the employee's "usual holiday pay in accordance with the Working Time Regulations" (which would normally be 100% pre-furlough pay) for days of annual leave. The Guidance notes that employers will be obliged to pay additional amounts over the grant, but comments that employers will have the flexibility to restrict when leave can be taken if there is a business need, both during furlough and afterwards. This is consistent with further (non-legally binding) guidance on holiday entitlement and pay during COVID-19, published by BEIS here.

Employers may wish to avoid employees returning from furlough with large holiday balances at a time when they want to maximise productivity. The BEIS guidance clearly envisages that employers can require furloughed individuals to take holiday subject to the usual notice requirements and suggests that employers should engage with their workforce and explain reasons for wanting them to take leave before requiring them to do so. However, it also goes on to comment that "the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday". This perhaps reflects the suggestion by some commentators that tribunals might view enforced use of annual leave during furlough as an abuse of the employer's statutory right to require holiday. Of course the same limitations on "enjoyment" would apply in respect of requiring employees who are not furloughed to take holiday during lockdown. However, further on in the guidance, BEIS states that "in most cases" furloughed employees will be able to take holiday during the furlough period. This perhaps indicates that BEIS's view is that designating holiday during lockdown will generally be effective except for vulnerable individuals who are following the stronger social distancing guidance, extremely vulnerable individuals who are 'shielding', or individuals who are self-isolating due to their or their household having symptoms. Given that social distancing is likely to be the 'new normal' for some time, it would perhaps be surprising if the social-distancing restrictions on society as a whole were to be treated as sufficient to prevent enjoyment of holiday. However, there is clearly scope for argument with regard to periods while stronger lockdown restrictions are in place. Claims are perhaps more likely where an employer seeks to require furloughed employees to use up their entire year's entitlement while on furlough. In practice, furloughed employees may accept that a requirement to take a pro rata amount reflecting the expired portion of the leave year is not an unreasonable request.

Also note that the Government has amended the Working Time Regulations to allow workers to carry over up to four weeks of unused statutory leave into the next two leave years where it was not reasonably practicable for the worker to take some or all of it due to the effects of coronavirus (on the worker, employer or generally). The BEIS guidance suggests that one example of it not being reasonably practicable would be where, due to the impact of coronavirus on operations, the employer is financially unable to top up the salary covered by the CJRS to full holiday pay. See our general briefing on COVID-19 issues for employers for further details.

Amendments to the Guidance on 1 July 2020 added that "**employees should not be placed on furlough for a period simply because they are on holiday for that period**". Using the CJRS simply to fund or part-fund holiday pay is presumably viewed as an abuse of the scheme, for which HMRC would seek repayment.

5. DURATION OF FURLOUGH AND CLAIM PERIODS

Under the original CJRS, an employee had to be furloughed for a minimum period of 3 consecutive weeks.

From 1 July 2020, there is no minimum period of furlough, but there is a **minimum period that a claim can cover** as well as other restrictions on claims:

- claims can only cover days within one calendar month, but this does not prevent the furlough itself from overlapping months – there is no need for an employee's furlough to be ended and restarted with each month-end. For some employers claim periods may well differ from pay periods.

- claim periods starting on or after 1 July must start and end within the same calendar month and must last at least 7 days (although the claim might only be for wages in respect of fewer than 7 days' furlough within that 7 day duration). The exception to this rule is that a claim can be made for an employee covering a period of fewer than 7 days ("**orphan days**") if the period includes either the first or last day of the calendar month, and the employer has already claimed for that employee for the period ending immediately before it. (Employers operating rotational furlough will need to carefully consider the length of their claim periods to avoid this causing difficulties.) The rules also permit claim periods of less than 7 days in respect of the first claims made on employees' returning to work from family leave or military service or on the transfer of employees under TUPE.

- employers can only make one claim for any period so must include all fully or flexibly furloughed employees in one claim, even if they are paid at different times. Careful consideration may therefore be needed when determining claim periods. For example, ideally employers would time a new claim period to start on the same date as furloughed employees transfer under a TUPE transfer so that claims for their wages from the acquisition date can be made.

- where employees have been furloughed continuously, the claim periods must follow on from each other with no gaps in between the dates.

- employers should ideally claim only once they are sure of the exact number of hours being worked during the claim period. If claims are made in advance and turn out to be too high, the overclaim must be paid back (see here).

- as before, employees can be furloughed multiple times without any minimum period of work between furlough periods.

If furlough periods start before 1 July 2020, the furlough must still last 3 consecutive weeks (even though it will end after 1 July 2020) in order for the wages to be claimed under the CJRS. Separate claims will be needed to cover (i) the period to 30 June 2020, which must be submitted by 31 July 2020, and (ii) the period from 1 July 2020 (even if employees are furloughed continuously).

6. PUTTING AN EMPLOYEE ON FURLOUGH

AGREEING FURLOUGH

Employment law requirements

Some employees will have a contract permitting an employer to 'lay them off', ie, provide no work or pay, but keep them on payroll. There is nothing to suggest that the CJRS is not available where employers already have a contractual right to 'lay off' employees, nor indeed where they have already exercised this right. However, this is rare and in most cases the employer will not have this contractual right. Therefore placing an employee on 'furlough' at a reduced salary will be a change to their terms of employment requiring the employee's agreement. (Employers will also need to provide the employee with a written statement of changes to the "section 1 statement" of terms and conditions, at the earliest opportunity and in any event not later than one month after the change.) However, where the employer is simply instructing an employee not to work and is continuing to pay their full remuneration, there may be no need to agree a change to terms (unless there is an express or implied right to be given work to do). The Guidance recommends that employers discuss furloughing with their staff and make any changes to the employment contract by agreement.

CJRS eligibility

Under the original CJRS it was unclear whether an employee was required to agree in writing to being furloughed or whether an oral agreement with the employer was sufficient if later recorded in writing. It was also uncertain whether a retrospective agreement would be valid for the purposes of making a claim.

The position is a little clearer under the revised CJRS. Although the Guidance is unhelpful in still referring to the need for "a written agreement" in a couple of places, the Schedule (which will take precedence) is clear that an oral agreement recorded in writing (ie, recorded by the employer and so without needing anything written from the employee) is sufficient.

The Schedule provides that, to be eligible under the CJRS, there needs to be an agreement having effect for the period covered by the claim which fulfils the following conditions:

- the employer and employee must have agreed (which may be by means of a collective agreement between the employer and a trade union) that the employee will do no work or not work their usual hours in relation to their employment
- the agreement/collective agreement must specify the main terms and conditions on which work is to be ceased
- the agreement must be made before the beginning of the period to which the claim relates, but can subsequently be varied to reflect any variation agreed during the claim

period

- the agreement must be incorporated expressly or impliedly in the employee's contract
- the agreement must be in writing or confirmed in writing by the employer (and writing includes in electronic form such as email), and
- the employer must keep the agreement/collective agreement/confirmation until at least 30 June 2025.

The requirement for agreement to be made in advance of the relevant claim period makes clear that a retrospective agreement is not sufficient, although an employer could retrospectively record an oral agreement reached prior to the claim period. The position is less clear in relation to an employer retrospectively recording in writing an agreement which is implied, for example where employees acknowledge receipt of a unilateral notification of furlough (setting out the required terms) and accept furlough wages without protest. Although such an implied agreement would not be in advance of the very first claim made (being simultaneous with the start of that period), it would be in advance of subsequent claim periods covered by the agreement. It also remains unclear whether the CJRS requirement for an agreement is satisfied by an employment contract which already permits furloughing on the relevant terms (eg, on full pay), if no fresh explicit consent is given by the employee. The prudent course of action, to avoid argument, is to obtain at least a new, express oral agreement in advance of the relevant claim period (or ideally an advance written agreement if that is feasible).

Extension

Earlier versions of the Guidance confirmed that employers can extend a period of furlough by any amount of time whilst the employee remains in furlough. There is no need to allow furlough to end and then re-start it, although where the terms are changing (for example, to provide for flexible furlough), or where a fixed end-date was agreed, this might require further employee agreement and it would be prudent to get this in writing if feasible. Obviously furlough can only be claimed for days up until the date the CJRS ends

COLLECTIVE CONSULTATION

The Guidance notes that, if sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment.

Collective redundancy obligations

Collective redundancy consultation is required where 20 or more dismissals (for redundancy or for some other reason unconnected with the individual) are proposed within a 90 day period at one establishment. The process involves providing specified information and consulting with unions or employee representatives about ways of avoiding or reducing the number of dismissals and mitigating the consequences. The process must start at least 30 days before the first dismissal, and 45 days before if 100 or more dismissals are proposed.

While there is a 'special circumstances' provision which might apply given the 'exceptional' nature of the pandemic, the availability of furlough grants may make this less applicable and in any event an employer must still comply with the process so far as is reasonably practicable. There are significant financial penalties for non-compliance (potentially 90 days' pay per affected employee).

The employer must also notify the Department for Business, Energy and Industrial Strategy of the proposed redundancies by letter or on form HR1 (copied to the union/employee representatives), at least 30 days (or 45 days if 100 or more dismissals) before the first dismissal. Failure to do so can lead to criminal prosecution and a fine (with no upper limit), on summary conviction, for the company and/or officers of the company, although only a few prosecutions have been brought to date.

An employer may have had to comply with these obligations when first furloughing employees. Case law suggests that the collective consultation obligation would apply where an employer's proposal is to try and agree furlough with 20 or more employees but, if unsuccessful, to dismiss them as redundant. The same would apply where the employer's proposal is to seek employee agreement with 20 or more employees and, if unsuccessful, to dismiss and re-engage the employees on the new terms (including the furlough provision). Further, there is EU case law suggesting that the obligation would apply where an employer proposes unilaterally imposing on 20 or more employees a substantial change to terms sufficient to amount to a constructive dismissal; imposing a new furlough term could be sufficient depending on the scope of and any limitations on the particular furlough term.

If an employer's proposals for furlough post 30 June 2020 would involve a further change to employees' terms of employment or, if not agreed, dismissal, then a fresh obligation to consult will apply notwithstanding the previous consultation.

In any event, if trade unions are recognised, the employer will likely be required to consult with them on the extent to which the CJRS will be applied, to whom, for how long and whether there will be any top-ups. Similarly, if an employee forum is in place, consultation may be advisable Where there are no existing employee representatives, it should be made clear to employees that if they do not agree the furlough, redundancies will be proposed and the information and consultation process will be followed. It would also be prudent to file the HR1 at the start, accompanied by an explanation that the proposal is to seek agreement to furlough rather than compel redundancies.

SELECTING EMPLOYEES FOR FURLOUGH

As before, it remains possible to furlough only part of the workforce (and indeed only those who completed 3 consecutive weeks' furlough ending on or before 30 June 2020 can be furloughed). Employees can request furlough, but an employer is not obliged to agree.

The employer therefore has some discretion when deciding to whom to offer full or flexible furlough from 1 July 2020, subject to discrimination law (as noted in the Guidance), the prohibition on detriment for whistleblowing/exercising certain other statutory rights and general duties of trust and confidence.

Employees who cannot perform their roles from home remain obvious candidates for furlough. For others, although the process may not need to be quite as rigorous as is required for fair redundancy selection, it would be prudent to set out and apply rational criteria; equally, it would be prudent to consult on the selection with individuals and any trade union or workplace forum.

Giving preference to placing those aged over 70 on furlough would be direct age discrimination but could potentially be justified to achieve the legitimate aim of protecting vulnerable employees as identified by Government public health advice. Given the potential for employees to have widely differing situations (given individual health concerns and family responsibilities, and dependent on whether work is capable of being done remotely), it would seem sensible to invite volunteers for furlough as a first step.

If the employer decides to make redundancies later on, it will of course need to apply a fair selection process at that point. The CJRS does not prevent an employer making redundancies during or at the end of a period of furlough (although see discussion here). The Guidance notes that normal redundancy rules apply to furloughed employees.

It may be possible for employees to argue that an employer's failure to use furlough rather than make redundancies renders any redundancies before the end of the scheme unfair, although this argument may become more difficult once employers are required to contribute to the cost from August 2020.

7. PROCESS FOR CLAIMS

Employers can upload claims through the HMRC online portal and grants are expected to arrive in employer bank accounts via BACS payment within six working days. The claim end date must be no more than 14 days in the future from the date the claim is made and any claim period must contain all the furloughed days that the claim amount relates to. The Schedule clarifies that employers do not need to make a payment to employees in advance of claiming reimbursement from the CJRS, provided they intend to pay employees within a reasonable time of receipt.

Employers must provide details of:

- the employer's PAYE reference number, unique taxpayer reference/company registration number, bank account details and billing address, and contact details
- the number of employees furloughed, their names and NI numbers (and should make a search for the number if unknown, or contact HMRC if an employee has no or a temporary NI number), and can optionally also provide their payroll/employee number
- claim period (start and end date) and the full amounts claimed for each (separately) of employee wages, NICs and minimum pension contributions
- if claiming for flexibly furloughed employees, the number of usual hours and the number of hours [to be] worked in the claim period; employers should also jeep a record of the number of furloughed hours.

Employers with fewer than 100 furloughed employees will need to enter details of each employee directly into the system; those with 100 or more furloughed employees should populate an upload the template provided. Agents authorised to act for an employer for PAYE purposes can upload the claim on their behalf, but file-only agents cannot. Records must be kept for 6 years, including records of the amount claimed can claim period for each furloughed employee, the usual and actual hours worked for those flexibly furloughed, and calculations used. Employees must then be told that a claim has been made and that they do not need to take any more action.

Employers must claim for all employees in each claim period at one time. The claim can be saved in draft but must be completed within 7 days of starting it. A claim can also be deleted within 72 hours of its submission. If an error has been made in a claim resulting in an overclaimed amount, this must be paid back to HMRC. The employer will be asked to declare any overclaimed amount when making their next claim and adjust the amount down to reflect it. A record of the adjustment should be kept for 6 years. If no further claims are planned, employers must notify HMRC to be given a payment reference number and pay the overclaimed amount back as set out here. Where grants have been overpaid and not repaid, the employer must notify HMRC by the latest of 90 days after receiving the money and 20 October 2020, otherwise penalties may be charged - see section 2 for further details.

If the error results in an underclaim, the employer should contact HMRC to amend the claim and HMRC will conduct additional checks. Amendments can no longer be made to add employees to claims for any period up to 30 June (the cut-off for this was 31 July).

The grant must be paid in full to the employee and claimed employer NICs and pension contributions must also be paid, otherwise the money has to be repaid to the HMRC. No administration charges, fees or other costs can be charged from the money granted. Income tax, employee National Insurance contributions, and Student Loan repayments should continue to be deducted from the furlough wages paid to the employee, and the Guidance confirms that the same applies to salary deductions authorised by an employee (including any automatic enrolment 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 wages to the extent that this would take the individual's furlough pay below the minimum amount payable under the CJRS.

Payments received under the CJRS must be included as income when calculating taxable profits for Income Tax and Corporation Tax purposes.

8. REDUNDANCIES AND OTHER TERMINATIONS OF FURLOUGHED EMPLOYEES

GIVING NOTICE DURING FURLOUGH

Employers can give notice of termination to employees while they are on furlough. They can also continue to claim a CJRS grant covering the relevant proportion of the wages paid to those employees while they are on statutory or contractual notice (see discussion in section 2 above). Grants cannot be claimed in respect of pay in lieu of notice.

There has been some debate as to whether it could be viewed as an abuse of the CJRS to give a longer period of notice than is required by contract or statute, to expire on 31 October 2020 when the CJRS ends. We consider that the risk of HMRC taking this view and pursuing repayment of the relevant grant is low; HMRC is likely to focus on clearer cases of abuse, particularly given a recent survey suggesting that, contrary to the rules of the scheme, two thirds of employees furloughed prior to 1 July continued to work for their employers during furlough (albeit that only around 20% were formally asked to do so by their employer). An alternative to extending the period of notice would be simply to defer the giving of the required period of notice so that it expires on 31 October.

CALCULATING STATUTORY REDUNDANCY PAY AND NOTICE PAY WHERE EMPLOYEE ON REDUCED FURLOUGH RATE OF PAY

On 31 July 2020 new regulations came into effect aimed at ensuring that employers making redundant employees who have been furloughed (including flexibly furloughed) must calculate any statutory redundancy pay entitlement based on the employees' normal wages, rather than a reduced furlough rate. (Employees dismissed for redundancy are entitled to a statutory redundancy payment calculated using age, length of service and weekly pay rate, provided they have two years’ continuous service.)

The new regulations are complex but in summary provide that, for those with normal working hours, any reduction in the amount payable as a result of the employee being furloughed must be disregarded when calculating "a week's pay" for these purposes. For those who do not have normal working hours, "a week's pay" is calculated according to their "reference salary" for claiming furlough pay under the Coronavirus Job Retention Scheme (CJRS), but without the cap imposed by the CJRS.

Where an employee has normal working hours and their remuneration does not vary according to the time or amount of work done, the new rules apply where the calculation date is on or before 31 October 2020 (as for these employees "a week's pay" is based on the rate on the calculation date and 31 October is the last date on which the employee could be on furlough and therefore potentially on reduced furlough pay on the calculation date). The 31 October cut-off for calculation dates is not applied to other categories of employee given that for them calculations involve averaging pay rates over the 12 weeks prior to the relevant calculation date and therefore periods spent on furlough could affect statutory redundancy payments for redundancies taking place until mid January 2021.

The same rules are applied in relation to the calculation of a week's pay for certain other statutory rights where an employee is dismissed while or after being furloughed:

- minimum statutory notice pay: where an employee is absent from work during the notice period because of sickness, pregnancy/childbirth/family leave, holiday or because no work is provided by the employer (but the employee is ready and willing to work), the employee is entitled to be paid as if working normally during the notice period unless the employee's contractual notice period exceeds the statutory minimum (one week per year of service up to a maximum of 12 weeks) by at least one week
- remuneration for time off to look for work or arrange training
- compensation for failure to provide a written statement of reasons for dismissal
- unfair dismissal basic awards
- additional awards for failure to comply with a reinstatement or re-engagement order (made following unfair dismissal).

Where a furloughed employee is not entitled to minimum statutory notice pay (eg, their contractual notice period exceeds the statutory minimum by at least one week or, possibly, the employee has been furloughed at their own request and so cannot be viewed as "ready and willing to work"), employers can continue to pay the contractual rate during the notice period; this will usually be the furlough rate unless the employer agreed otherwise in the furlough agreement.

The regulations came into force on 31 July 2020 but do not expressly state whether it is the notice of termination, the termination date or the calculation date that must occur on or after 31 July in respect of the various rights covered.

- For statutory redundancy payments the new rules will probably apply where the effective date of termination is on or after 31 July, ie where notice expires on or after 31 July (even if notice was given prior to that date) or would have done so had statutory minimum notice been given.

- In relation to an entitlement to statutory minimum notice pay, the new rules should apply if both the date notice is served and the date of termination occur on or after 31 July, and will not apply if both dates occur prior to 31 July. The position is less certain where notice is served before 31 July and the employment ends on or after that date: it could be argued that the key date is when the entitlement to minimum statutory notice pay arises, that this is the date notice is served and therefore that the new rules would not apply even in respect of that portion of the notice period occurring after 30 July 2020.

If the new rules do not apply to some or all of the notice weeks, the position under the previous rules depends on whether the employee has normal working hours and remuneration that does not vary according to the time or amount of work done. If the employee does, they should be paid at the contractual rate applicable if the employee worked normal working hours and this would probably be the pre-furlough rate (although it may be possible to argue that the furlough agreement has actually varied the "normal working hours" and/or pay rate). If they do not have normal working hours or are piece or shift workers, the required rate of pay is averaged using actual pay over a 12 week period which will include weeks paid at a reduced furlough rate and so be less than normal pay.

However, particularly as the Government's announcement simply states that the legislation "will ensure that notice pay is based on normal wages rather than their wages under the CJRS", it is likely that employers will come under pressure to pay the pre-furlough rate for all notice weeks regardless of the strict legal requirement. Employers will need to bear in mind employee relations and reputational issues when deciding their approach.

The statutory cap on a week's pay (currently £538) which is applied when calculating statutory redundancy pay, unfair dismissal basic awards (but not the compensatory award) and additional awards continues to apply to those payments. (In our view the regulations do not extend this cap to statutory notice pay, unfair dismissal compensatory awards or the other statutory payments which are not normally affected by the cap, although some commentators have suggested this may be the inadvertent effect of the slightly unclear drafting.)

Grants cannot be claimed under the CJRS in respect of redundancy payments.

9. JOB RETENTION BONUS

The Chancellor's Economic Statement delivered on 8 July 2020 announced that the government will introduce a one-off (taxable) payment of £1,000 to UK employers for every furloughed employee who remains continuously employed through to the end of January 2021. Further details were published on 31 July 2020.

Employees must earn above the Lower Earnings Limit (£520 per month) on average between the end of the Coronavirus Job Retention Scheme and the end of January 2021 and receive at least some earnings in each of the three months. Payments will be made from February 2021. There is no cap on this measure, which can potentially be applied to all 9 million employees currently on furlough.

The bonus will not be available in respect of employees who have been given notice of termination before 1 February 2021, and an employer will only be able to claim in respect of employees transferred to it under TUPE if the new employer has successfully claimed furlough for them - furlough by the transferor is not sufficient; the same applies for changes of ownership covered by PAYE business succession rules and certain transfers from a liquidator.

Only earnings recorded through HMRC Real Time Information (RTI) records can count towards the earnings threshold. The policy paper notes that "*Employers must keep their payroll up to date and accurate and address all requests from HMRC to provide missing employee data in respect of historic Coronavirus Job Retention Scheme claims. Failure to maintain accurate records may jeopardise an employer's claim. HMRC will withhold payment of the Job Retention Bonus where it believes there is a risk that Coronavirus Job Retention Scheme claims may have been fraudulently claimed or inflated, until the enquiry is completed*."

Full guidance will be published by the end of September.

10. ACTION POINTS

- Claims for periods of furlough up to 30 June 2020 can no longer be made – the cut-off was 31 July 2020.
- Employers will need to consider whether, and if so how, they will continue to furlough employees in the period through to the end of October 2020. Flexible furlough will demand extra resource and time given the complexity of the calculations, and employers will need to keep an eye on the high-watermark number and orphan day provisions particularly where rotational furlough has been used.
- Employers may need to agree changes to furlough agreements and contractual terms to move employees onto flexible furlough, or give notice to bring employees back to work their usual hours. Where previously furloughed employees are to return to work some

hours at the work site rather than remotely, employers may need to address employee concerns over health and safety – these are discussed further in our client briefing on post-lockdown issues here. Employers should plan for the practical difficulties and extra time these processes may take while employees are on furlough.

- Care should also be taken to comply with all record keeping requirements.
- The requirement to shoulder part of the financial cost of furlough from 1 August 2020 may also force some employers to consider the prospect of redundancies. The requirement to start collective redundancy consultation for 100 or more proposed redundancies (and to notify BEIS) at least 45 days before the first proposed dismissal date would mean that consultation should have commenced by 16 June 2020 if redundancies are proposed to take effect on 31 July 2020, or by 16 September 2020 if proposed to take place when the scheme ends on 31 October 2020.
- In order to be eligible for the Job Retention Scheme, employers should ensure that their employee records are up to date and that all of their CJRS claims have been accurately submitted and any necessary amendments notified to HMRC.

View our Catalyst hub

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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