

## Letter explaining Coronavirus Job Retention Scheme and furlough leave to be sent to employees registered on the employer's PAYE system

### Notes for employer only:

HM Revenue and Customs has published Guidance on the Coronavirus Job Retention Scheme (**CJRS**), under which employers will be able to claim back 80% of the wages (up to £2,500 per month) of employees who have been furloughed (i.e. put on a leave of absence) in response to the COVID-19 pandemic.

The CJRS was announced on 20 March 2020 and BEIS has already published Guidance for employees but the new HMRC Guidance is the first detailed overview of how it will work in practice.

### When will CJRS start?

HMRC expects the scheme to be up and running by the end of April.

### How long is CJRS open for?

HMRC confirms that the CJRS will be in place for at least three months from 1 March 2020.

HMRC will establish an online portal through which employers will be able to reclaim:

- 1 wage costs, **plus**
- 2 the employer's NI contributions; **plus**
- 3 the minimum automatic enrolment employer pension contributions on that wage.

### What businesses are covered?

The scheme will be open to all UK employers, including charities, recruitment agencies and public authorities (who are not receiving direct support from the Government), so long as they have:

- 1 created and started a PAYE payroll scheme on or before 28 February 2020, and
- 2 have a UK bank account.

### What employees are covered?

The HMRC Guidance states that the CJRS will cover employees who have been on the payroll since 28 February 2020 on any type of contract, including:

- 1 full-time and part-time employees,
- 2 employees on agency contracts, and
- 3 employees on flexible or zero-hour contracts.

An employee is considered furloughed for the purpose of CJRS only if he or she does no work for the employer. The scheme therefore does not cover the wages of employees whose hours are reduced.

#### What salary should the employer pay?

During the period of furlough, the employer should pay the employee at least the lower of 80% of salary or £2,500. In each case PAYE (Income Tax) and NI is deducted before the salary is paid to the employee.

The Guidance notes that the employer may choose to top up wages to 100% but is not obliged to do so.

For full-time and part-time salaried employees, the employee's actual salary, before tax, as at 28 February 2020 should be used to calculate the 80%.

The employee's wage will be subject to income tax and other deductions eg NI.

The Guidance notes that fees, commission and bonuses should not be included.

Further guidance on how to calculate claims for employers national insurance contributions and the minimum automatic employer pension enrolment contributions will be issued before CJRS goes live.

Where an employee's pay varies, the employer will be able to claim for the higher of the employee's earnings in the same month the previous year or the employee's average monthly earnings in the 2019/20 tax year.

In the case of an employee who has been employed for less than a year, the employer will be able to claim for an average of the employee's monthly earnings since he or she started work.

In the case of an employee who only started in February 2020, the employer will be required to pro-rate the employee's earnings so far.

The Guidance also covers the application of the national minimum wage (NMW) to furloughed employees.

It states that, since employees are only entitled to the NMW while doing work, furloughed employees, who are not working, must be paid at the 80% rate (or £2,500) even if, based on their usual working hours, this would be below the applicable rate of NMW.

However, the Guidance goes on to state that if employees are required to, for example, 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.

#### What happens if an employee is on Statutory Sick Pay?

Employee who are on sick leave or self-isolating should get statutory sick pay but can be furloughed after this time. We think therefore that an employee on contractual sick pay could also be placed on furlough leave when their fit note return to work date is reached.

Employees who are shielding in line with public health Guidance can be placed in the CJRS.

#### What to say to employees and what should employers ask them to sign?

The Guidance recommends that employers discuss furloughing with their staff and make any changes to the employment contract **by agreement**.

We advise that this letter is the first letter to send to staff.

Accordingly this letter records the date when the first communication to furlough was given to the staff. If the employer is planning to reduce the salary and any benefits related to salary (eg pension) to the 80% level then under employment law this is an unlawful deduction from wages for the 20% of salary and benefits and could be constructive (unfair dismissal).

It is therefore important to meet/speak with the employee to explain what the employer is proposing to do. In effect this is consultation with them.

This first letter assumes that March salary and benefits will be paid in full. If that is not the case then please speak with us as a more detailed letter will be needed explaining what is happening.

Employers should then write a second letter to employees seeking their agreement showing the exact changes to their salary and other benefits and confirming that they have been furloughed and keep a record of this communication.

This second letter would be counter-signed by the employee and it is safest to get the second letter counter-signed even if there has been agreement by email. Under employment law it is important to have a counter-signed letter evidencing the change. If the employer is maintaining 100% of salary and benefits and just designating the employee as a furloughed worker a different letter will be sent.

It is important to maintain good communication and be available to speak as needed.

Employers should expect questions and therefore employers can produce a Q&A to help.

#### How does the employer select staff?

The Guidance states that equality and discrimination laws continue to apply to the selection process for employees to go on furlough leave. There is further advice on what to do in our article <https://www.thelegalpartners.com/coronavirus-job-retention-scheme-how-to-furlough-workers/>

#### What happens if the employer is planning to furlough 20 or more staff?

This letter is designed where less than 20 staff are employed by one legal entity at one establishment are to be included in the CJRS.

If there are more than 20 staff and the employer would have to consider redundancies if the employees did not accept the furlough leave at 80% salary then the collective consultation paragraph in this letter needs to be included.

The Guidance makes specific reference to these risks and the need to take overall legal advice.

What happens to employees who have been made redundant – can they be furloughed and be in CJRS?

Employees who have been made redundant since 28 February can be furloughed if they are rehired.

What happens to employees hired after 28 February 2020?

They cannot join CJRS.

What is the minimum time that an employee can be furloughed?

3 weeks.

Can an employee volunteer or do training work during furlough leave?

A furloughed employee can volunteer as eg an NHS volunteer, as long as he/she does not provide services or generate revenue for the organisation.

If an employee is required to complete online training courses whilst they are on furlough leave then they must be paid at least the National Living Wage/National Minimum Wage for the time spent training even if this is more than 80% of their salary which will be subsidised by CJRS.

What happens to an employee who is on maternity leave, contractual adoption pay, maternity pay or shared parental pay?

The normal rules apply and they are entitled to claim the usual statutory pay or allowances.

For example an employee who qualifies for statutory maternity pay will still be eligible for 90% of their average weekly earnings in the first six weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently hundred and £148.68 a week, rising £151.20 a week from April 2020.

If the employer offers enhanced (earnings -related) contractual pay to women on maternity leave this is included as wage costs and can be claimed through CJRS.

The same principle applies to contractual adoption, paternity or shared parental pay.

What information does an employer need to claim under CJRS?

To claim an employer will need:

1. the ePAYE reference number
2. the number of employees being furloughed
3. the claim (start and end date)
4. the amount claimed (per the minimum length of furloughing of three weeks)
5. the employer's bank account number and sort code
6. employers contact name
7. employers contact phone number

Employers will need to calculate the amount they are claiming from the Government. HMRC will retain the right to audit retrospectively all aspects of an employer's claim.

How frequently can an employer submit a claim?

An employer can only submit one claim every three weeks.

Can an employer backdate the claim to 1 March 2020?

The Guidance says yes if applicable. For cash flow planning we suggest being prudent and waiting until the CJRS portal is active to see exactly what statement/information needs to be provided to HMRC in order to verify the date of the furlough leave.

What happens when the CJRS ends?

Employees that have been on furlough leave have the same rights as they did previously.

Returning employees will still have their usual rights to statutory sick pay, maternity rights, other parental rights and rights against unfair dismissal and suffering discrimination.

What happens if the business can no longer receive back all employees when their furlough leave ends?

The employer will need to make a decision, depending on the business situation at that time, whether all employees can return to their duties.

If not it will be necessary to consider termination of employment through a fair and reasonable redundancy process.

Next Steps

The further Guidance from HMRC published on Thursday evening 26 March 2020 is set out at <https://www.gov.uk/Guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

There may be questions and variations needed on this letter so please do contact us to discuss what is needed.

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**Letter explaining Job Retention Scheme and furlough leave to be sent to employees registered on the employer's PAYE system**

**On Employer's Letterhead**

***[Insert name]***

***[Insert address]***

***[Insert date]***

Dear **[Insert name]**

**Coronavirus Job Retention Scheme**

I write further to our discussion on *[insert date]* in respect of the current coronavirus outbreak, and the challenges the company faces as a consequence in continuing to provide you with work for the foreseeable future.

During our discussion, I set out the impact that the current situation is having on the company's business, which is *[insert details explaining the need to use furlough e.g. that, as a business in the hospitality, retail//leisure sectors the Government has enforced our closure from Friday 20 March 2020 as part of its social distancing measures.]*

The company is therefore unable to offer work to any of our employees/workers for the time being **OR** The company is therefore unable to offer any work of the kind that you are employed to perform for the time being, and the company has been unable to identify any other role in the business which you would be in a position to undertake.

The Government recently announced measures to assist businesses in the same situation as the company. This is the Coronavirus Job Retention Scheme which includes placing employees/workers who are on our PAYE filing system with HMRC on 'furlough leave' which is, as we discussed, a period of leave which is paid.

The Government has confirmed it will provide grants to businesses to cover 80% of wage costs upto a maximum of £2,500 per person per month, when they are on furlough leave.

Wage costs means your usual salary plus the company's national insurance contributions and minimum automatic workplace pension contributions on that salary. When the company receives the grant payment from HMRC it will deduct your PAYE, national insurance and workplace pension (if you have not opted out) contributions as usual and pay that amount to you.

*[More explanation may be needed: If 80% of your wages costs exceeds £2,500 per month this is the maximum available to fund your wage costs. If 80% of your wage costs are less than £2,500 per month then you will receive that lower amount.]* The Scheme will be open from 1 March until 31 May 2020 and may be extended.

I am notifying you that the company has taken the decision to use this Scheme and is proposing to designate you as a 'furloughed worker' once the HMRC registration portal is operational.

*[The company may have decided to pay March salaries and benefits in full in which case this should be stated here.]* The company will be paying March salary and benefits in full. *[If this is not the case please speak with us as a special letter will be needed]*

The company will seek your agreement before designating you as a furloughed worker. The company will confirm the date that this Scheme applies to you, which could be from 1 March, once the HMRC portal where you will be registered as a furloughed worker is operational. We will write to you with more details and what payment you will receive each month under the Scheme and how it will affect your benefits.

I appreciate that this is an unsettling time but we wish to ensure that we are implementing the Scheme in the correct way.

The company is taking this difficult step as an alternative to the prospect of redundancies in the near future because of the challenges we are currently facing. *[Delete if less than 20 staff are affected by these proposals.* I have also spoken to the staff employee representatives as part of the collective consultation process and I am sending this letter to them as well as the company's proposal to avoid redundancies. I will be speaking to them again this week/in the next few days]

If you are designated as a furloughed worker, you will not do any work for the company during this period and you will receive 80% of your wages costs, subject to the rules of the Scheme.

When HMRC have provided more information,.

You will remain employed by the company and your terms and conditions/employment contract will be amended by this Scheme. You will not be working and will not be able to work for anyone else without our consent. For example, if you have volunteered to be an NHS volunteer then please let me know and the company would be pleased to agree for you to do so during your period of "furlough leave".

I appreciate that you will receive a lower salary when your furlough leave commences and accordingly you may be eligible for support through the welfare system, including Universal Credit. Please see <https://www.gov.uk/government/publications/Guidance-to-employers-and-businesses-about-covid-19/covid-19-Guidance-for-employees#claiming-benefits> and <https://www.citizensadvice.org.uk/health/coronavirus-what-it-means-for-you/> for more information.

The company will keep your period of furlough leave under continuous review and in the event that the position changes, you will be notified.

The board/senior management team of the company is doing everything it possibly can to ensure it continues and survives the challenges that the company is facing.

I hope to be able to notify you of your return to work as soon as possible once the current situation is resolved.

Please note the board / senior management team of the company have decided that certain critical functions will continue and I will remain working and will be your point of contact during this period.

I will be in touch again shortly to progress this process.

It would be helpful if you can please indicate that you would be in agreement with being placed on furlough leave and being designated as a furloughed worker under the Coronavirus Job Retention Scheme. I plan then to write to you again seeking your agreement knowing this is your intention. This will help the company with its planning for the period. Please email me back to confirm.

If you have any queries about the contents of this letter, please do not hesitate to contact me.

Yours sincerely

[Insert name]  
[Insert job title]