

## Late yesterday, the government published its detailed guidance on the extension to the Coronavirus Job Retention Scheme (CJRS).

As expected, the guidance (all 13 different bits of it!) largely reflects what was contained in the policy paper issued last week, only in slightly more detail, and is broadly the same as the previous CJRS guidance. Once again, we get the impression that the guidance was issued in haste, as it is littered with typos, what we assume are drafting errors (take a look at the TUPE question below!), and sometimes what is said in one part of the guidance is slightly different from what is said in another. The government really isn't making this easy for employers! There must be a strong argument for having all the guidance in one document, or at least one central location where you can find it all, even if you do not then understand how it all fits together.

There is one important point for employers to be aware of. Buried in the [guidance on which employees you can put on furlough](#), the government says in the section on redundancies that it is "reviewing whether employers should be eligible to claim for employees serving contractual or statutory notice periods and will change the approach for claim periods starting on or after 1 December 2020, with further guidance published in late November."

In other words, it looks as though the government is going to restrict the ability of employers to claim under the scheme for any salary paid during the notice period of any employee who is given notice of termination.

PILON payments and statutory or enhanced redundancy payments are already outside scope. Employers should, therefore, bear in mind this potential additional cost when making future redundancies (or indeed in respect of any employees who will still be working out their notice periods after the end of November). It is also surely going to deter employers from re-hiring recently dismissed staff, as there is now some serious uncertainty about whether they will be able to claim for them if they are subsequently served with notice (as they inevitably will be, given that these are people the employer has already made a conscious decision it does not need). We are not sure if the government has thought about this potential knock-on effect of its announcement on the re-hiring facility, but on past form, it is hard to deny that the odds are against it.

Regrettable though it is to have to say so, to issue guidance only a matter of days (potentially hours) before the decision on notice is made becomes effective, as promised, may leave employers with little choice but to cancel rehiring programmes now and to start giving notice at the earliest point to those already re-hired. You could hang on and see if the promised review does, in fact, lead to the answer that notice periods cannot be claimed for but do note the unconscious error in the drafting of that sentence – "will change the approach for claim periods..." That looks remarkably definite for something notionally undecided.

We have updated our "quick guide" to reflect the updated guidance.



## CJRS Extension

### UPDATED Quick Guide

<b>What is happening to the CJRS?</b>	<p>As the Chancellor explained in his speech to the House of Commons on 5 November, the economic effects of the pandemic are proving much longer-lasting than originally anticipated and the government has decided to extend the CJRS to give businesses greater certainty and protect more jobs over what is clearly going to be a very difficult winter.</p> <p>The good news is that as this is an extension to the previous scheme, the rules will remain broadly the same, with a limited number of exceptions as highlighted below.</p> <p>It remains a UK-wide scheme, so not restricted to particular sectors, regions or even individual nations within the UK. It will also be open to eligible employers even if they have not previously furloughed staff.</p>
<b>When does support start?</b>	<p>Support under the CJRS Extension will be available from 1 November and will run until 31 March next year.</p> <p>The government will review the scheme in January, so there may be changes to it at that time, most likely in the form of increases to the level of employer contributions if the economy is doing well enough to ask employers to contribute more.</p>
<b>Which employers are eligible to use the CJRS Extension?</b>	<p>As highlighted above, employers will be able to use the extended scheme even if they did not use the CJRS previously. All employers should, therefore, consider whether it is appropriate to make use of the CJRS Extension in light of the ongoing economic impact of the pandemic and their greater understanding and experience of how it is affecting their business.</p> <p>Employers will be able to use the scheme whether their businesses remain open or are required to close under national or local restrictions. There will also be no financial impact test for larger employers, as was going to be the case under the JSS Open. Despite that, and the formal deferral of the JSS and its related guidance, we consider that there will still be eyebrows raised within HMRC if CJRS Extension support is claimed by employers that at the same time pay material dividends to shareholders or discretionary bonuses to senior staff. The Court of Public Opinion will also still be very much in session on this, and as if to assist the jurors there, HMRC intends to publish the names of employers that use the CJRS Extension, starting from December.</p> <p>Fully publicly funded organisations will not be expected to use the scheme, but partially funded organisations will be eligible “<i>where their private revenues have been disrupted</i>” (whatever that means – we doubt that it will entail any particularly high burden of proof, as that would run counter to the generosity/evident desperation of the rest of the extension).</p>
<b>Can employers make capital distributions under the CJRS Extension?</b>	<p>The guidance does not deal with this point, so we must take it that employers <b>can</b> make capital distributions (e.g. dividends) while claiming the grant. As set out above, even if they can technically do so without losing eligibility, there remains the question of whether that is a good idea from a PR perspective.</p>

## Which employees can we claim for under the CJRS Extension?

Eligible employers will be able to claim for employees who were employed and on their PAYE payroll on 30 October 2020. The employer must have made a PAYE Real Time Information submission to HMRC between 20 March and 30 October, notifying a payment of earnings for those employees.

As was the case under the previous CJRS rules, staff on any type of contract are eligible, including those on variable or zero hours contracts and agency workers, provided they are paid through PAYE.

Crucially, employers do not need to have previously claimed for an employee before 31 October 2020 to claim for periods from 1 November. Employers claiming for a period that ends on or before 31 October can still only claim if they previously furloughed the relevant employees before 1 July 2020.

Employers will be able to re-hire staff who recently left the business – employees who were on the payroll on 23 September 2020 but were made redundant or stopped working for their employer after that date can be re-employed and claimed for under the CJRS Extension. In order to do this, employers must have made a PAYE Real Time Information submission to HMRC for them from 20 March to 23 September 2020, notifying a payment of earnings for these employees. Similar provisions apply to employees on fixed-term contracts that expired after 23 September.

In the same way that the government allowed employers to re-hire staff back in March when the CJRS was first introduced, this provision seems designed to catch those employees who were dismissed at a time when their employer did not think it would receive any financial support for them and to encourage such employers to re-hire them. We know that some businesses are considering doing this, but we would advise caution. Things to think about include: what type of contract will you engage them on (a fixed-term contract would probably be best, though it would be a brave employer these days that would set a fixed date for the CJRS to end), what happens to any redundancy payments that have already been paid (you are probably not going to be able to recover these unless you are able to agree otherwise with the employee), and how much is it going to cost you to re-hire them (remember you will need to pay employer National Insurance contributions and employer pension contributions on any unworked hours, and accrued holiday). On the flip side, if the employment has already ended there is no requirement that the re-hire must be with unbroken continuity of employment or on the same terms as before. We would recommend that employers take advice before re-hiring staff, especially in light of the latest guidance, which indicates that employers may also not be able to claim for salary paid during notice periods after the end of November.

There is no maximum number of employees that an employer can claim for from 1 November 2020.

## How will the CJRS Extension work?

As set out above, the CJRS Extension will work in broadly the same way as the previous CJRS scheme. Employers will be able to furlough staff on either a full-time or a part-time basis and they will be able to vary the hours worked in agreement with affected employees.

There will be no minimum hours threshold (the “viable jobs” minimum 20% has disappeared along with the JSS) and no cap on the number of employees who can be furloughed.

The government will then pay 80% of wages for hours not worked, up to a maximum of £2,500 per month for no hours worked at all. The £2,500 cap is reduced proportionately to the number of unworked hours. Employer contributions during the CJRS Extension until at least January 2021 will mirror those as in August 2020, i.e. employers will be required to cover National Insurance contributions and employer pension contributions for unworked hours. Sadly, it does not appear that the government has taken advantage of the opportunity to scrap some of the ludicrously complicated maths behind the assessment of contributions under the [Flexible Furlough Scheme](#), so employers maintaining staff on such arrangements will need to keep a careful eye on hours worked in order to have proof in any later HMRC audits.

The government will review the scheme in January and it may be that from that point employers will be required to increase the size of their contribution to include some percentage of the wages for unworked hours.

Employers will have to pay employees for any hours worked as normal, as well as employer National Insurance contributions and employer pension contributions for those hours.

<p><b>Can employers “top up” wages and still claim under the CJRS Extension?</b></p>	<p>Yes, employers can top up employee wages above the maximum salary contribution threshold at their own expense.</p>
<p><b>What should employers include in the calculation of wages?</b></p>	<p>For employees who were eligible under the original CJRS, whether or not actually furloughed, employers must use the same calculations for <a href="#">calculating reference pay and usual hours</a> as under the previous CJRS.</p> <p>For employees who meet the eligibility criteria for the CJRS Extension but were <b>not</b> previously eligible for the original CJRS (joiners after March, for example), employers must use the alternative calculations set out in the guidance. For example, the reference pay for such employees on a fixed salary will be 80% of the wages payable in the last pay period ending on or before 30 October. For those whose pay varies, it will be 80% of the average pay between the start date of their employment or 6 April 2020 (whichever is later) and the day before their CJRS Extension furlough period begins.</p> <p>For those employers that agreed pay reductions with staff over the summer months, this could mean that longer-serving employees will be on higher furlough pay than their more recently recruited colleagues because of the different reference periods that have to be used for the calculation of wages.</p> <p>Further details of how to do the calculations are contained in the updated <a href="#">guidance</a> on calculating how much you can claim, including example calculations.</p>
<p><b>What is the position regarding holidays?</b></p>	<p>The position on holidays is the same as under the previous CJRS rules.</p> <p>The guidance confirms that furloughed employees continue to accrue leave as per their employment contract.</p> <p>Employees can take holiday whilst on furlough and this will not affect an employer’s claim. If an employee is flexibly furloughed, any hours taken as holiday during the claim period should be counted as furloughed hours rather than working hours. Employees should not be placed on furlough simply because they are on holiday for that period.</p> <p>If a furloughed employee takes holiday, they should be paid their usual holiday pay in accordance with the Working Time Regulations 1998.</p> <p>Employees who have been on furlough for a long period of time may be accruing a significant amount of paid holiday; employers should be aware of this and consider requiring employees to take leave during furlough to mitigate that build-up and avoid significant absences after Q1 next year and/or accrued holiday pay liabilities on termination.</p>
<p><b>Are employers required to obtain the consent of employees to be eligible for the grant?</b></p>	<p>Yes. To be eligible for the grant, employers will have to “agree” any new furlough arrangements with affected staff (or unions).</p>

<p><b>Do we need to have written agreements in place with affected employees?</b></p>	<p>The updated guidance confirms that to be eligible for the grant, employers must have confirmed to their employee (or reached collective agreement with a trade union) in writing that they have been furloughed or flexibly furloughed. Employees do not have to provide a written response.</p> <p>Employers will be able to confirm these arrangements retrospectively, to reflect the fact the scheme applies from 1 November but employers have only just been told about it.</p> <p><b>Important bit:</b> If you are intending to treat an employee as on furlough from 1 November, you must confirm this in writing to them <b>by 13 November</b> (i.e. this Friday), as the guidance confirms that any agreements made retrospectively will only be valid for the purposes of a CJRS claim if they are made according to the conditions referred to above and are in place by 13 November.</p> <p>In terms of what the agreements should contain, the guidance is silent on this. The policy paper says rather vaguely that the terms of any agreement must “<i>reflect the hours the employee has actually worked or not worked over the period of the agreement</i>” and “<i>allow the employer to satisfy the terms of CJRS so they can make a claim in relation to hours not worked</i>”. We think this probably means the agreement should include details of working hours (to the extent this is possible), that the employee should not do any work while on furlough, etc. In other words, similar information to previous furlough letters. If hours change during the currency of the extended flexible furlough, employers should provide written confirmation of this to the employee and keep a copy so that it can be matched up with the corresponding alterations in the furlough support levels claimed.</p>
<p><b>What is the position with regard to training/ volunteering, working for other employers?</b></p>	<p>As with the previous CJRS rules, employees will be able to take part in training or volunteering while on furlough as long as in undertaking training they are not providing services to, or generating revenue for or on behalf of, the company or a linked or associated organisation. They can also work for other employers if contractually allowed to do so.</p> <p>Employees <b>must not</b> do any work for their employer during the hours they are recorded as being on furlough and are claimed for accordingly. Even where employees have been told in terms by the employer that they must not work over periods being claimed for, arrangements can still come unstuck where individual line managers seek to push their luck and get a little more out of their staff than they should. We have seen a number of allegations made by disgruntled employees made redundant in recent weeks as the government schemes were due to unravel that they had been made to work while officially furloughed. The furlough whistleblowing hotline will no doubt remain in operation until this extension to the CJRS ends, so it is just not worth an employer’s while taking liberties around the edges of this.</p>
<p><b>What happens to employees who are due to go on family leave at some point, e.g. maternity leave?</b></p>	<p>The position is similar to the previous CJRS rules.</p> <p>As with the original CJRS, parents who are due to go on maternity, paternity, adoption leave, etc., should not lose out on their entitlement to SMP, SPP, SAP, etc., as a result of being furloughed during the relevant assessment period.</p> <p>Note that under the CJRS Extension, employees who have caring responsibilities resulting from coronavirus, including those who need to look after children, can be furloughed.</p>
<p><b>What happens to employees who are sick or required to shield under the new restrictions?</b></p>	<p>As with the previous CJRS scheme, employees can be furloughed where they are unable to work anyway because they are shielding in line with public health guidance. Again, if an employee is off sick, especially long term, they may also be furloughed if their employer wants to do so for business reasons.</p> <p>In terms of shielding, see link to latest guidance <a href="#">here</a>.</p>
<p><b>Can employers rotate employees on and off furlough?</b></p>	<p>Yes, it would appear so. There is no minimum furlough period. Any documentation should reflect what is agreed. Employers need to ensure they do not discriminate when selecting employees to be furloughed. Employers should also make clear the basis on which individual employees are being furloughed and when they may be required to return to work/be taken off furlough.</p>

<p><b>Can we make employees redundant if we are using the CJRS Extension?</b></p>	<p>Yes, but be aware that the detailed guidance now says: <i>“The government is reviewing whether employers should be eligible to claim for employees serving contractual or statutory notice periods and will change the approach for claim periods starting on or after 1 December 2020, with further guidance published in late November.”</i></p> <p>As highlighted in the introduction above, employers should be aware of the potential additional costs of making staff redundant going forward. We will have to wait for the further guidance to see the full implications for employers. On the one hand, you can see why the government is reluctant to pick up the salary costs for those employees who are not being retained, but this approach will deter employers from taking staff back on or halting those redundancy exercises that were already in process. These constant tweaks to the schemes just cause further uncertainty and undermine the government’s efforts to encourage businesses to retain staff during these difficult economic times.</p> <p>There also appears to be some sloppy drafting with regard to the current position, and whether employers can claim for statutory or contractual notice periods. The guidance aimed at employers still refers to them being able to claim for a furloughed employee who is serving a statutory notice period, whereas the employee guidance talks about employers being able to claim for employees while they are serving a statutory or contractual notice period. Surely, it is not too difficult to have one person checking all the different bits of the guidance to ensure it is consistent!</p>
<p><b>What about employees who transfer under TUPE?</b></p>	<p>The guidance says that in order to be claimed for after 1 November, employees should have <i>“been employed by their prior employer on or before 30 October 2020 and transferred from them to their new employer on or before 1 September 2020.”</i> Eh? This must be a drafting error and hopefully will be rectified shortly, as it does not make sense. The intention is presumably to make it clear that employees who transfer under TUPE can also be furloughed by their new employer.</p>
<p><b>What records should employers keep?</b></p>	<p>Employers must keep a written record of any agreements with employees for at least five years.</p> <p>Employers must keep the following records for six years: the amount claimed and the claim period for each employee; the claim reference number; their calculations in case HMRC needs more information about their claim; and how many hours employees work and the number of hours they are furloughed and of any variations in each.</p>
<p><b>How do employers make a claim under the CJRS Extension?</b></p>	<p>Employers can make a claim online from today, Wednesday 11 November.</p> <p>As was the case previously, employers must report and claim for a minimum period of seven consecutive calendar days and the claim period must start and end within the same calendar month. Claim periods cannot overlap.</p> <p>Claims relating to November must be made by 14 December. Claims relating to each subsequent month should be submitted within 14 days of the following month. This is quite a tight timescale, so employers should ensure these deadlines are met.</p> <p><b>Do not forget that the closing date for claims up to and including 31 October is still 30 November 2020,</b> using the previous CJRS guidance.</p>
<p><b>What is the inter-relationship with other Coronavirus Job Schemes?</b></p>	<p>As indicated above, the launch of the JSS has been postponed because of the changing position related to the pandemic, so employers do not need to concern themselves with this, for now at least.</p> <p>The Job Retention Bonus is also no longer going to be paid in February 2021, in light of the extension of the CJRS. Another <i>“retention incentive”</i> will, however, apparently be <i>“deployed at the appropriate time”</i>, so against the caveat that it is unwise at present to forecast <i>anything</i> in terms of the shape of State support, expect something similar to resurface in February or March for those previously furloughed staff who are still on the books at the end of June or thereabouts.</p>

## Where can employers find further information about the CJRS Extension?

Link to press release [here](#).

Link to policy paper [here](#).

Link to economic factsheet [here](#).

Full guidance (all 13 different bits!) was published on 10 November. Links to the key parts are set out below:

[Check if you can claim for your employees' wages through the CJRS](#)

[Check which employees you can claim for](#)

[Calculate how much you can claim](#)

A full list of the updated guidance documents can be found on HMRC's documents page.

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