

Flexible furlough: rewriting the rules

Rose Smith looks at the new 'commandments' that employers must follow before making claims under the updated furlough scheme



Rose Smith is a senior associate at Doyle Clayton

On 20 March 2020, the UK government announced its unprecedented Coronavirus Job Retention Scheme (CJRS) to pay grants to employers so they could continue to pay their employees when they did not have work for them, rather than having to make redundancies. 'Furlough' quickly became part of the vernacular, dominating headlines, and offering businesses a lifeline as Covid-19 ransacked the population and the economy.

Key commandments of CJRS

As more and more information became available on the CJRS, employers, HR professionals and employment law practitioners swiftly familiarised themselves with the key commandments of CJRS:

- furlough must be a minimum of three weeks in length;
- workers should undertake no work during furlough;
- employers should communicate furlough arrangements in writing, confirming that workers on furlough should not work; and
- employers can claim up to £2,500 per month per furloughed worker, or 80% of their normal pay, whichever is the lower.

By 12 June 2020, it was reported that some 8.9 million workers had been furloughed under the scheme.

This too, shall pass

But all things come to an end and, on 29 May 2020, we learned that the CJRS is to close to new entrants. Anyone not previously furloughed must have completed three weeks' furlough by 30 June 2020 (meaning furlough needed to have started by 10 June 2020) to be eligible for the CJRS grant going forwards. The furlough can have been served with their previous employer, if there has been a business transfer and employees have transferred by way of TUPE.

An exception was then announced for employees returning from maternity, paternity, adoption, shared parental and parental bereavement leave. They can still be furloughed for the first time after 10 June 2020, provided that:

- the organisation has previously furloughed staff within its workforce;
- the period of family leave from which they return started before 10 June 2020 and ended after 10 June 2020; and
- the individual was on the payroll (ie featured in the company's RTI submission notifying HMRC of payment to them) on or before 19 March 2020.

The government has since announced a further exception for those returning to work from a period of service as a military reservist after 10 June, with further guidance on this to follow.

'While being a potentially helpful tool for businesses, flexible furlough is going to be burdensome and time-consuming for them to operate.'

On 12 June, we saw the details of the much-hinted-at further changes to the scheme. The government released its guidance on how furlough arrangements would start to provide for the staged return of the workforce and how employers would start to pick up some of the tab for their furloughed workers.

Flexible furlough

A major change to the CJRS key commandments brought in by the new guidance is the introduction of flexible furlough. From 1 July 2020, furlough periods will no longer be subject to the rigid three-week minimum furlough

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period. However, any repeat period of furlough started after 10 June (where employees have been rotating on and off furlough) will first need to run its three-week course, with no work allowed.

Under flexible furlough, employers can require their furloughed staff to return to work for any length of time, for any working pattern. Furloughed workers may follow an 'x days on, x days off' pattern, may be asked to work reduced hours on certain days, or both. It remains the case that workers can still be furloughed for 100% of their normal hours, but employers now have many more options for gradually restarting their workforce.

It will be important to keep in mind that an employee must agree to work different working hours from usual. Also, as mentioned above, almost all employees will need to have served a period of furlough lasting at least three weeks before 30 June 2020.

A key CJRS commandment that remains the same, despite flexible furlough changes, is the requirement that furloughed employees must not undertake any work during their furloughed hours. This will be difficult to police. How many of us are, or know, part-time workers, who find themselves picking up 'odd bits' on their non-working day? This is not permitted – to take advantage of the

scheme, a worker must not do any work at all for their employer during furloughed hours. Employers will need to be very strict about this or risk invalidating their CJRS claims.

However, furloughed directors are permitted to carry out reasonably necessary duties to fulfil their statutory obligations. In addition, employees can take part in training as long as they are not providing services to, or generating revenue for, their employer or a linked organisation.

Flexible furlough pay

As you would expect, for any period worked, the employer will have to pay

the employee a pro-rata amount of 100% of their normal wages. For furloughed hours, employees can continue to be paid 80%, subject to the £2,500 cap. (However, the cap is proportional to the number of hours worked – so an employee placed on furlough for 60% of their usual hours is entitled to 60% of the £2,500 cap). It remains open to employers to top this up.

To calculate the number of furloughed hours, you need to subtract the actual hours worked from the employee's 'usual' hours. What amounts to 'usual' hours depends on whether the employee works fixed or variable hours.

For those working fixed hours, this will be calculated as:

- the number of hours they were contracted to work at the end of the pay period ending on or before 19 March 2020;
- divided by the number of calendar days in the repeated working pattern (including non-working days);
- multiplied by the number of calendar days in the period claimed for; and
- rounded up to the nearest whole number.

Periods of leave, sickness absence or family leave will be disregarded from the calculation.

For those on variable hours, 'usual' hours will be calculated as the higher of:

- the average hours in the 2019/20 tax year (until the point the employee went on furlough, if applicable); and
- the hours worked in the corresponding pay period in the 2019/20 tax year (the corresponding pay period being a period overlapping by at least one date).

Periods of leave on full pay (such as holiday) and overtime hours (where overtime pay is non-discretionary) will also be included.

Sounds complicated? It certainly is and some complex calculations will be required. The government has published a calculator to assist but it is very limited in its functionality. There are also examples of calculations in the guidance.

Employer contributions

Another key commandment of the CJRS scheme set to change is the amount which the employer can claim from HMRC. Until 31 July 2020, the position remains the same – for furloughed hours, employers can claim 80% of wages up to a cap of £2,500 per employee per month, plus employer National Insurance contributions (NICs) and auto-enrolment pension contributions. This will change monthly on a sliding scale from 1 August 2020. For furloughed hours in:

- August 2020: the employer can claim 80% of wages up to a cap of £2,500 but it must pay employer NICs and pension contributions;
- September 2020: the employer can claim 70% of wages up to a cap of £2,187.50 but it must pay employer NICs and pension contributions, as well as topping up the amount it pays to the employee to 80% of full salary or £2,500; and
- October 2020: the employer can claim 60% of wages up to a cap of £1,875 but it must pay employer NICs and pension contributions, as well as topping up the employee's pay to 80% of full salary or £2,500.

However, the cap reduces in proportion to the number of hours worked.

Inflexible claim periods

Previously, there was no maximum claim period and no limitations on periods the claims should cover. Employers could make claims to line up with their normal payroll or pay periods.

As the amount of grant available will be changing monthly, claim periods are being brought into line with this from 1 July 2020. Claim periods leading up to 30 June 2020 will need to end on 30 June 2020 at the latest and employers will have to claim for periods up to 30 June by 31 July. Thereafter, claim periods must start and end in the same calendar month. They must also cover a minimum of seven calendar days (unless the claim includes the first or last calendar day in a month and the employer has already claimed for the period ending immediately before it, in which case, it may cover less than seven days). A claim period cannot span more than one calendar month and this will mean that they may no longer align with the pay period that the employer usually adopts. Employers will need to check the contracts in place with their employees to decide when to make payments.

From 1 July, only one claim can be made for each claim period. So even if you have employees working different types of furlough, or paid at different frequencies, all applications for all furloughed employees for any one period will need to be in the same claim.

Applications can be made up to 14 days before the end of the period to which they relate and the payment will be made within six working days of the application. However, applying so far in advance could cause difficulties for employers taking advantage of flexible furlough, if they do not yet know employees' hours at the time of applying or if those hours change in the intervening period. The guidance explicitly states that employers should not make a flexible furlough claim until they are clear on the hours that employees will work.

Documentation

The key CJRS commandment when documenting 'normal' furlough has

been interpreted as requiring written confirmation by the employer of agreed furlough arrangements, with no need for anything in writing from the employee confirming their agreement.

Not so for flexible furlough, although the guidance is not clear on this. The guidance seems to tell us that there must be a written agreement (ie agreed by both the company and the employee) setting out the flexible furlough arrangements. Employers

- the actual hours worked by the employee.

So, we have complex calculations, claim periods that may not align with when employees are actually paid, confusing different lengths of time for which records should be kept and the requirement of a written agreement to commence flexible furlough. These all go to show that while being a potentially helpful tool for businesses, flexible

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should therefore try to get signed flexible furlough agreements from their employees. Companies should keep records of such agreements for at least five years.

Employers using flexible working arrangements will need to find a way of recording and logging the hours worked and hours furloughed. This exercise will be made more challenging where the workforce is working remotely, as many currently are. Businesses will need to keep records for six years of:

- the amount claimed for each claim period for each employee;
- the claim reference numbers;
- the calculations used;
- the usual hours worked by the employee; and

furlough is going to be burdensome and time-consuming for them to operate.

Getting it wrong

Employers will have to repay any overpayments claimed under CJRS. This is likely to arise if they claim early for flexibly furloughed workers who end up working more hours than anticipated.

There is a facility in the claim to correct any overpayments and, if the employer is submitting further CJRS claims, the overpayment will simply be deducted from the next grant. HMRC will put in place a mechanism for repayment in due course for situations when no future payment is expected.

It is also possible to correct an undervalued claim but this will involve more investigation from HMRC. They are working on pulling together a process for doing this.

Cap on claims

The new rules include a cap on the number of employees an employer can claim for. From 1 July, the number of employees whom you can furlough in any claim period cannot exceed the number claimed for under any claim ending by 30 June 2020.

There are some exceptions to this cap. It will not include:

- employees returning from maternity or parental leave (and presumably military service); or
- employees who transferred to the business by way of TUPE after 10 June 2020 pursuant to a business transfer.

End of the scheme

The CJRS scheme has an end date of 31 October 2020. Employers should be keeping this date in mind and, in the lead up to it, be asking themselves:

- Can our employees return to work by 31 October 2020?
- Do we need to consider a reduction in hours or redundancy?
- Would we need to collectively consult on redundancies or changes to terms and conditions?

The 12 June 2020 guidance states that 'normal redundancy rules' apply to furloughed employees.

Confusion remains

As we can expect from a new and hastily created scheme, ambiguities remain. From past experience, we can expect updated versions of the guidance to be published as time goes on and there will also need to be a new Treasury Direction setting out the legal framework for flexible furlough.

The fact that the new guidance seems to set out a need for a written agreement suggests that the approach adopted by some employers of issuing unilateral furlough notices (not necessarily agreed by employees) may not have been the intention of the initial guidance.

The reference to 'normal redundancy rules' applying during furlough also raises a number of

questions. Though it seems clear that redundancy consultations can take place during furlough and that notice can be served during that time, ambiguity still remains in respect of:

- whether employers can claim notice pay through the CJRS;
- how employers should calculate notice pay;
- how employers should calculate 'normal' pay when working out an employee's statutory redundancy payment after a period of furlough; and
- how a period of flexible furlough will affect redundancy pay. ■