

## COVID-19: Extended CJRS and flexible furlough FAQs

On 5 November 2020, the UK Government announced that the CJRS will be extended to the end of April 2021 (“**extended CJRS**”). We have addressed key FAQs regarding the workings of the extended CJRS.

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### SPEED READ: Overview of extended CJRS

- Employees can be fully furloughed or flexibly furloughed (i.e. work some of their normal hours and be on furlough for the remainder).
- The government will pay 80% of employees' normal pay for hours not worked, up to a cap of £2,500 per month (reduced in proportion to the hours not worked) until the end of April 2020.
- Employers will pay employer National Insurance Contributions (NICs) and pension contributions.
- Employers can claim the grant for the hours that their employees are not working, calculated by reference to their usual hours worked in a claim period.
- From 1 December 2020, employers cannot claim for notice periods.
- HMRC will publish details of employers who claim under the extended CJRS.

This document is a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

### Which employees are eligible for the extended CJRS?

Employees will be eligible for the extended CJRS provided that their employer has made a PAYE RTI submission to HMRC between 20 March 2020 and 30 October 2020 notifying a payment of earnings for them, and they:

- are employed by their employer on 30 October 2020; or
- were on their employer's payroll on 23 September 2020 but have since been made redundant or stopped working for the employer but the employer has re-employed them and put them onto the furlough scheme. (Employees on fixed-term contracts that have expired since 23 September can also be re-employed and claimed for).

### Can employees who are shielding be furloughed?

Yes, HMRC guidance confirms that employees who are shielding can (not must) be furloughed.

### Can employees with caring responsibilities be furloughed?

Yes, HMRC guidance confirms that employees with caring responsibilities resulting from COVID-19 (e.g. caring for children who are at home due to childcare facilities and schools closing or caring for vulnerable children) can be furloughed.

### During the extended CJRS can an employee be furloughed at any point?

Yes, from the guidance it appears that employees can be furloughed at any time between 1 November 2020 and 31 January 2021 provided that they have agreed in writing to being placed on furlough. The details of the extended CJRS for February – April 2021 will be set out in a further Treasury direction.

### What working arrangements can be agreed with employees on flexible furlough?

The extended CJRS gives employers significant flexibility in terms of working arrangements. For example:

- Flexible furlough agreements can last any amount of time.

- Employees can be fully furloughed or flexibly furloughed.
- Employees do not need to work a minimum of their usual hours when on flexible furlough.
- Employees can be furloughed for part of a working day.
- Employees can be brought on and off furlough.
- Employers can change employees' working arrangements on a weekly basis subject to obtaining the employees' agreement.

### Is there a cap on the number of employees that can be furloughed?

No, this time the government guidance confirms that there is no maximum number of employees who can be furloughed and employees do not have to have been furloughed previously.

### Does a business have to show a downturn in work to avail of the extended CJRS?

The Treasury Direction for the extended CJRS states that the scheme applies to employees "*whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission*".

The employer guidance also states that employees can be furloughed if employers "*cannot maintain your workforce because your operations have been affected by coronavirus*".

The employee guidance states:

*"The scheme is designed to help employers whose operations have been severely affected by coronavirus to retain their employees and protect the UK economy. However, **all employers are eligible to claim under the scheme and the government recognises that different businesses will face different impacts from coronavirus.**"*

Taking into account the above guidance, it seems employers have a degree of discretion as to whether they wish to claim under the scheme. There is no specific requirement to show a downturn in work e.g. reduced turnover or profit.

### What are the deadlines for submitting claims under the extended CJRS?

The deadlines for making furlough claims in the below calendar months are:

- October 2020 by 30 November 2020
- November 2020 by 14 December 2020
- December 2020 by 14 January 2021
- January 2021 by 15 February 2021
- February 2021 by 15 March 2021
- March 2021 by 14 April 2021
- April 2021 by 14 May 2021.

### Is it necessary to obtain employee agreement to place them on furlough again?

Yes, the employee must consent in writing to the variation to their terms of employment. Agreements can be altered during the claim period and copies of all agreements need to be retained by employers for at least five years.

### What happens if an employee becomes sick or is required to self-isolate whilst on furlough?

If an employee becomes sick while on furlough, it is up to the employer to decide whether to keep them on furlough or move them onto SSP.

If the employee is moved onto sick pay, the employer will have to pay the SSP or company sick pay due and can no longer claim for the employee's salary through the furlough scheme.

In contrast, if an employee is off sick and their employer wants to move them onto furlough, it should be mindful of the government guidance updated on 2 December 2020 which states that the CJRS is "*not intended to be used for short-term sickness absences*". However, the guidance also states that employers may nevertheless decide to furlough employees for "*business reasons*" while they are off sick. This makes the position somewhat unclear but affords employers discretion as to how to approach employees who are off sick in terms of furlough.

### Can employers make employees on furlough redundant?

Yes, but employers cannot claim for any days that a furloughed employee is serving their contractual or statutory notice period on or after 1 December 2020.

### Do employees continue to accrue annual leave under the extended CJRS?

Yes, furloughed employees continue to accrue annual leave entitlement. Employers may agree with employees that any enhanced contractual holiday entitlement will be reduced down to the statutory minimum (5.6 weeks for a full time employee).

### Can employers make employees use annual leave during periods of furlough?

Yes, employers can require employees to use annual leave during periods of furlough. However, employees need to be given twice as much notice as the length of the holiday they are required to take (e.g. ten days' notice for five days' holiday) unless the employment contract says otherwise.

The government guidance states that any hours taken as holiday during a flexible furlough claim period should be counted as furloughed hours rather than working hours. This means that an employee who is due to work part-time during a particular claim period under the flexible furlough scheme will be treated as being on furlough for all holiday taken during that period, regardless if some or all of the days of holiday fall on days when they were otherwise due to work.

Employers should also be mindful of the purpose of annual leave, namely for rest, relaxation and leisure. Therefore, if an employee is self-isolating employers will need to consider whether the employee's ability to enjoy a period of rest and relaxation is affected.

### What rate of holiday pay should employees receive whilst on furlough?

Employers must top up furlough pay to the employee's normal rate of pay for any days taken as annual leave. I.e. employers can still claim for 80% of the employee's wages under the CJRS but must top up the additional 20%.

### How do employers calculate usual wages for a fixed wage employee?

This depends on whether the employee was eligible for furlough under the original CJRS.

*Eligible employees under original CJRS:* the calculation is based on the wages payable to your employee in their last pay period on or before 19 March 2020.

*Employees only eligible under extended CJRS:* the calculation is based on the wages payable in the last pay period ending on or before 30 October 2020.

**How do employers calculate usual wages for employees whose pay varies?**

This depends on whether the employee was eligible for furlough under the original CJRS.

*Eligible employees under original CJRS:* the calculation is based on the higher of the wages earned in the corresponding calendar period in the tax year 2019 to 2020, or the average wages payable in the tax year 2019 to 2020.

*Employees only eligible under extended CJRS:* the calculation is based on the average payable between the start date of their employment or 6 April 2020 (whichever is later) and the day before their CJRS extension furlough periods begins.

**KEY CONTACTS**



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