

# COVID-19

## Operator Employment Support

*23 April 2020*



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Update 23 April 2020

The information below is based on updated guidance produced by the UK Government and is not intended to deal with all aspects relating to the Coronavirus Job Retention Scheme ('CJRS'). Further information about the CJRS is available on the Backhouse Jones resource hub <https://www.backhousejones.co.uk/covid-19-resource-hub/>

This update is **valid as at 23 April 2020**.

### Key Points

1. Coronavirus Job Retention Scheme Portal
2. Annual Leave
3. Written Agreement

#### 1. Coronavirus Job Retention Scheme Portal

The CJRS has been live since Monday 20 April 2020 and many employers have been using the service to reclaim monies paid to employees since they have been furloughed. As you can imagine there was an initial scramble to register for the online portal which caused problems for some but these issues seemed to be resolved now.

In order to make a claim through the CJRS portal, you must have the below information **before** starting to complete the application:

- The number of employees being furloughed.
- The dates employees have been furloughed to and from.
- Details of employees – the name and National Insurance Number of each furloughed employee.
- Your employer PAYE scheme reference number.

- Your Corporation Tax Unique Taxpayer Reference, Self-Assessment Unique Taxpayer Reference or Company Registration Number as appropriate to your entity.
- Your UK bank account details.
- Your organisation's registered name.
- Your organisation's address.

In addition to the above information, the employer should ensure in advance of making their claim that they have worked out:

1. The total amount being paid to furloughed employees.
2. The total employer NICs.
3. The total employer pension contributions (up to 3%).

## 2. Annual Leave

The legal interaction between annual leave and periods of furlough has not always been made clear when it comes to reclaiming monies through the CJRS. Further guidance has now been issued but this does leave some outstanding questions.

We know that furloughed employees continue to accrue leave as per their employment contract. It is also suggested that employees have the right to request holidays and take them as normal during the period of furlough. The impact of that annual leave on furlough has not always been identified however, leaving many employers concerned about granting leave in the event that this broke the period of furlough (which has to be a minimum period of 3 weeks) thus preventing or delaying a claim under CJRS.

Working Time Regulations require holiday pay to be paid at the employee's normal rate of pay or, where the rate of pay varies, calculated on the basis of the average pay received by the employee in the previous 52 working weeks. Therefore, if a furloughed employee takes holiday, the employer should make sure to top up their pay to 100% if currently paying 80%. Any furlough agreement reducing the level of pay to 80% or £2,500 (maximum claim under the scheme) will not alter "normal pay" for the purpose of annual leave.

If an employee takes annual leave whilst on furlough, while the employer must pay 100% of that employee's pay, they may recover 80% of that payment through the CJRS for the period that they are on annual leave.

If an employee usually works bank holidays, then the employer can agree that this is included in the grant payment. If the employee usually takes the bank holiday as leave then the employer would either have to top up their usual holiday pay or give the employee a day of holiday in lieu.

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**Note: the UK Government have specifically stated that they are keeping the policy in respect of holiday pay and furlough under review – so this is an area most likely to be subject to change.**

Employers are also concerned about employees who are currently placed on furlough accruing a significant amount of leave entitlement and having on a short period to utilise the leave when the restrictions imposed by the government are lifted. To combat this issue the government has indicated that employees who cannot take annual leave because it is not reasonably practicable to do so as a consequence of Coronavirus may carry up to four weeks of that annual leave over into the following two leave years, after the leave year in which that annual leave is granted.

A further option available to employers is to request that furloughed workers use a portion of their leave entitlement whilst furloughed. This is permitted in accordance with the Working Time Regulations provided that the employer gives the employee twice as much notice as the period of leave. By way of example, if an employer requires a furloughed worker to take 1 weeks leave then they will need to provide 2 weeks' notice. Employers seeking to utilise this provision will need to confirm this request in writing to the furloughed worker and will also need to top up the pay during the period of leave. Employers should also be cautious when applying any such request fairly across the workforce.

### **3. Written Agreement**

**NOTE: If you have furloughed staff previously, you should check how those employees have been furloughed. If there is no auditable written record of the agreement to furlough, then you may not fall within the scope of the Direction and CJRS, and consequently may not be able to claim back those wages.**

The position on whether a written agreement is required has not been entirely clear, given the conflicting wording of the Direction (which requires furlough to be 'agreed in writing') and the 6<sup>th</sup> iteration of the CJRS guidance published days later (which states that there should be a written record, but the employee does not have to provide a written response).

HMRC have since confirmed that the employer and employee must reach an agreement and that an auditable written record of this agreement must be retained. This suggests that an employee does not have to provide written confirmation of the agreement. Employers should however ensure that they have something confirmed in writing to demonstrate when an individual was placed on furlough and the applicable terms during that period. The record should be placed on the personnel file and retained for at least 5 years.

*If you require any specific legal advice in respect of your employees or anything further mentioned in this update, please don't hesitate to contact Backhouse Jones at 01254 828300.*

### **Summary of the CJRS and useful links**

- On 20 April 2020 the HMRC launched their online portal to facilitate the Coronavirus Job Retention Scheme ("CJRS"), found here:

<https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme>

- A step-by-step guide of how to use this portal can be found here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/880376/Coronavirus\\_Job\\_Retention\\_Scheme\\_step\\_by\\_step\\_guide\\_for\\_employers.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880376/Coronavirus_Job_Retention_Scheme_step_by_step_guide_for_employers.pdf)

In addition to this, the Govt has released material to further clarify the relationship between annual leave and furloughed employees, as have Acas.

- Gov.uk:

<https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme>

- Acas:

<https://www.acas.org.uk/coronavirus/using-holiday>

*Disclaimer: This note is not intended to constitute legal advice and operators should seek specific advice which will be provided based on their particular circumstances.*

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