

Updates to the Furlough Scheme (As of 15 April 2020)

April 16, 2020

On 15 April, the UK Government made some changes to the Coronavirus Job Retention Scheme (CJRS, or the “scheme”), by way of updated guidance, as well as producing some directions for HMRC as to how they should administer the scheme. This updated guidance and the directions supplement changes or attempts to clarify (and in some places contradicts) the advice that the Government and/or ACAS have previously been circulating.

- The most eye-catching change is that the eligibility cut-off date for the Coronavirus Job Retention Scheme has been extended to 19 March 2020 from 28 February 2020.
 - The Government has also announced that the new scheme system is expected to be fully operational on Monday 20 April, and that reimbursements will be processed within six working days.
 - The most glaring contradiction is in relation to putting an employee on furlough, which employers may previously have done by way of notification (and agreement if there was a salary reduction, or in some cases inferred agreement (i.e., negative consent) where the employer felt that it wasn’t practicable for them to get confirmatory signatures). The Government’s direction to HMRC is that “it is necessary for the employer and employee to have agreed that the employee be on furlough.” In practice, where employers have implemented a reduction in salary, it is likely that this agreement will be covered in existing correspondence. However, for those employers where they have not sought consent (e.g., because payment is remaining the same), they likely have not sought the required level of “agreement” which HMRC has been directed by the Government to now require. It is recommended that these employers seek urgent advice on whether they should obtain employee consent now in order to avoid the risk that HMRC determines that the scheme does not cover their furloughed employees. There is also a risk that HMRC determines that funds are only claimable with respect to the time after which the employee has agreed.
 - For an employer to qualify for reimbursement in respect of furloughed employees, those employees originally had to be employed on 28 February 2020. However, the amended guidance says that employers can claim for furloughed employees that were on the PAYE payroll on or before 19 March 2020 (i.e., the day before the scheme was originally announced) and which were notified to HMRC through the Real Time Information (RTI) submission on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020. In practice, this means that the eligibility date for employees to have been on the payroll has been brought forward (to 19 March 2020), but the employer must also have notified HMRC that that person was on their payroll by that date. The usual time for employers to do that would be when they process pay. Therefore, it may be that some new joiners from 1 March 2020 are still not covered by the scheme if their employer did not notify HMRC by 19 March 2020 that they were on the payroll, for example, because their first month’s pay was not processed until towards month end.
 - Employees who were employed as of 28 February 2020 and on payroll (i.e., notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough (even if that employee had resigned the first time around, as opposed to being made redundant).
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- The amended guidance did not bring any additional clarity on the holiday pay position for furloughed employees. If an employee’s pay has been reduced to 80%, then, in the ordinary course, their holiday pay could also be reduced to 80%, as their normal remuneration has been varied. The position put forward by ACAS, however, is that furloughed employees should be paid their full, “normal” rate of pay if they use their annual leave while furloughed. “Holiday” under the Working Time Regulations is not income, but a health and safety measure, designed to ensure that employees take the requisite amount of breaks from work. Additionally, employers are furloughing employees because they are unable to pay their full salary. It, therefore, seems contrary to the intention of the scheme for an employee to get a windfall if they take holiday, and to expect an employer to pay additional holiday costs if the employee has agreed to a reduction in pay while on furlough, given the circumstances. We expect clarification of this in the near future.

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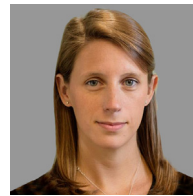
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