

The government has issued what we might fervently hope will be the final piece of the jigsaw on the latest extension to the Coronavirus Job Retention Scheme (CJRS) – [the Treasury Direction](#).

This is the fourth Treasury Direction (TD4) that has been issued in relation to the CJRS. TD4 sets out the law that will govern the extension of the Scheme, at least up until 31 January 2021, and formally withdraws the Job Retention Bonus Scheme. The content of the Direction largely reflects what was contained in the guidance issued last week, just expressed in a more complicated way! As mentioned in our previous alerts, the government intends to review the scheme in January so we can look forward to another Treasury Direction in the early part of next year.

Last week, we highlighted that the government was looking at restricting the ability of employers to claim under the extended CJRS for any salary paid during the notice period of any employee who is given (or gives) notice of termination. PILON payments and statutory or enhanced redundancy payments are already outside scope. After what can only be described as a remarkably speedy review, the government has, as suspected, decided that employers will **not** be able to claim under the extended Scheme for employees who are serving contractual or statutory notice periods at any time after 1 December 2020. This is the case whether it is the employer or the employee who gives notice of termination and whatever the reason for the dismissal, i.e. these new rules do not just apply to redundancy dismissals. It seems not to be limited to notices given after that date. This change in approach is reflected in TD4 and the CJRS guidance has also now been changed.

The other significant bit in TD4 (also trailed in last week's guidance) is that HMRC will publish details of those employers that receive payments under the Scheme in respect of claims made in December and January, and employers making claims in respect of any period after 1 December are deemed to agree to that. It will publish the name of the employer and the approximate amount of the claim made by it. This information will be published within three months of the end of the relevant month in which the claim is made and may be available publicly for up to 12 months. HMRC will only withhold such information in very limited circumstances, namely, if it is satisfied that publication will expose any director, officer, employee, etc. to a "serious risk of violence or intimidation". A small risk of violence, therefore, seems not to be an issue for HMRC, and it remains to be clarified why making a CJRS claim would logically generate that fear in the first place. In publishing employer names, the government's intention is notionally to minimise the scope for fraud/abuse of the scheme. It may also, however, have the not-entirely-inadvertent knock-on effect of deterring businesses from claiming. The concern must be that that will include those that have a genuine need for financial support, which could lead to those businesses making job cuts rather than furloughing staff.

We have, once again, updated our "quick guide" to reflect these latest developments. Any significant changes are highlighted accordingly.



CJRS Extension

UPDATED Quick Guide

What is happening to the CJRS?	<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>
When does support start?	<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>
Which employers are eligible to use the CJRS Extension?	<p>As highlighted above, employers can 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 (see below).</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> <p>UPDATED: TD4 confirms that HMRC will publish the following information in respect of claims made in December and January: name of employer or qualifying PAYE scheme; company reference number, if any; and the approximate amount of the claim made by the employer. HMRC will only withhold such information in very limited circumstances, namely if it is satisfied that publication will expose any director, officer, employee, etc. to a serious risk of violence or intimidation.</p>
Can employers make capital distributions under the CJRS Extension?	<p>Neither the guidance nor TD4 deal with this point, so we must take it that employers can 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 can 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 strongly recommend that employers take advice before re-hiring staff, especially in light of the latest guidance and TD4, which state that employers will 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>Can employers “top up” wages and still claim under the CJRS Extension?</p>	<p>Yes, employers can top up employee wages above the maximum salary contribution threshold at their own expense.</p>
<p>What should employers include in the calculation of wages?</p>	<p>For employees who were eligible under the original CJRS, whether or not actually furloughed, employers must use the same calculations for calculating reference pay and usual hours as under the previous CJRS.</p> <p>For employees who meet the eligibility criteria for the CJRS Extension but were not 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 guidance on calculating how much you can claim, including example calculations. They are also set out in horribly complicated detail in TD4.</p>
<p>What is the position regarding holidays?</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>Are employers required to obtain the consent of employees to be eligible for the grant?</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>Do we need to have written agreements in place with affected employees?</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>UPDATED: As mentioned previously, any agreement made retrospectively that has effect from 1 November will only be valid for the purposes of a claim if this was agreed by 13 November (i.e. last 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 wording in TD4 reflects the position under the original flexible furlough scheme, i.e. they should contain 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>What is the position with regard to training/ volunteering, working for other employers?</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 must not 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>What happens to employees who are due to go on family leave at some point, e.g. maternity leave?</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>What happens to employees who are sick or required to shield under the new restrictions?</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 here.</p>
<p>Can employers rotate employees on and off furlough?</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>Can we make employees redundant if we are using the CJRS Extension?</p>	<p>UPDATED: Yes, but be aware that the updated guidance now says: "<i>For claim periods starting on or after 1 December 2020, you cannot claim for any days on or after 1 December 2020 during which the furloughed employee was serving a contractual or statutory notice period for the employer (this includes people serving notice or retirement or resignation). If an employee subsequently starts a contractual or statutory notice period on a day covered by a previously submitted claim, you will need to make an adjustment.</i>"</p> <p>Employers should therefore be aware of the potential additional costs of making staff redundant going forward. 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 their 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>What about employees who transfer under TUPE?</p>	<p>UPDATED: The guidance has been updated to make it clear that for claim periods after 1 November, new employers are eligible to claim in respect of the employees of a previous business transferred if the TUPE or PAYE business succession rules apply to the change in ownership.</p> <p>To be eligible, the employees being claimed for should have been:</p> <ul style="list-style-type: none"> • transferred from their old employer to their new employer on or after 1 September 2020 • employed by either their old employer or new employer on 30 October 2020 • on a PAYE Real Time Information submission to HMRC, by their old employer or new employer, between 20 March 2020 and 30 October 2020, notifying a payment of earnings for that employee. <p>This is reflected in more complicated language in TD4!</p>
<p>What records should employers keep?</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>How do employers make a claim under the CJRS Extension?</p>	<p>Employers are now able to make a claim online. The scheme has been open since 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>Do not forget that the closing date for claims up to and including 31 October is still 30 November 2020, using the previous CJRS guidance.</p>
<p>What is the inter-relationship with other Coronavirus Job Schemes?</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 Treasury Direction [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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