



Employment Law Newsletter – Coronavirus update 16th April

Yesterday afternoon the Treasury issued a direction to HMRC and HMRC issued its fourth guidance note on how the scheme will work. Helpfully, this time the information was issued when we were working. The information we sent about the previous guidance is all at <https://watershedhr.com/resources-main/resource-library/newsletters/>

As employers, you will be concerned about the mechanics of obtaining the money. HMRC must be concerned about whether its staff and IT infrastructure will be able to cope. Addressing both worries, the latest guidance says that the way to make a claim is online - the service should be simple to use and any support you need available on GOV.UK.

It encourages you to use the online support and to refrain from contacting HMRC unless it is absolutely necessary - any questions should be directed at your agent, representative or its web chat service.

Here are the changes:

Who can claim?

You must have created and started a PAYE payroll scheme on or before 19th March 2020 rather than 28th February 2020 as previously required. The warning that it can take up to 10 days to enrol for PAYE online has been removed but we do not view that as significant.

For which employees can you claim?

You can now claim for furloughed employees that were on your PAYE payroll on or before 19th March 2020 and which were notified to HMRC on a Real Time Information (RTI) submission on or before 19th March 2020. A change from the previous cut off of 28th February 2020 that would have left many new starters facing dismissal.

What if you made employees redundant or they stopped working for you after 28th February 2020?

If you made employees redundant, or they stopped working for you on or after 28th February 2020, you can re-employ them, put them on furlough and claim for their wages through the scheme. This applies to employees that you made redundant or stopped working for you after 28th February 2020, even if you do not re-employ them until after 19th March 2020.

The employee must have been on your payroll as at 28th February 2020 and must have been notified to HMRC on an RTI submission on or before 28th February 2020.

How does the scheme treat employees with more than one employer?

If an employee has had multiple employers over the past year, has only worked for one of them at any one time, and is being furloughed by their current employer, their former employer/s should not re-employ them, put them on furlough and claim for their wages through the scheme.

Can you furlough an employee who is on unpaid leave?

If an employee started unpaid leave after 28th February 2020, you can put them on furlough instead.

If an employee went on unpaid leave on or before 28th February 2020, you cannot furlough them until the date on which it was agreed they would return from unpaid leave. Of course, there is no obligation for you to do this so you should consider what is best for your business if an employee is not currently receiving wages from you.

Can you furlough an employee who has transferred to you under TUPE or where there has been a change in ownership?

The date change also applies here.

So, a new employer is eligible to claim under the CJRS in respect of the employees of a previous business transferred after 19th March 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.

How does the scheme treat a consolidated payroll?

Where a group of companies have multiple PAYE schemes and there is a transfer of all employees from these schemes into a new consolidated PAYE scheme after 19th March 2020, the new scheme will be eligible to furlough those employees and claim the grants available under the CJRS.

How much can you claim?

The cap remains unchanged, but the calculation of reference salary has changed.

So, you can claim for:

- 80% of your employees' wages (even for employees on National Minimum Wage) - up to a maximum of £2,500 per month (the subsidised pay).
- Employer National Insurance contributions that are paid on the subsidised pay.
- Employer pension contributions on the subsidised pay up to the maximum employer auto enrolment pension contribution.

How do you calculate wages?

Full or part time employees on a salary

Claim for 80% of the employee's salary, as in their last pay period before 19th March 2020.

If, based on previous guidance, you have calculated your claim using the employee's salary as at 28th February 2020 (and this differs from their salary in their last pay period before 19th March 2020) you can choose to still use this calculation for your first claim.

What about employees whose pay varies?

If the employee has been employed for 12 months or more, you can claim the highest of either:

- Their same month's earning from the previous year
- Their average monthly earnings for the 2019-2020 tax year

If the employee has been employed for less than 12 months, claim for 80% of their average monthly earnings since they started work until the date they are furloughed. Previously the guidance did not state that the calculation ended the date that they are furloughed.

If the employee only started in February 2020, they have been employed for less than a month, work out a pro-rata amount for their earnings so far, and claim for 80%.

What will you need to make a claim?

The guidance clarifies that you need only provide details for the employees you want to furlough. It provides further guidance on the mechanics of making a claim.

If you have fewer than 100 furloughed employees you will be asked to enter details of each one you are claiming for directly into the system - this will include their name, National Insurance number, claim period and claim amount, and payroll/employee number (optional).

If you have 100 or more furloughed employees, you will be asked to upload a file with the information rather than type it directly into the system. HMRC will accept the following file types: .xls .xlsx .csv .ods

The file should include the following information for each furloughed employee: name, National Insurance number, claim period and claim amount, payroll/employee number (optional).

HMRC has also reminded you to retain all records and calculations in respect of your claims. But warns that it cannot provide your employees with details of claims you have made on their behalf and asks you to answer their queries rather than directing them to HMRC.

The Treasury has issued a direction to HMRC under powers conferred by the Coronavirus Act 2020.

Treasury direction

The most significant parts of the direction are:

What is the purpose of scheme?

The HMRC guidance has described the aims of the scheme in various ways. The Treasury states that the purpose of the scheme is for '*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*'. This releases employers from the obligation to use the scheme as an alternative to redundancy.

It goes on to say that no CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purpose of CJRS.

Who is a furloughed employee?

Further guidance on the purpose of the scheme is given by explaining that an employee is a furloughed employee if the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

What about company directors?

We had been told that where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to the company, they may do so provided they do no more than would reasonably be judged necessary for that purpose. Those duties have been construed narrowly, so it is only '*work undertaken by a director of a company to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company*' that may be carried out.

Do you need written agreement?

The requirement to have a written agreement has been emphasised. A furloughed employee is not only defined as an employee that has been instructed by the employer to cease all work in relation to their employment, but also that the employer and employee have agreed in writing (which may be in an electronic form such as an e-mail) that the employee will cease all work in relation to their employment.

What counts as wages?

You cannot claim for anything that is not regular salary or wages. So you cannot claim for pay that varies according to the performance of the business, the employee, or is a discretionary payment. It must also not be conditional on any matter or be a benefit of any other kind. It must arise from a legally enforceable agreement, understanding, scheme, transaction, or series of transactions.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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