

COVID-19

Job Retention Scheme
Update for November 2020



Freshfields Bruckhaus Deringer

Key questions for employers – updated Job Retention Scheme

As announced on 5 November 2020, the Coronavirus Job Retention Scheme (**CJRS**), otherwise known as the furlough scheme, has been extended by the UK Government until 31 March 2021. The Government has now published updated guidance and a revised Treasury direction (which is the legal underpin to the furlough scheme). The revised direction applies until 31 January 2021, at which point we expect further updates from the Government on the continued operation of the CJRS.

We have examined the new [guidance](#) and [Treasury direction](#) and have sought to answer some key questions on how the CJRS operates over the period between 1 November and 31 January.

What payments will the government cover under the extended CJRS?

From 1 November 2020 employers can claim 80% of an employee's usual salary for any hours not worked, up to a maximum of £2,500 per month. This effectively reverts to the original structure of the CJRS where no contribution towards the 80% is required from employers.

Employers must, however, make minimum pension contributions and pay employer national insurance contributions on furlough payments.

The Government has confirmed that it will bear the full cost of the 80% contribution until at least 31 January 2021. It will review the scheme in January to decide whether employers should fund part of the 80% during February and March (as had been the case up to the end of October).

Which employees can be furloughed?

Claims can be made for employees who were employed on 30 October 2020 as long as there has been a PAYE Real Time Information (**RTI**) submitted in respect of that employee between 20 March 2020 and 30 October 2020.

There is no restriction on how many employees can be placed on furlough.

CJRS claims cannot be made in respect of any days during the period between 1 December 2020 and 31 January 2021 when the employee is under notice of termination or is on unpaid leave. The relevant period stops on 31 January because that is the final date covered by the revised Treasury direction. However, employers should not assume that the position will change over the last two months CJRS remains in force (i.e. in February and March) as it is unlikely that the CJRS terms will become more generous. Until 1 December, the guidance confirms that employers can continue to claim CJRS payments for employees who are serving their statutory or contractual notice period (but, as before, the grants cannot be used to substitute redundancy payments). Employers should of course remember the need to follow a fair process (which may require collective consultation) before they can give notice of redundancy.

Can I re-hire employees who have already been made redundant or have otherwise left employment and place them on furlough?

Yes. If employees were made redundant, or otherwise stopped working for the employer, on or after 23 September 2020 they can be re-hired and placed on furlough. The employee in question must have been employed and on PAYE on or before 23 September 2020 and an RTI submission must have been made on their behalf between 20 March 2020 and this date. They do not have to have been previously furloughed to be rehired.

An interesting question arises as to whether the job into which an employee is re-hired must have some long-term viability. The Government's stated intention to review CJRS eligibility for employees under notice of termination (as described in the question above) may suggest that the scheme is not designed to be used to cover employment costs for non-viable roles. Re-hiring an employee simply to cover employment costs through lockdown, before making them redundant again, appears currently to be permitted. However, this scenario may fall foul of the eligibility requirements once the Government conducts its further review in the next few weeks.

Additionally, given the stance the Government has taken in relation to the CJRS not being available in respect of employees under notice, there must be some risk that employees who are re-hired on fixed-term contracts expiring at the end of the CJRS period would not be covered under CJRS. There is no guidance in the Treasury direction that covers this, and employers should therefore bear in mind that until this question is addressed there is no guarantee that costs incurred for such employees can be re-claimed.

Can employers use the scheme if they didn't previously place any employees on furlough?

Yes. All employers can use the new CJRS, providing that they have a UK bank account and are set up with UK PAYE. There is no need to have previously claimed for an employee before 1 November 2020.

How long can employees be furloughed for?

Employees can either be furloughed on a full-time basis or 'flexibly' furloughed, meaning that they can perform work for the employer for certain days and be furloughed on others.

Employees can be furloughed for any period of time, although the guidance does say that the period claimed for must be for a minimum claim period of seven calendar days (in other words, whilst you can furlough employees for three days a week, you must aggregate your claims to be a minimum of seven days).

Key questions for employers

What needs to be agreed with employees?

Under the Treasury direction, employers must reach agreement with the employee or trade union in order to place employees on furlough, regardless of whether they are flexibly furloughed or not. The agreement must be in place before the start of the relevant claim period, but may be varied during the claim period.

The updated guidance contains one 'exception'. In recognition of the fact that the extended scheme runs from 1 November, and the guidance was released on 10 November, the Government has confirmed that a retrospective agreement with employees to place them on furlough (or flexible furlough) with effect from 1 November will still be valid. However, the window to rely on this exception was small: only retrospective agreements put in place up to and including 13 November may be relied on in making a claim.

How is pay to be calculated?

When calculating the amount of pay that can be claimed:

- For employees for whom a CJRS claim was made for a claim period ending any time on or before 31 October 2020, or who were on payroll and had an RTI submitted as at 19 March 2020, the reference period will be the last pay period ending on or before 19 March 2020.
- For all other employees, the employee's reference period will be their last pay period ending on or before 30 October 2020 (which by definition will only apply for periods after 1 November).

For employees whose pay varies:

- For employees for whom a CJRS claim was made for a claim period ending any time on or before 31 October 2020, or who were on payroll and had an RTI submitted as at 19 March 2020, the employee's wages will be the higher of either the average wage across the 2019/2020 tax year or wage for the corresponding calendar year period in the tax year 2019/2020.
- For all other employees, pay will be calculated by reference to the average wages from 6 April 2020 (or their start date, if later) up to the employee's first day on furlough on or after 1 November 2020. Employers should read the full guidance on the gov.uk website [here](#) for further information on how pay should be calculated.

What deadlines will apply?

The extended CJRS will run until 31 March 2021. Claims from 1 November 2020 must be submitted by 11:59pm 14 calendar days after the month the employer is claiming for. The amount of any claim can be amended within 28 days of the month the claim relates to.

All claims for periods between 1 July 2020 and 31 October 2020 must be submitted no later than 30 November 2020. After this date, employers will no longer be able to submit any further claims for periods prior to 31 October 2020 or add to any existing claims.

A full list of claim deadline dates is set out on the gov.uk website [here](#).

What are the options where an employee returns from leave?

Where the claim period starts on or after 1 November 2020, the normal CJRS rules will apply in respect of employees returning from maternity, shared parental, paternity, adoption or bereavement leave.

Will it be made public that an employer is participating in the CJRS?

Yes. This is a new and significant change. From December 2020, HMRC will publish employer names and, for companies and LLPs, the company registration number of those who have made claims under the scheme for the month of December onwards. A 'reasonable indication' of the amount claimed will also be included. The information will be published by a notice on gov.uk or by such other means as HMRC consider appropriate.

It is a condition of making a claim under the CJRS that the employer accepts that their details will be published in this way, and employers will want to give consideration to whether they are happy for it to be known publicly that they have claimed under the CJRS. However, an exception can be made if the employer can show that publication would risk the employer, employees or other related parties being at 'serious risk of violence or intimidation'.

What is happening to the Job Support Scheme?

The UK Government has postponed the Job Support Scheme that was due to start on 1 November.

Key questions for employers

What is happening to the £1,000 job retention bonus that was due to come into force?

This has been withdrawn by the UK Government.

Are there any further changes to UK incentive arrangements?

In June and July 2020 HMRC published a series of updates that extended the number of savings contributions an employee in an SAYE scheme could miss without their option lapsing (so called 'payment holidays') where the contributions were missed due to the employee receiving payments under the CJRS i.e. because they were on furlough. The Government had confirmed that these payment holidays would continue while the Job Support Scheme was in place. We expect that the payment holidays should continue to apply now that the CJRS has been extended.

The latest HMRC guidance on EMI schemes also provides a clarification regarding modifications that were made to the EMI legislation in July 2020, to ensure that EMI option holders who found they no longer met the working time commitments because of reasons connected to the coronavirus pandemic could maintain the tax advantages and reliefs of their incentives, as if they continued to work for their employer. The modifications took effect from 19 March 2020 and are due to end in April 2021, but HM Treasury can extend the modifications for a further 12 months if the pandemic has not ended by April 2021.

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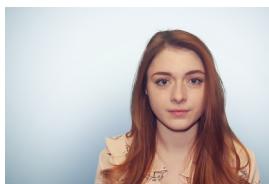
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