

# Pilgrim Law

## EMPLOYERS FACTSHEET ON CORONAVIRUS JOB RETENTION SCHEME (“CJRS”) (AS AT 4 APRIL 2020)

### Do I need to consider having “Furloughed Workers”?

On Friday 20 March, the government announced the Coronavirus Job Retention Scheme (CJRS). Under this scheme, it will be possible for employers to be reimbursed some staff costs where they are designated “furloughed workers” and meet the terms of the Scheme.

This is a new legal concept for the UK, a (probably one-off) temporary alternative to the more technical legal concept of a “lay off” (where the employee has some right to a small guarantee payment and may request to be made redundant after 12 weeks).

We have some (but not) of the detail on how the Scheme will operate. Our understanding of how it will work on practice is set out below. This cannot constitute legal advice - it is our best steer based upon the current information available:

<b>What has been said</b>	<b>How we currently think it will work in practice</b>
<b>We intend CJRS to run for at least 3 months from 1 March 2020, but will extend if necessary</b>	It can be ended at any time.
<b>It is expected to be up and running by the end of April</b>	It will be operational when an HMRC online portal has been set up, which will be late April
<b>It will allow claims backdated to 1 March 2020</b>	You can claim from the date you asked eligible employees not to undertake work for you (ie the date they were effectively “furloughed” even if you did not use that label)
<b>All UK employers with a UK payroll and UK bank account are eligible, including not-for profits, charities and public sector organisations</b>	Those working overseas for qualifying employers are eligible. Foreign internationals working for qualifying employers are eligible
<b>Before you can submit a claim, you must enrol with PAYE online, which may take up to 10 days to set up</b>	If you intend to make a claim, you should enrol (via <a href="https://www.gov.uk/payee-online/enrol">https://www.gov.uk/payee-online/enrol</a> ) in good time
<b>It 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</b>	The Scheme may be used by employers not yet affected or who have immediate financial reserves but who wish to take steps to limit future impact
	The decision to furlough should be connected in some way to coronavirus, such as an employee who is unable to work because of shielding or because they are looking after children whose School has closed.
<b>The Scheme covers employees who are</b>	Fixed term employees whose contracts are due

<b>PAYE (including part time, full time, zero hours and apprentices).</b>	to end during the furlough period are eligible
<b>Provided they are PAYE, the Scheme also covers: office holders; company directors; salaried members of LLPs; agency workers; and (Limb (b) workers<sup>1</sup></b>	
<b>The self-employed are not eligible</b>	
<b>The employee must have been on your PAYE payroll on 28 February 2020. Employees hired after that time are not eligible</b>	Employees who commenced their employment before 28 February, but who did not come on the payroll until after that are not eligible
<b>Employees on “unpaid leave” as at 28 February are not eligible</b>	Those who were on statutory leave that is not paid (such as emergency dependant leave or post-SMP maternity leave) as at 28 February are eligible. Those who were on unpaid sabbatical or unpaid sick leave as at 28 February are not eligible
<b>The Employee must be unable to work for a reason connected to coronavirus</b>	
<b>Employees made redundant or who stopped working for you after 28 February are eligible, if rehired by you. This includes an employee who resigned after 28 February to go to a new job that fell through for reasons related to coronavirus (even if they started the new job)</b>	There is no minimum or maximum period of time between the termination date and the re-hire date.
	Those “laid off” after 28 February for little or no pay can be furloughed
	Those who resign (or are dismissed) after 28 February for reasons unrelated to coronavirus, eg in order to have a career break, are not eligible
	The claim period starts from when they are furloughed (ie after being re-hired)
<b>Both you and the employee must agree to put them on furlough</b>	Although good industrial practice, we do not consider agreement will prove necessary where the furloughed employee is receiving their normal pay and benefits and suffers no detriment, meaning designation as a furloughed worker can, in practice, be imposed by you
<b>The employee needs to be designated a “furloughed worker” by you</b>	Consultation is recommended, but a failure to consult does not make you ineligible, but could be a breach of contract and a breach of your statutory consultation obligations
<b>You cannot claim for employees receiving Statutory Sick Pay, but can do once they are no longer receiving Statutory Sick Pay</b>	If you are paying the employee enhanced sick pay, they can be furloughed. An employee receiving SSP may be financially better off ending their sick leave
<b>Employees on maternity leave who qualify for maternity pay (or adoption pay or paternity pay) can be furloughed (as can those who qualify for adoption pay or paternity pay)</b>	This includes the first two weeks (compulsory) maternity leave

<sup>1</sup> A Limb b worker is a “worker” within the definition of s230(b) Employment Rights Act 1996: generally, someone who is not an employee but who is contractually obliged to provide services personally to a business that is not his client/customer. It covers many in the ‘gig’ economy

	Employees who are on unpaid maternity leave (or similar) cannot be furloughed until they end their leave
	Employees cannot be paid less than the statutory maternity (or similar) payments they are entitled to, such as the 90% of pay for the first 6 weeks.
<b>Holidays: The guidance is silent</b>	Employees can take holiday (or be held to their pre-booked holiday) whilst furloughed
	The right to require employees to take statutory holiday on notice can be exercised for furloughed workers (except those on maternity or similar leave)
<b>You need to notify the employee in writing that they have been designated a “furloughed worker”</b>	A verbal communication is not sufficient on its own, but a written global (rather than individual) communication is
<b>The furlough period you can claim for runs from the date they are furloughed, not the date they were notified in writing</b>	
<b>A record of the written notification must be kept for 5 years</b>	
<b>You need to keep the employee on the payroll</b>	The furloughed employee should be paid in line with the Scheme but can be made redundant or otherwise dismissed (ending their furlough)
<b>Your employee must be furloughed for at least three consecutive weeks. They can be unfurloughed and then put on furlough again</b>	The employee does not need to be furloughed for the entire period covered by a claim. You may not claim for them until they have been furloughed for three weeks, but some of that period can occur within the period of your previous claim
<b>There must be at least three weeks between submitting claims for payment</b>	This is three weeks between any claims for any employees, not three weeks between claims for any specific employee
	An employee does not need to be furloughed for the entire period of the periodic claim. Where an employee is furloughed for 3 consecutive weeks but the first 2 weeks fall within a period you have already claimed for, they will be covered by your next claim
<b>HMRC will reimburse 80% of your employee’s regular wage (gross) up to a cap of £2,500. (the “Furlough Payment”)</b>	The grant is a reimbursement requiring payment to be made first, and proof of payment
	It is based upon wages after any salary sacrifice.
<b>You will not normally have to pay the other 20% of wages to receive the grant (but see below). Minimum wage legislation does not apply to furloughed employees unless they are required to attend training</b>	Reducing staff wages could be a breach of contract, but will not make you ineligible
<b>If the employee is entitled to Statutory Maternity Pay, the full amount of SMP must still be paid</b>	The same will apply for those on other paid family-related statutory leave.
	Reducing the non-statutory element for furloughed employees would not make you ineligible under the Scheme but could be unlawful discrimination and a breach of contract

<b>HMRC will pay an additional grant to cover employer's NICs on the Furlough Payment (but not on payments exceeding this)</b>	
<b>HMRC will pay an additional grant to cover the employer's mandatory auto-enrolment contributions on the Furlough Payment (but not on payments exceeding this)</b>	This will be 3% of the amount that must be considered for auto-enrolment (for the 2019/20 tax year, this is pay between £512 and £4,167 a month, or £118 and £962 a week)
<b>If the employee is salaried, the grant is based on their actual gross salary as at 28 February.</b>	It does not include anything which is not salary, such as commission, bonuses or directors fees
<b>If the employee is not salaried:</b> a) If employed for >1 year, it is based on whichever is higher of: their pay for the same month in the previous tax year; or their average earnings for the previous tax year b) If the employee has been employed for <1 year, it is based on their average monthly earnings c) If the employee started in February 2020, it is a pro-rated calculation of their earnings for February	For the unsalaried employee, this will include regular payments you are obliged to pay, which could in some cases include overtime, fees, and compulsory commission, but not any discretionary payments.
<b>The Scheme does not release you from obligations to deduct/account for income tax, NICs and any auto-enrolment pension contributions</b>	
<b>You must pay your employee the full amount of the grant received</b>	You may not make deductions from it, save those required by statute or by law (for example to comply with an attachment of earnings order)
<b>To be eligible for the grant, when on furlough, an employee cannot undertake work for, or on behalf, of the organisation (but see below). This includes providing services or generating revenue. Employers are free to consider allocating any critical business tasks to staff that are not furloughed</b>	There is no exception allowing furloughed employees to do tasks that are business critical
	The employee will be able to carry on in an existing second job for you. You will not otherwise be able to employ them in a new/ different role whilst furloughed
	If the employee works for you in a way that is not permitted, you are ineligible to claim for that employee for any period in which they worked. If that makes the continuous furlough period less than 3 weeks, you cannot claim.
<b>Directors who are furloughed may undertake duties to comply with their statutory obligations</b>	They should not go beyond what is reasonably necessary to comply with their statutory obligations
	Others under a personal statutory obligation may similarly undertake duties to comply with this
<b>The employee can do voluntary work for you, provided this does not provide services to or generate revenue for, or on behalf of you</b>	

<p><b>The employee can undergo training for you, provided this does not provide services to or generate revenue for, or on behalf of the employer. You must comply with minimum wage legislation for the time spent training.</b></p>	
<p><b>The employee may work for someone else</b></p>	<p>The employee is able to take up self-employment or new employment with a new employer whilst furloughed.</p>
<p><b>You will need to submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal. The grant will be made by BACS</b></p>	

## CONCLUSION

Clarification is needed, but if the Scheme operates in line with announcements, it will be a very powerful tool to enable organisations to keep going.

Things are likely to change, and this advice may quickly become out of date. We are unlikely to distribute updated factsheets each time, but will endeavour to keep our clients apprised.

***Health Warning - This factsheet is not intended to be a full summary of the law, and advice should be sought on individual situations.***