



FURLough LEAVE - AN ESSENTIAL GUIDE FOR EMPLOYERS (AS AT 24 MARCH 2020)

On Friday, 20 March 2020, the Chancellor, Rishi Sunak, announced that the government was taking the unprecedented step of helping to pay people's wages through a new Coronavirus Job Retention Scheme (the "CJR Scheme"). The CJR Scheme will enable all UK employers to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis.

Limited details of the CJR Scheme are set out in the new government guidance published the same day for businesses and for employees (COVID-19: support for businesses and Covid-19: guidance for employees) (the "Guidance"). We set out below what we know so far and provide some guidance on some key outstanding questions.

THE CORONAVIRUS JOB RETENTION SCHEME: SUMMARY OF WHAT WE KNOW SO FAR

The Chancellor's announcement was categorical that "any employer in the country small or large, charitable or non-profit, will be eligible" for the CJR Scheme. Unlike the recently introduced scheme to reimburse two weeks' statutory sick pay ("SSP"), which is limited to employers with fewer than 250 employees as at 28 February 2020, the new CJR Scheme does not appear to be limited to any particular size of employer.

The Guidance states that the CJR Scheme applies to "those employees that would otherwise have been laid off during this crisis". It is understood that "laid off" for these purposes means either made redundant or otherwise not provided with work or pay. Employees are not allowed to work for their employer while furloughed.

Employers will first need to designate affected employees as "furloughed workers" and then submit their information to HMRC through a new online portal (which has not yet been set up). It is likely that most employers will need to obtain the agreement of employees before designating them as furloughed workers. HMRC will reimburse 80% of furloughed workers "wage costs, up to a cap of £2,500 per month". HMRC will make the payments directly to employers.

HMRC's existing systems do not facilitate payments to employers, so HMRC is working urgently to set up a new system for reimbursement. If employers are struggling with cash flow in the meantime, the Guidance directs them to the eligibility requirements for the new Coronavirus Business Interruption Loan.

We have set out below some key unanswered questions and what we think is the most likely answer, legally and practically.

WHO DOES THE CJR SCHEME APPLY TO?

The CJR Scheme applies to employees. It is not clear, however, if workers are covered by the new CJR Scheme. The Guidance labels those individuals designated as being on furlough leave as “furloughed workers”. It seems to be a necessary part of the Scheme that if someone is designated as a “furloughed worker” they are kept on their employer’s payroll. Our understanding is that those not on payroll, such as self-employed workers, would not therefore be covered. If workers are directly engaged and paid via payroll (with tax and national insurance deducted), it seems likely that they will be covered.

ARE THERE ANY OTHER QUALIFYING CONDITIONS?

There is no suggestion that employees will be means-tested before they can qualify for wage protection under the CJR Scheme. The Guidance does not indicate that employees require a minimum length of service with their employer before they may qualify under the CJR Scheme. It would be expected that the CJR Scheme would only apply to those employed or engaged prior to its announcement on 20 March 2020, although this is not stated expressly.

IS EMPLOYEE CONSENT REQUIRED?

The employee section of the Guidance says that: “If your employer intends to access the CJR Scheme, they will discuss with you becoming classified as a furloughed worker.” The employer section clarifies that it is for the employer to designate affected employees as ‘furloughed workers,’ and to notify them of this change. It also states, however, that “changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation”.

There may be some employers who have a contractual right to place employees on unpaid or part paid leave. Careful consideration will need to be given to whether such contractual right actually applies to this new type of leave, furlough leave (leave with part pay). Some employers may have the contractual right to lay employees off. However, in our view, furlough leave and the statutory lay off provisions are two different things and should not be confused. Using a contractual right to lay-off to impose furlough leave should be carefully considered as it potentially brings in other elements of the law regarding lay-off to the new right to furlough leave.

Most employers will not have a contractual right to unilaterally place employees on furlough leave and so will need to obtain the employee’s agreement before designating him or her as a furloughed worker. If the alternative to being furloughed is genuinely to be laid off or made redundant, we expect that all but the most militant of employees will agree to being designated a furloughed worker.

As employers need to notify employees they are designated as a furlough worker, we recommend confirming this in writing once agreement is reached.

HOW LONG WILL THE CJR SCHEME LAST FOR?

The Guidance says that “we intend for the Coronavirus Job Retention Scheme to run for at least 3 months from 1 March 2020, but will extend if necessary.”

WILL EMPLOYEES WHO HAVE BEEN MADE REDUNDANT PRIOR TO 20 MARCH 2020 BE COVERED?

The CJR Scheme will apply retrospectively from 1 March 2020. The CJR Scheme was not announced until 20 March 2020 and many employees were made redundant in the intervening period in response to the coronavirus situation. Although it is currently unclear if employers will be allowed to re-engage these employees and then immediately designate them as “furloughed workers” it seems that those dismissed prior to 20 March 2020 may not be covered by the CJR Scheme.

WHAT IF THE EMPLOYER HAS ALREADY IMPLEMENTED OTHER COST SAVING MEASURES?

If an employer has already implemented alternative working arrangements that would avoid the need for employees to be made redundant (e.g. short-time working or reduced wages/salary or placing employees on unpaid leave), this could possibly prevent such employers from accessing support through the CJR Scheme. The CJR Scheme will apply to any employee who would otherwise have been laid off (made redundant or provided with no work and no pay). If a reduced working hours scheme is already in place and no employees need to be laid off, then the CJR Scheme may not apply.

It is not yet known how the government will assess which employees would otherwise have been laid off. For example, we do not know what evidence (if any) HMRC will require an employer to provide in support of its claim for financial support. It is expected that HMRC will require certain evidence before allowing employers access to the CJR Scheme in order to avoid its abuse.

CAN THE CJR SCHEME COVER EMPLOYEES WHO ARE LOOKING AFTER CHILDREN?

Many employees are currently working from home, juggling childcare, home schooling and work. Some are taking holiday, some unpaid parental leave and some are reducing or varying hours. If such employees are unable to work (or are finding it difficult to work) due to caring commitments, they are likely to be interested in being designated as a furloughed worker. Employees will not be able unilaterally to put themselves on furlough leave. Arguably, such employees will not be entitled to be designated as a furloughed worker unless they ‘would otherwise have been laid off’. If there is no work for them, their employer may agree to putting them on furlough leave. See below for some comments on selection.

CAN THE CJR SCHEME COVER EMPLOYEES WHO ARE ON SICK LEAVE?

As above, employees on sick leave may be covered by the CJR Scheme if there is no work for them to do (if they were well enough to attend work). See below for comments on selection.

WHAT ABOUT EMPLOYEES ON MATERNITY OR OTHER FAMILY FRIENDLY LEAVE?

Employees currently receiving no pay, such as those on unpaid maternity leave, may seek to return to work earlier than planned and immediately be designated as furloughed and entitled to 80% pay. If the period of their leave ends soon, there is no reason why maternity returners cannot be included in the CJR Scheme. See below for comments on selection. However, if they wish to curtail their leave early, the Government may take the view that they would need to give the requisite notice (8 weeks) and so may not be in a position to be included. Artificially curtailing leave in order to fall within the Scheme may not be allowed.

CAN EMPLOYEES UNDERTAKE WORK WHILE FURLOUGHED?

One condition of being on furlough leave under the CJR Scheme is that the employee cannot do work for his or her employer. It is not clear whether employees could be designated as furloughed employees for a period of time, then work again and then be designated as furloughed employees again. If this is not allowed, the CJR Scheme may not be suitable for all employers whose businesses are under pressure as a result of the coronavirus crisis. Those employers who still require their employees to do some work, and are only able to pay them for the work that they do, may need to implement short-time working or other pay reduction schemes, even if such schemes result in their employees receiving less than 80% of their pay. This is likely to be unpopular. Such employers may, instead, decide to retain a proportion of their workforce to undertake the remaining work at their normal rate of pay; and designate the other part of their workforce as furloughed workers.

It is not clear if employees can work for someone other than their employer whilst on furlough leave. This is clearly not the intention of the benefit however.

CAN EMPLOYERS ROTATE EMPLOYEES IN AND OUT OF FURLOUGH LEAVE?

We can see that it would be attractive to employees and employers if they could rotate employees in and out of furlough leave, perhaps one week on, one week off, or designate each employee as a furloughed worker for a certain number of days each week and require them to work on the remaining days. It is not clear whether such arrangements would be legally or practically possible. Given employers have to designate employees as furloughed workers and submit information to HMRC about the furloughed worker and their earnings, it seems that rotating in and out may not be practically possible.

WHAT IS THE TAX TREATMENT?

The Guidance states that HMRC will reimburse 80% of furloughed workers' wage costs, up to a cap of £2,500 per month. As this is reimbursement scheme (HMRC are not paying the furloughed employees themselves) employers will need to continue paying such employees. As furloughed workers remain on the payroll of their employer, it is likely that the employer will need to deduct tax and employee national insurance from amounts paid as usual. It is likely that the employer would also have to pay employer national insurance contributions (13.8%) and possibly also the apprenticeship levy (0.5%). Employers will need to consider how much they are actually going to be able to pay furloughed employees, if they wish the payment and attendant tax to be covered by the reimbursement. Furloughed employees may therefore not receive the full £2,500 as some may expect. It will be more likely to be £2,500, less income tax and employer and employee national insurance and possibly also less the apprenticeship levy payment. This may be a difficult message to convey when getting employee consent.

WHAT IS COVERED BY "WAGE COSTS"?

It is also not clear what will be included within the term "wage costs", for example, basic salary, overtime, commission etc. Where an employee has already been subjected to a pay reduction, it is unclear if their original salary would apply for the purposes of the CJR Scheme. Where an employee's pay is not fixed, it may be difficult to work out what their "wage costs" are. One possibility is that the government could use the relatively complex formula for calculating "weekly pay" set out in the Employment Rights Act 1996. From 6 April 2020, the reference period for calculating average weekly pay for an employee with variable pay extends from 12 to 52 weeks. If this longer reference period applies to calculating wage costs under the CJR Scheme, it will in many cases shelter employees who have already suffered reduced pay as a result of the coronavirus crisis.

It is also unclear how benefits, pension payments and salary sacrifice arrangements will be affected by the CRJ Scheme.

WILL EMPLOYERS HAVE TO REIMBURSE THE REIMBURSEMENT?

This reimbursement was described by the Chancellor, and is referenced by the Guidance, as a "grant", suggesting that employers will not need to repay the sums received under the CJR Scheme.

DO EMPLOYERS HAVE TO TOP UP THE REMAINING 20%?

The Guidance says: "You will remain employed while furloughed. Your employer could choose to fund the differences between this payment and your salary, but does not have to." So, it is optional for the employer to fund the difference between HMRC's payment and the employee's wages/ salary and other costs, such as employer national insurance contributions. Arguably, without a contractual right to withhold pay, it may be unlawful for the employer not to top-up the employee's wages/ salary, if the employer can afford to do so.

HOW DO EMPLOYERS SELECT WHO TO PUT ON FURLOUGH LEAVE?

Employers are likely to wish to ring fence and retain their most productive employees, while furloughing others. More conscientious and efficient employees are likely to find themselves being required to work, while their potentially less dedicated and able colleagues are being paid at least 80% of their wages/ salary to remain at home. This is likely to be unpopular,

especially given the additional risks to health that attending a workplace poses at present and the childcare difficulties many are facing.

Where employers need to select who within a department or team to furlough, care should be taken, as there are risks of discrimination as with any selection exercise (for example redundancy selection). Although it makes logical sense to select vulnerable employees (those over 70 or with one of the listed health conditions) or those with childcare obligations, care needs to be taken to avoid sex, age and disability discrimination. It may however be justifiable to prioritise those who are regarded as being vulnerable. Ideally, therefore, employers should first ask for volunteers. Then if they do not have enough, carry out an objective non-discriminatory selection process.

DO FURLOUGHED WORKERS CONTINUE TO ACCRUE SERVICE?

It is currently not clear, but seems likely that employees will continue to accrue service while furloughed. This may encourage employers who are not optimistic about the future recovery of their business, to terminate the employment of any employees with less than two years' service, rather than designate them as furloughed workers (to avoid them accruing valuable employment rights, including the right to a redundancy payment). This is surely not the government's intention and this may, therefore, prompt the government to suspend service accrual while employees are furloughed.

DOES HOLIDAY CONTINUE TO ACCRUE?

The Guidance does not clarify if furloughed workers will continue to accrue annual leave whilst on furlough leave. The government may be dissuaded from enabling furloughed workers to accrue annual leave while furloughed, to reassure anxious employers that they will not be faced with substantial accrued holiday post crisis or substantial termination costs, if they no longer require their furloughed workforce after the coronavirus crisis subsides. However this would require changes to the existing legislation as at present even those on unpaid leave continue to accrue holiday.

Employers may be able to ask furloughed workers to take some holiday whilst they are on furlough leave but we are awaiting further clarification on this. Employers would need to ensure they were paid fully for such holiday.

FURTHER GUIDANCE AND LEGISLATION AWAITED

Clearly, far greater detail about the CJR Scheme is required to enable struggling employers to determine whether they will be able to access the support that they currently need. Such detail is required urgently, as many employers around the country are deciding how best to ensure the survival of their businesses now, while also seeking to preserve a workforce that will assist them in recovering, once the coronavirus crisis is passed.

KEY CONTACTS

For further information about any of the issues raised in this guide, please contact:



Kerry Garcia

Head of Employment, Pensions and Immigration
T: +44 (0)1483 734270
M: +44 (0)7900 384163
E: kerry.garcia@stevens-bolton.com

Lloyd Davey

Partner
T: +44 (0)1483 734232
M: +44 (0)7900 365147
E: lloyd.davey@stevens-bolton.com



Hannah Ford

Partner
T: +44 (0)1483 401218
M: +44 (0)7818 402796
E: hannah.ford@stevens-bolton.com

Sarah Taylor

Senior Associate
T: +44 (0)1483 401202
M: +44 (0)7879 634298
E: sarah.taylor@stevens-bolton.com

STEVENS&BOLTON

Wey House, Farnham Road
Guildford, Surrey, GU1 4YD
Tel: +44 (0)1483 302264
Fax: +44 (0)1483 302254
DX 2423 Guildford 1
www.stevens-bolton.com

The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

© Stevens & Bolton LLP 2020.

Stevens & Bolton LLP is a limited liability partnership registered in England with registered number OC306955 and is authorised and regulated by the Solicitors Regulation Authority with SRA number 401245. A list of members' names is open to inspection at the above address.

DEPARTMENTAL\14579821v1