



Strictly Private and Legally Privileged

Coronavirus Job Retention Scheme – Questions and Answers Guidance Note

This Guidance Note is based on information available as at 9am on 19 June 2020. The guidance given will be subject to change as the Directions given by government on the Covid-19 situation continues to develop. You should therefore ensure that you keep up to date with latest advice from the government. For information on the flexible furlough scheme, please see our separate Guidance Note.

The information in this Guidance Note should be read alongside the latest government guidance and Treasury Directions.

This Guidance Note is of a general nature and is not a substitute for professional advice. The information given is based on government guidance and applying general employment law principles. The government guidance is not binding and can be amended or changed. No responsibility can be accepted for the consequences of any action taken or refrained from as a result of the content of this note.

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Q1: What is the Coronavirus Job Retention Scheme (CJRS)?

The key terms of the CJRS are as follows:

- The scheme will run from 1 March 2020 (it can therefore be backdated) and will continue until 31 October 2020.
- In order to access the scheme, employers and employees must have agreed in writing that the employee will not work;
 - at all during the furlough period; or
 - or only undertake work in accordance with the Flexible Furlough scheme which comes into force on 1 July 2020.
- Employers can choose to 'top up' the salary payment so that employees receive their full salary for the period they are furloughed.
- The scheme will close to new entrants from 30 June. From this date onwards, employers will only be able to furlough employees that have been furloughed for a full 3 week period prior to 30 June - the final date that employers can furlough an employee for the first time will be 10 June.
- From 1 July: employers can bring back to work employees that have been previously furloughed on a part-time basis whilst still being able to claim the CJRS grant for the employee's normal days/hours that are not worked. When claiming the CJRS grant in this scenario, employers must report and claim for a minimum period of a week. Employers will be responsible for paying employee's full wages while they are in work.
- Up to and including 31 July: HMRC will reimburse 80% of 'furloughed' workers' usual wage costs, capped at the lesser of 80% of the employee's monthly pay or £2,500 per month per employee. Employers will also be able to claim for Employer NICs and minimum employer automatic enrolment pension contributions on the subsidised furlough pay.
- From 1 August: HMRC will continue to pay 80% of 'furloughed' workers' usual wage costs, subject to the cap of £2,500, however, employers will now have to pay Employer NICs and pension contributions on the furlough pay.
- From 1 September: HMRC will reimburse 70% of 'furloughed' worker's usual wage costs up to a new cap of £2,187.50. Employers will now have to pay Employer NICs and pension contributions and 10% of furloughed workers' wages (capped at £312.50) to make up the employee's entitlement to 80% of their pay while on furlough.
- From 1 October: HMRC will reimburse 60% of 'furloughed' workers' usual wage costs up to a new cap of £1,875. Employers will now have to pay Employers NICs and pension



contributions and 20% of furloughed workers' wages (capped at £625) to make up the employee's entitlement to 80% of their pay while on furlough.

- In summary:

Payment	From July	From August	From September	From October
Liability for employer NIC's and pension contributions	HMRC	Employer	Employer	Employer
Liability for wages	For furloughed hours, HMRC to pay 80% up to £2,500 No employer contribution (except when on flexible furlough)	For furloughed hours, HMRC to pay 80% up to £2,500 No employer contribution (except when on flexible furlough)	For furloughed hours, HMRC to pay 70% up to £2,187.50. Employer to pay remaining 10%	For furloughed hours, HMRC to pay 60% up to £1,875. Employer to pay remaining 20%



The requirement for the employer to contribute to the employee's wages in September and October is to ensure that employees receive 80% of their wages up to the cap of £2,500 for the time they are furloughed.

Q2: What is the legal status of the Directions issued by the Treasury and which Direction applies?

The Directions are described as the legal framework for the CJRS. The Directions do not explicitly state that they are a Statutory Instrument (a form of legislation) but as they are an 'exercise of ministerial authority' they have the force and effect of an Act (a bill that has been approved by both Houses and has been given Royal Assent). This means that failure to following the Direction will be treated as unlawful.

On the other hand the guidance issued by HMRC on the government website does not have any legal weight but gives important guidance on the detail of how the CJRS works in practice. It remains unclear how HMRC will treat situations where there is a direct conflict between the Directions and the guidance.

The first Direction was issued on 15 April (First Direction). It applies to CJRS claims that were submitted before 22 May and are not compliant with the Second Direction.

The second Direction was issued on 22 May (Second Direction). It applies to claims made on 22 May or after, or claims submitted before 22 May but are compliant with the Second Direction until 30 June. This means the Second Direction applies to the furlough period from the date of the last claim an employer made under the First Direction.

Q3: Which employers will be able to claim under the scheme?

The CJRS is available to all employers who had a PAYE payroll on 19 March 2020 including businesses, charities, recruitment agencies (for agency workers) and public authorities and whose operations have been affected by coronavirus.

An Administrator managing a company will be able to access the CJRS, however, the government would only expect an Administrator to do so if there is a reasonable likelihood of adopting the employment contracts of the employees.

As many public sector employers are involved in essential public services or contributing to the response to coronavirus, the government do not expect many public sector employers to claim under the CJRS. If they continue to receive public funding for staff, employers should use this to pay staff and not furlough them. This also applies to private sector employers who receive public funds. Organisations who receive public funding specifically to provide services necessary to respond to the coronavirus are not expected to furlough staff.

In order to be eligible to claim, you must have:

- a UK bank account;
- created and started a PAYE payroll scheme on or before 19 March 2020;



- enrolled for PAYE online, which can take up to 10 days. Employers who are not already enrolled should do so as soon as possible so that they're able to apply to the CJRS once the portal is open.

Q4: Which employees are included in the scheme?

Employers can use the CJRS for employees that were on their PAYE payroll on or before 19 March 2020 and which were notified to HMRC on an RTI submission on or before 19 March 2020. The scheme covers employees on any type of contract, including: full-time and part-time employees, employees on agency contracts, apprentices, flexible contracts or zero-hours contracts. Specific guidance regarding apprentices has been issued by the government, please click the link [here](#).

Employers are also able to furlough office holders (including directors), salaried partners of LLPs, agency workers (including those employed by umbrella companies) and 'workers'. The guidance provides further detail about furloughing these types of workers. Foreign nationals can also be furloughed regardless of the type of visa they hold.

The scheme does not cover employees who were hired after 19 March 2020, but employers can re-hire and furlough any employees who were on their payroll as at 28 February 2020 and were then made redundant or stopped working after that date. The table below summarises the eligibility position for new starters/departing employees:

Was the employee employed with you as of this date?	Date RTI submission notifying payment was made to HMRC	Eligible for CJRS?
28 February 2020	On or before 28 February 2020	Yes
28 February 2020	On or before 19 March 2020	Yes
28 February 2020	On or after 20 March 2020	No
19 March 2020	On or before 19 March 2020	Yes
19 March 2020	On or after 20 March 2020	No
On or after 20 March 2020	On or after 20 March 2020	No

Specific guidance has been issued on how payments should be made to suppliers of contingent workers impacted by coronavirus where the party receiving the workers services is a specific public body or government department. A link to this guidance can be found [here](#).

Q5: How do I designate employees as 'furloughed workers'?

An employee is furloughed if they:



- have been instructed by their employer to cease all work in relation to their employment;
- cease that work for at least 21 days; and
- have been instructed to cease work by reason of circumstances arising in consequence of COVID-19.

Government guidance requires employers to comply with employment regulations when designating employees as 'furloughed workers'. Employers will therefore need to request that staff whose pay will reduce to 80% of their normal wages or who are placed on a period of flexible furlough agree to being furloughed. This should be recorded in writing: setting out the change and how long it will last, likely to be until the end of the CJRS and should be signed by the employee. Employers should also explain the possible consequences of not agreeing, which could be further consultation or possibly redundancies. How the employee agrees to being furloughed differs in respect of claims made under the First or Second Direction.

There was uncertainty as the First Direction required the employee to agree in writing to being furloughed. The Second Direction does not require the employee to provide written consent but it does require the parties to agree, that there is a valid contractual variation (specifying the main terms and conditions on which the employee will cease work) and that the agreement is made or confirmed in writing by the employer (email will suffice).

Employers must keep a record of the written communication for 5 years.

For information on whether you need to enter into fresh furlough agreements with employees if their furlough period continues after the end of June 2020, please see our flexible furlough guidance note.

Q6: If we do not have a contractual right to lay off or short time working and we seek to furlough employees on 80% pay, what happens if they refuse to agree?

If affected staff do not agree, employers may need to go through a consultation process. If fewer than 20 affected staff have not agreed, this can be done through a normal consultation process. If there are more than 20 staff in any one 'establishment' then you may need to go through a collective consultation process. We can advise further in this regard if necessary. If collective consultation does apply, the timescales to bring about the change (i.e. furloughing staff) are considerably longer. Employers may be able to rely on the 'special circumstances' defence (where there are special circumstances which means it is sufficient for the employer to do what is reasonably practicable in the circumstances towards full compliance). The defence will not relieve employers from the obligation to consult completely; it must still take such steps as are reasonably practicable towards compliance. Failure to comply with the collective consultation process will expose the employer to significant risks (which may include criminal liability). We strongly advise you take further advice in this regard and to see whether the special circumstances defence may apply.

Q7: When should the furlough period start?



The furlough period should start from the date when the employee stopped working, rather than the date that the employer decided to furlough the employee or the date written confirmation is sent to the employee. A claim cannot start any earlier than the date the employee was first furloughed.

However, employee consent is determined differently under the two Directions. Under the First Direction, the furlough period starts from the day on which the employee has agreed in writing to cease all work for their employer and cease all work. Under the Second Direction, the employee is not required to give written consent although an agreement must have been reached and made or confirmed in writing by the employee.

Q8: Can claims be backdated?

Claims should be started from the date that the employee finishes work and starts furlough, not the date that the decision is made or when they receive a notification confirming their furloughed status. We believe this means the start date of furlough leave can be back-dated to the date that the employee finished work, provided that the employee is agreeable to this (subject always to the facts of the case in question). If payroll has already been processed for part of this period or the employee is not agreeable to 80% pay being backdated, the employer could choose to top up pay for the first few weeks of furlough leave.

Q9: Should employers deduct tax, employee's National Insurance contributions, pension contributions and student loan payments in the usual way?

Yes, employees will still pay the taxes and other payments they normally pay out of their reduced wages. Employers should still deduct employee's auto-enrolment contributions unless the employee has opted out of the scheme.

Q10: What if an employee is earning the National Living Wage/National Minimum Wage and a reduction to 80% would take them below this threshold?

As workers are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) or Apprentices Minimum Wage (AMW) for hours they are working or treated as working under minimum wage rules, time spent on furlough does not need to be paid at this rate. I.e. you can still pay them 80% of their wages or £2,500 even if, based on their usual working hours, this would bring them below the minimum wage.

However, where an employer requires a furloughed employee to carry out training, they must ensure that they receive the NLW/NMW/AMW for this period. In most cases, furlough pay at 80% of an employee's normal earnings will be sufficient.

Be aware of the increase in the minimum wage rates that came into effect from 1 April 2020.

Q11: Can employees work for their employer during furlough?

Until flexible furlough provisions apply (1 July 2020) furloughed employees must not work, generate revenue (i.e. make money for their employer), or provide services to their employer or any person/organisation that is linked, associated or connected with their employer during



furlough. This applies irrespective of whether the employer has chosen to top up the employee's salary to 100%. The Directions give further guidance as to whether a person/organisation is connected to an employer.

Employers are able to reallocate tasks between staff to allow them to furlough those who would ordinarily carry out business critical tasks.

Q12: Can employees carry out training or studying?

Employees are permitted to carry out training during furlough leave if:

- the purpose of the training/studying is to improve an employee's effectiveness in the employer's business or the performance of the employer's business; and
- the study or training does not directly provide services to the employer, contribute to the employer's business activities or generate revenue for, or on behalf of their employer or a linked or associated person/organisation; and
- the study or training does not directly contribute to any significant degree in the production of goods the employer intends to supply to another or supply of services that the employer may be considering (this captures any contribution to a linked or associated person/organisation).

The guidance states employees they should be encouraged to undertake training. Employers should ensure that they provide employees with training materials where required to meet statutory/CPD requirements.

Q13: Can employers claim for staff who are working reduced hours?

Until 1 July 2020 an employer cannot claim for any member of staff who works on reduced hours (see our flexible furlough guidance note for further details). In order to be eligible to claim for furloughed hours, employees must not be carrying out any work for the employer or any linked or associated organisation. Employers could consider reallocating work so that some staff could be placed on furlough.

Q14: Can an employer furlough staff who have been transferred to their organisation under TUPE?

The **Second Direction** sets out some quite detailed rules but, in essence, where a business transfer (to which TUPE or 'business succession rules' apply) takes place after 28 February 2020, the 'new employer' is able to claim under the CJRS for any furloughed staff employed on 28 February by the transferring business. There are also some detailed provisions that will apply where an employee has been dismissed as a result of a TUPE transfer. You should take specific legal advice on this particular issue.

The latest rules now state that a 'new employer' may make a claim for a payment under CJRS in respect of a 'relevant employee' as if the new employer had a 'qualifying PAYE scheme' and



made a payment of earnings in the 2019/20 tax year, which is shown in a return under Schedule A1 to the PAYE Regulations made on or before 19 March 2020.

An employer is a 'new employer' for CJRS even if its PAYE scheme was registered on HMRC's real time information for PAYE after 19 March 2020 and has effect in relation to the 'relevant employee', provided that the other eligibility requirements are met.

An employee is a 'relevant employee' if:

- On or before **28 February 2020** the employee was employed by an employer who is not the 'new' employer (the Guidance states that the employee must be employed by the old employer on 19 March 2020, but we believe this will extend to those employees employed prior to 19 March where the transfer takes place earlier);
- After 28 February 2020 there is a change in the employee's employer from the former employer to the new employer while the employee remains in employment in the same business;
- Immediately before the change, the former employer's PAYE scheme was a qualifying scheme; and
- TUPE applies to the transfer of the employee from the former employer to the new employer.

Provided the preconditions above apply, TUPE and furloughing is now compatible, irrespective of whether the transfer of employees takes place after **28 February 2020** and whether or not the transferee (new employer) has its own PAYE scheme set up and registered by 19 March 2020.

In order to continue to furlough employees of a previous business transferred after 10 June, the employees must have been furloughed for a period of at least 3 weeks between 1 March and 30 June.

Q15: Can furloughed employees work for another employer?

Employees are able to work for another employer (who is not linked to, associated with or connected to their employer) whilst they are on furlough leave if their contract allows this. Where the employment contract prevents the employee from working elsewhere, the employer can choose to waive this. The current guidance doesn't suggest that HMRC will seek to claim back any amounts earned by the employee above their usual salary whilst they are on furlough, as many expected.

If employees are allowed to take up a second job, employers should consider whether it should be done on the basis that the employee agrees to pay back any sums which HMRC claim back from the employer as a result. We think there is a very small risk of this happening in practice given the updated guidance but we cannot be sure. Employers should be aware of the risk that they are unable to recover any sums which HMRC claim back from the employer, for example, if they do not return from furlough. It might also be sensible to stipulate that



employees should only earn sufficient from a second job to make up the shortfall in their salary lost from being furloughed.

Q16: Can furloughed employees do volunteer work?

Furloughed employees are allowed to carry out voluntary work provided that they do not generate revenue for or provide services to their employer or any linked/associated/connected organisation. Not-for-profit/charitable employers should not allow furloughed staff to volunteer for them to avoid any allegations that they were actually working whilst furloughed. Employers are able to assist furloughed workers in finding volunteer work if they wish.

Q17: What if we want to furlough some staff and keep some staff working?

The guidance makes it clear that where employers are making decisions relating to the furlough process, equality and discrimination laws will apply in the usual way. Therefore, if an employer needs a 'skeleton' staff to keep parts of the business running, then there should be fair and objective selection criteria for electing which employees to furlough, which should be applied consistently to avoid allegations of unfairness/discrimination. These selection criteria could include the skills of each employee (against the skills that you require in your skeleton staff), experience and generally the needs of the business.

Employers may be able to prioritise some employees over others. For example, prioritising disabled employees (where their disability makes them more vulnerable) may be justified as a reasonable adjustment for such employees. Electing to furlough older employees, although direct discrimination, may also be justified by the aim of reducing the risk to their health.

Q18: How do I manage staff who are unhappy because they have not been furloughed?

Employers may encounter disgruntled employees who believe it is unfair that they are not put on furlough when some of their colleagues are. Whilst there is no clear solution to this and employers should take the time to listen to employees' concerns, they may also wish to offer concessions to such employees, such as granting them additional annual leave when the disruption subsides or providing them with a bonus at the end of the year.

Q19: Can I furlough an employee who has more than one job?

If an employee already has more than one job, the government guidance states that they can be furloughed from each job separately and the cap applies separately to each employer. Equally, they can be furloughed in one job, but continue working their other job.

Q20: Can employees on maternity leave or other family friendly leave be furloughed?

Yes in some circumstances this may possible, subject to the terms of the scheme, the application of the Directions and the specifics of the case. As this is a complex area, legal advice should be taken before any action is taken to put such an employee on furlough.

Parents on statutory family friendly leave who return to work can be furloughed even after 10 June (the deadline for furloughing an individual for the first time). However, there are rules



about when you can make a claim for employees who have returned from maternity leave early so you should take specific legal advice on this before any action is taken.

Statutory family friendly leave includes: maternity, paternity, adoption, shared parental and parental bereavement leave, but not any non-statutory leave that the employer may provide in addition.

Employees are required to take maternity leave for at least 2 weeks following birth (4 weeks in the case of factory workers). They can then continue to take maternity leave as normal if they wish and whilst they are on maternity leave, they will be eligible for contractual and Statutory Maternity Pay (SMP) in the usual way. Employers are able to reclaim contractual SMP, but cannot claim any statutory payment sums under the CJRS (they can continue to claim these back in the usual way). The guidance does not make it clear whether employees need to be designated as furloughed whilst they are still on maternity leave in order to claim.

Employees could give notice to come back from maternity leave early and then be put on furlough. However, they will not then be able to go back on maternity leave when the disruption subsides.

If an employee has been furloughed and is due to take a period of family friendly leave on or after 25 April 2020, they would be on furlough until the start date of their leave and should be paid accordingly. The government have recently updated the guidance to confirm that for employees in this position, their average weekly pay should be calculated on the higher of what they actually received from their employer or what they would have received had they not been on furlough. Essentially, their statutory pay should not be reduced because they spent a period of time on furlough leave.

The same principles apply where the employee is on adoption, paternity, shared parental or parental bereavement pay.

Q21: How should pay for employees returning from statutory leave be calculated?

Where an employee is returning from maternity, paternity, shared parental, adoption, parental bereavement, sick or unpaid parental leave, their pay should be calculated on their usual salary not the pay they received whilst on statutory leave.

Where the employee is on variable pay, their pay should be calculated in line with the rules relating to variable pay, as set out below.

Where a salaried employee returns from statutory leave and is furloughed, their salary should be calculated on what the employee would have been paid during a period of annual leave.

Q22: Can employees on unpaid leave be furloughed?

The Directions and guidance now confirm that:

- Employees who started unpaid leave on or before 28 February cannot be furloughed until the date on which it was agreed that they would return from unpaid leave.
- Employees who started unpaid leave after 28 February 2020 can be furloughed. Their furlough pay should be based on their regular wage; for fixed rate employees, this



should be what the employee would have been paid during a period of annual leave and for variable rate employees, this should be calculated as set out at Q31 below.

Q23: Can we furlough an employee who is off sick?

Yes, the government guidance confirms that employers are eligible to furlough sick employees for "business reasons". However an employee cannot be on sick leave (and therefore eligible for SSP) and furlough leave at the same time. The Second Direction (which applies from 22 May 2020) and guidance confirm that in order to be placed on furlough, the employee's sick leave must end and this can be agreed between the employer and employee. It is worth noting that it is for the employer to decide whether they wish to place an employee on furlough leave (and end their sick leave). . There remains some uncertainty about claims for CJRS payments where the employee was on sick leave and furloughed prior to 22 May.

The guidance confirms that the CJRS is not intended for short-term absences from work due to sickness, and there is a 3 week minimum furlough period. The guidance does not define what amounts to short term sickness, however, a reasonable assumption is that this is likely to include sickness absence that is less than 3 weeks (subject to further clarification). The guidance also advises that short term illness/ self-isolation should not be a consideration in deciding whether to furlough an employee.

Sick employees who have been furloughed should no longer receive sick pay. Employers can claim from both the CJRS and the SSP rebate scheme for the same employee but not for the same period of time. Once a sick employee has been furloughed, employers can only reclaim from the CJRS and cannot claim through the SSP rebate scheme.

Q24: What happens if a furloughed employee becomes sick?

Government guidance confirms employees must be paid at least SSP but advises that employers can either decide to (1) move these employees onto SSP or (2) keep them on furlough, at their furloughed rate of pay.

If an employer moves a sick furloughed employee onto SSP, as set out above, employers cannot claim for their furloughed salary under the CJRS. Employers will therefore have to pay SSP themselves (with the possibility of being reimbursed for a rebate of up to 2 weeks of SSP, if they meet the eligibility criteria, which includes a requirement that the employee is off sick as a result of coronavirus). SSP is payable for up to 28 weeks, which means the employer may end up paying a further 26 weeks out of its own pocket. The employee may also be eligible for contractual sick pay, depending on his/her terms of employment.

If the employer decides to keep the sick furloughed employee on the furloughed rate, they will remain eligible to claim for these costs through the CJRS. Therefore, it is likely most employers will elect to keep the employee furloughed as this is more cost efficient for the employer and cost beneficial for the employee. There is a potential issue in that paragraph 8.6 of the First and Second Direction states that claims under the CJRS cannot include amounts of "specified statutory payments" during the furlough period and the gross amount of earnings



to be reimbursed must be correspondingly reduced. SSP is a specified benefit and therefore 8.6 suggests if the employee is not moved onto SSP, an employer's CJRS claim must be reduced by an amount to reflect SSP. Until this is clarified, there is a risk that an amount equivalent to the SSP amount may not be recoverable and/or may need to be paid back to the Government.

Q25: What happens if the employee is shielding in line with public health guidance, can they be furloughed?

The government guidance says employers can furlough employees who are shielding in line with public health guidance. Previously, there was additional wording which suggested that this was only possible where the shielded employee could not work from home and the employer would have had to make them redundant. This wording has now been removed.

There has been an update to the SSP Regulations as of 16 April 2020, which deem employees who are shielding as incapable for work and, therefore, entitled to SSP (subject to the usual eligibility criteria). As such, the risks set out in Q23 may also apply to shielding employees. The SSP Regulations amendments do not appear to have retrospective effect.

Q26: Can we furlough employees with caring responsibilities?

Yes, the guidance states employees who are unable to work because they have caring responsibilities resulting from coronavirus can be furloughed e.g. employees who need to look after their children.

Q27: Can I furlough an employee on a fixed term contract?

Yes, provided that the employee's contract expired on or after 28 February or 19 March and an RTI submission was notified to HMRC on or before the respective date.

The guidance confirms fixed term contracts can be renewed or extended during the furlough period without breaking the terms of the CJRS, however, once the fixed term contract ends, an employer can no longer claim under the CJRS for these employees.

Be aware that the expiry of a fixed-term contract constitutes a 'dismissal' in law. Therefore, if the employee has completed 2 years' service, they will still have *ordinary unfair dismissal* rights and a fair termination process will be required. This will involve appropriate consultation and a fair reason for dismissal (which might be redundancy or some other business reason, depending on all the circumstances).

Q28: What happens with holiday during furlough?

Employees will continue to accrue holiday during furlough, although employers and employees can agree to vary holiday entitlement so that employees accrue only the statutory minimum entitlement during furlough.

Government guidance has now confirmed that employees can take holiday whilst on furlough. Employers can, therefore, request that employees take periods of holiday during furlough



(including pre-booked leave and additional periods, if they wish). If employees do not agree to voluntarily take leave, employers can compel them to by giving notice which is at least twice the length of the period of leave they are requesting the employee takes (e.g. two weeks' notice in advance of the first day of holiday must be given for one weeks leave).

Guidance confirms that holiday should be paid in accordance with the (UK) Working Time Regulations (WTR). As such, employers should pay 100% of pay during periods of annual leave during furlough and this will need to include all elements that are usually included in holiday pay.

Holiday pay, generally, has itself become terribly complicated in recent years due to the different positions depending on whether holiday entitlement falls under the European Working Time Directive (WTD), the WTR or represents additional contractual leave. If employers calculate payment for the 4 weeks' WTD leave differently to the 1.6 weeks' WTR leave and contractual leave, this distinction can also be reflected in holiday pay during furlough.

The position in relation to bank holidays has now also been confirmed. Current guidance states that if an employee usually works on a bank holiday then this can be included in the calculation of furlough salary. If the employee usually takes bank holidays as leave, then the employer will need to top up the holiday pay for bank holidays (in accordance with the WTD/WTR leave rules set out above or allow the employee a day's holiday in lieu). We do not believe that designating a bank holiday day as part of the employee's holiday allowance will break continuity for the purposes of the 3 week minimum furlough period.

The government guidance expressly states that they are keeping the policy on holiday during furlough under review, so it is possible that the position may change, but it is unlikely that employers can be criticised for acting in accordance with government guidance at the time.

Q29: Can employees carry over leave accrued during furlough?

Yes. The WTR have been amended and brought into force immediately to allow workers to carry over 4 weeks' annual leave for up to two years. The change to the WTR was intended to allow key workers to carry over leave where it was not possible to take it, but the legislation does not limit the rules to key workers.

The legislation allows employees to carry over WTD leave (i.e. 4 weeks) where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society").

This appears to leave considerable employer discretion as to whether holiday can be carried over but employers should monitor holiday carefully and encourage staff to take holiday where they are able to in accordance with Acas guidance. This will allow employees a break from work which is necessary for work/life balance and complies with employer's duty of health & safety/duty of care towards workers, which is the primary purpose of annual leave.



Employers should consider reviewing their annual leave policy and confirming to staff whether they expect to allow employees to carry over leave as above.

Q30: Can I temporarily raise employees' pay so that we can claim the maximum amount during furlough?

No. The government has made it clear that there will be measures in place to prevent fraud and that this could result in criminal liability. Employees and members of the public are able to report suspected fraud being carried out by employers claiming under the CJRS via HMRC's online Fraud Hotline.

Q31: Can I rotate employees on furlough?

In order to benefit from the CJRS, employees must be on furlough for a minimum period of 3 consecutive weeks. Employers are able to take staff on and off of furlough so could rotate employees on furlough if they wish. This may also prevent allegations of unfairness/discrimination when selecting who to furlough vs who will remain working. However it may be too administratively burdensome for some employers.

As of 1 July, the CJRS will only be available to employers to claim for employees who have completed the minimum 3 week furlough period by 30 June but the minimum furlough period of 3 weeks will no longer apply after 1 July.

Q32: How should employers calculate employees' pay in order to make a claim?

- a. For full-time and part-time salaried employees:

To qualify as a salaried employee (or 'fixed rate' employee) an individual must fulfill the following:

- be paid an annual salary for the hours they work;
- not be entitled to any additional payment for working hours;
- be paid a set amount in each pay period (e.g. weekly/monthly);
- the hours they work must not normally vary according to business, economic or seasonal considerations.

- b. Employers should use the employee's actual salary before tax as at 19 March 2020 to calculate the furlough pay. If employers have already calculated the payment due based on an employee's salary as of 28 February 2020 (the date put forward in the early editions of the guidance), and this differs from their salary on 19 March, employers can use the 28 February date for the first claim they make. For staff whose pay varies:

Employers should use the following calculations:

Length of employment	Entitlement per month (unless higher than
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	£2,500)
12 months or more	The higher of: <ul style="list-style-type: none"> 1) the same month's earning from the previous year; or 2) average monthly earnings from the 2019-20 tax year.
Up to 12 months	The average of the employee's monthly earnings since they started work.
Employment began employment in February 2020	Pro-rata their earnings so far.

Q33: What can employers claim for under the CJRS?

A calculator is now available [here](#) to help you calculate how much you can claim per employee. There is also detailed guidance (with examples) available [here](#).

The amount you should use when calculating 80% of your employees' wages is regular payments you are obliged to make. Broadly speaking, regular payments means salary or wages that are non-conditional and cannot vary based on the performance on the business or the employee, unless the variation is set out in a contractually binding arrangement. This includes:

- Regular wages (see Q:31 for how this is calculated) capped at the lesser of 80% of the employee's monthly pay or £2,500 per month per employee (please see question Q:29 for how wages are calculated).
- Employer's National Insurance contributions on the reduced wage. The total claim for NICs contribution must not exceed what is actually paid by the employer. **This is subject to the changes to the CJRS rebates which are due to come into force from 1 August (see Q1 for details).**
- Non-discretionary overtime, fees and commission payments (i.e. contractual).
- The lower of:
 - (1) employer pension contributions where the employee is not eligible under the auto-enrolment pension rules; or
 - (2) minimum automatic enrolment employer contributions (3% of qualifying earnings) on the reduced wage.

Any pension payments claimed must be paid into the pension scheme. If the employer pays more than the minimum employer contribution rate of 3% (e.g. 5%) the



employer must continue to pay this higher contribution rate unless the contribution rate is varied by agreement.

Q34: What can't employers claim for under the CJRS?

- National Insurance or auto-enrolment employer contributions which the employer makes because they chose to 'top up' an employee's wages during furlough, or where the employer is liable for these payments from 1 August.
- Any pension contributions the employer makes above the auto-enrolment minimum.
- Discretionary bonuses, commission payments (including tips), non-cash payments and benefits in kind.
- Statutory sick pay, statutory maternity pay, statutory adoption pay, statutory paternity pay, statutory shared parental pay and statutory parental bereavement pay (these benefits can be reclaimed in the normal way).
- Non-monetary benefits provided to employees, including taxable benefits in kind.
- Benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay. However, HMRC has confirmed that COVID-19 can be a 'life event' which could warrant changes to salary sacrifice arrangements.
- Apprenticeship levy payments.

Payments to members of a Limited Liability Partnership (LLP) are subject to specific rules set out in the First and Second Direction and fall outside of this general guidance note.

Q35: Can employers wait until they've received payments under the CJRS before paying employees?

The government guidance doesn't explicitly deal with this, but we think not because it would be against government policy to encourage employers not to pay staff. Failure to pay salary would in any event amount to a breach of contract and allow an employee to claim constructive dismissal.

If an employer, due to cash flow problems, cannot wait until the portal is functioning for the reimbursement, they should consider taking out a coronavirus business interruption loan. If this is not available, they should discuss the situation with their employees, and try to reach an agreement whereby the employees will not be paid until the system is functioning, at which point they will receive back pay from 1 March 2020.

Q36: How will furlough affect an employer's ability to make staff redundant?

The guidance states that an employer may make an employee redundant during or at the end of furlough leave. It is more likely to be reasonable to make an employee redundant if the employer has exhausted all possible alternatives, for example, asking the employee to defer their furlough salary until payments under the CJRS have been received by the employer. If employers do not explore alternatives, and simply make staff redundant, this is more likely to



be unreasonable and amount to unfair dismissal (if the employee has completed two years' service).

If an employer makes an employee redundant whilst the CJRS is operating, the government have made it clear that grants made under the CJRS cannot be used to substitute redundancy payments.

Q37: What information will employers need to make a claim under the CJRS?

The following information will be needed for employers to make a claim:

- 1.1 An ePAYE reference number
- 1.2 The number of employees being furloughed
- 1.3 Names, payroll numbers (optional) and National Insurance Numbers for furloughed employees
- 1.4 Corporation Tax Unique Taxpayer Reference, Self-Assessment Unique Taxpayer Reference or Company Registration Number
- 1.5 The claim period (start and end date)
- 1.6 The amount being claimed (per the minimum length of furloughing of 3 consecutive weeks). Employers are expected to calculate the claim amount.
- 1.7 The employer's bank account number and sort code
- 1.8 A contact name for the employer
- 1.9 A phone number for the employer

If employers have 100 or more furloughed staff, they will be asked to upload a file with the employees' details (name, NI number, claim period and claim amount, and payroll/employee number (optional)) rather than inputting it directly into the system.

Where employers use an external payroll provider who is authorised to act for them for PAYE purposes, they can make the claim on the employer's behalf. Employers can only submit one claim at least every three weeks and cannot make more than one claim during a claim period. Employers should make their claim shortly before or during running payroll.

The guidance states that HMRC reserves the right to retrospectively audit all claims, and employers must retain records for 6 years, which should include the amount claimed and the claim period for each employee, the claim reference number and the calculations of furlough pay.

Q38: What happens after a claim has been made?

HMRC will pay eligible claims by BACS into the employer's bank account within 6 working days. Employers must pay employees the full amount they receive in the form of money (i.e. it cannot be used to fund benefits and employers cannot enter into any transaction which reduce the wages below this amount).



Government guidance confirms that employers must tell their employees that they've made a claim and that they do not need to take any more action.

Q39: What happens if I get my claim wrong?

As the CJRS Guidance is being regularly updated and new Directions are still being issued, some employers may not have calculated 80% of employees' wages correctly (e.g. based on earlier guidance you may have assumed an employee was a fixed 'salaried' employee, when in fact their pay was variable and should have been calculated on this basis). The Direction allows employers to make adjustments and the time restrictions for doing so have been removed from the latest Direction. We believe that employers should be able to make a claim for further payments where calculations resulted in an underpayment to the employee.

If employers have made an error in a claim which has resulted in an over-payment from HMRC, this will need to be paid back and employers can disclose any over-payments in their next claim.

Q40: How do I bring someone off furlough leave and back to work?

There is no specific process for bringing an employee off furlough leave, so they can simply be asked to return to work on a specific date. Before bringing an employee back to work, you should check that they have spent a minimum of 3 weeks on furlough leave and, if your furlough letter provided a period of notice that you have to give when bringing an employee back, that you have complied with that notice period.

You should confirm the date that the employee is required to return in writing and retain this in case you are audited by HMRC in future.