



BRIEFING PAPER

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FAQs: Coronavirus Job Retention Scheme

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Summary

Introducing the Coronavirus Job Retention Scheme

On 20 March 2020 the Government announced the Coronavirus Job Retention Scheme.

The purpose of the Scheme was to provide grants to employers to ensure that they could retain and continue to pay staff, despite the effects of the COVID-19 pandemic.

The CJRS initially applied from 1 March to 30 May 2020. It was then extended to 30 June. The CJRS was extended again from 1 July to 31 October 2020. The rules were changed to allow employees to be 'flexibly furloughed' – meaning employers could ask employees to work any pattern and claim a CJRS grant for any usual hours not worked.

Under the initial CJRS, only employees who were employed on 19 March 2020 on a PAYE payroll notified to HMRC through an RTI submission on or before that date were eligible. Employees who were on a payroll on or before 28 February or 19 March but who stopped working after those dates could be re-employed and furloughed.

The CJRS initially covered 80% of an employee's wages (up to £2,500 per month) as well as employer National Insurance and pension contributions. From 1 August 2020, NICs and pension contributions were not covered. In September and October 2020 the CJRS only covered 70% and 60% of wages, respectively, and employers were required to top up to 80%.

Extending the CJRS from 1 November 2020 to 30 April 2021

The CJRS was set to end on 31 October 2020 to be replaced by the Job Support Scheme. Under the JSS Closed, businesses that were legally closed would have been able to furlough their staff and claim a grant for 67% of their wages with no employer top-ups required. Under JSS Open, which was open to all businesses, employers would have had to bring employees back for at least 20% of their normal hours. For hours not worked, employers would have had to cover 5% of wages and HMRC would have provided a grant to cover 61.67% of wages.

On 31 October 2020, as a new temporary national lockdown was announced for England, the Chancellor announced that the CJRS would be extended until December and the JSS would be postponed. On 5 November, the Chancellor announced that the CJRS would be extended further until 31 March 2021 to give businesses certainty over the winter months. On 17 December, the Chancellor announced the CJRS will be extended to 30 April 2021.

Under the extended CJRS, employers could flexibly furlough employees and claim a grant from HMRC for 80% of an employee's wages for any usual hours not worked (up to £2,500 per month or the relevant pro rata amount). Employers were required to cover employer NICs and pension contributions. As such, the rules were similar to those in August 2020.

Under the extended CJRS, employees who were employed on 30 October 2020 on a payroll notified to HMRC on or before that date were eligible. Those who were employed on 23 September but who since stopped working could be re-employed and furloughed. There was no need for an employee to have been furloughed between March and October.

Extending the CJRS from 1 May 2021 to 30 September 2021

In Budget 2021 the Chancellor announced that the CJRS would be extended until 30 September 2021. The CJRS grant would continue to cover 80% of an employee's wages

until 30 June 2021. From 1 July 2021, the grant covered 70% of wages and employers were required to top up an additional 10%. From 1 August 2021 the grant covered 60% of wages and employers were required to top up 20%. The CJRS closed on 30 September 2021.

Relationship between the CJRS and employment law

The CJRS was simply a mechanism through which employers can claim money from HMRC. It did not alter existing employment law rights and obligations.

Employers will normally be liable under the employment contract to pay employees their full wages, even if they cannot provide any work. In many cases, the employment contract would need to be varied to allow employers to furlough an employee on reduced pay.

The rules of the CJRS – set out in Treasury Directions – require employers to enter into a full furlough agreement or a flexible furlough agreement with their employees, setting out the main terms and conditions that will apply during any period of furlough. Agreements must be incorporated into the employee's employment contract.

It was for employers to decide whether to furlough an employee. This potentially caused problems for zero-hours workers and agency workers whose employers could simply reduce their work to zero without making a claim under the Scheme.

The Scheme also sat amongst a range of existing statutory employment rights. These include protections from discrimination, protections from unfair dismissal and rights to consultation in cases of collective redundancies. It also includes the rules on Statutory Sick Pay, statutory maternity pay and holiday pay.

The CJRS was extended a number of times and was closed to new claims on 30 September 2021. Unless otherwise stated, the FAQ responses in this paper refer to the fifth Treasury Direction (as amended) and are correct as at March 2021. If required, Members of Parliament can request specific information about a particular point in time from the House of Commons Library team.

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. A suitably qualified professional should be consulted if specific advice or information is required.

1. Background

1.1 Introducing the Coronavirus Job Retention Scheme

The Coronavirus Job Retention Scheme (CJRS) was announced by the Chancellor on 20 March 2020. The Chancellor said the scheme was being introduced to protect jobs at a time when the Government was asking people to work from home and telling businesses to close in response to the COVID-19 pandemic. Between 26 and 28 March 2020 the UK Government and devolved administrations passed legislation to implement 'lockdowns'.¹

The CJRS allowed employers to furlough eligible employees (i.e. instruct them to stop working) and claim a grant from HMRC to cover 80% of the employee's wages. Employers had to enter a furlough agreement with employees, agreeing relevant terms and conditions.

The CJRS initially covered the period from 1 March to 31 May 2020. It was subsequently extended to 30 June 2020.

On 12 May, the CJRS was extended again until 31 October 2020. The [rules of the scheme were also changed](#) from 1 July, allowing employees to be 'flexibly furloughed'. Unlike the previous rules where employees had to cease working for at least three weeks, employers could now ask employees to work any pattern and claim under the CJRS for any usual hours they did not work. However, the scheme was closed to employees who were not furloughed at least once between March and June. In addition, employer contributions were required from 1 August 2020.

The Chancellor explained that the scheme would be gradually wound down and would end on 31 October 2020:

We have to be honest: leaving the furlough scheme open forever gives people false hope that it will always be possible to return to the jobs they had before. The longer people are on furlough, the more likely it is that their skills will fade, and they will find it harder to get new opportunities. It is in no one's long-term interests for the scheme to continue forever, least of all those trapped in a job that can exist only because of Government subsidy. So the furlough will wind down, flexibly and gradually, supporting businesses and people through to October.²

Over the summer most of the lockdown rules had been significantly relaxed. Workers were legally permitted to return to the workplace, even if they could work from home. Businesses, including in the non-essential retail, hospitality and entertainment sectors were allowed to re-open. Some restrictions were kept in place through local lockdowns.³

An overview of the rules currently in force can be found in the Library Briefing, [Coronavirus: Returning to work \(CBP-8916\)](#).

¹ [SI 2020/350](#); [SSI 2020/103](#); [WSI 2020/353](#); [NISR 2020/055](#) (all now replaced)

² [HC Deb 8 July 2020 c974](#)

³ See [Coronavirus: A history of English lockdown laws, Commons Library Briefing Paper CBP-9068](#), 4 December 2020

1.2 Extending the CJRS

In September 2020, various groups called on the Government to extend the CJRS in some form past 31 October. In an Opposition Day Debate the Labour Party called for targeted support for sectors most affected by the pandemic.⁴ The [Institute for Public Policy Research](#) and the [Trades Union Congress](#) both published proposals for extending the CJRS.⁵

Job Support Scheme

On 24 September, the Chancellor [announced a new Job Support Scheme \(JSS\)](#) that would replace the CJRS from 1 November. Under the initial proposal, employers could furlough employees who worked at least 33% of their hours. For hours not worked, employers would cover one-third and HMRC would cover one-third (up to £698 per month). In practice this meant that employers would have covered at least 55% of the total wage bill and HMRC would have covered no more than 22%. Organisations like the Resolution Foundation noted that employers would have had financial incentives to cut jobs instead of using the JSS.⁶

On 9 October, the Chancellor [announced an expansion of the JSS](#). Under the expanded scheme, if a business was legally required to close, they could furlough their staff and claim a grant to cover 67% of their employees' wages (up to £2,100 per month). Employer contributions would be limited to National Insurance and pension contributions. The announcement came as various parts of the north of England were placed under new Tier 3 restrictions. The proposal was criticised as insufficient by mayors in the north of England, who called for more support for businesses that were open but facing lower turnover.⁷

On 22 October, the Chancellor [announced further changes to the JSS](#). The scheme for businesses legally required to close remained the same and was re-named 'JSS Closed'. However, changes were made to the scheme for other businesses. Instead of the initial proposal, employers would be allowed to furlough employees who worked just 20% of their hours. For hours not worked employers would cover 5% of wages and HMRC would cover 61.67%. In practice this meant that employers would have covered at least 24% of the wage bill and HMRC would have covered no more than 49%. The Resolution Foundation concluded that the changes "radically improved" the incentives to retain staff.⁸

Extending the CJRS from 1 November 2020 to 30 April 2021

On 31 October, the Treasury [announced the CJRS would be extended](#) until December and the JSS would be postponed. This came as the Prime Minister [announced a new temporary national lockdown](#) for England from 5 November to 2 December 2020.

⁴ [HC Deb 9 September 2020 c624](#)

⁵ [Opposition day debate: Protection of jobs and businesses, Commons Library Debate Pack CDP-2020-0087](#), 8 September 2020

⁶ Torsten Bell et al., [The Winter \(Economy Plan\) is coming](#), Resolution Foundation, 25 September 2020

⁷ See [Coronavirus: Support for workers during local lockdowns](#), Commons Library Insight, 15 October 2020

⁸ Daniel Tomlinson, [Sorting it out: The Chancellor moves to fix the Job Support Scheme](#), Resolution Foundation, 22 October 2020

The CJRS (and the proposed JSS) were UK-wide schemes. However, public health is a devolved matter and the devolved administrations set and implement lockdown rules in Scotland, Wales and Northern Ireland.

The extension of the more generous CJRS just as England went into national lockdown led to criticisms from the Scottish and Welsh First Ministers who argued that the Chancellor had initially refused to extend the CJRS when Scotland and Wales went back into stricter lockdowns.⁹ Answering questions on this issue in the House of Commons, the Prime Minister appeared to suggest that the CJRS would be extended again in the future if devolved administrations reintroduced lockdowns.¹⁰

On 5 November 2020, the Chancellor [announced that the CJRS would be extended until 31 March 2021](#). The extended CJRS will be open to those who were employed on 30 October 2020 on a payroll notified to HMRC on or before that date. Employees can be flexibly furloughed and employers can claim 80% of an employee's wages for any usual hours not worked. Employers will only be required to cover employer National Insurance and pension contributions. The CJRS will be open to any employer, regardless of whether they are legally required to close.

On 17 December 2020, the Chancellor [announced that the CJRS would be extended a further month](#) until 30 April 2021. It was also confirmed that HMRC will continue to cover 80% of an employee's wages.

Extending the CJRS from 1 May 2021 to 30 September 2021

In advance of the Budget on 3 March, various groups called on the Chancellor to announce a further extension to the CJRS. The TUC called for an extension until the end of 2021 whereas the CBI called for an extension until June, followed by more targeted support.¹¹ The Labour party called for an extension along with reforms, such as providing training for furloughed employees.¹²

In [Budget 2021](#) the Chancellor announced that the CJRS would be extended until 30 September 2021. The CJRS grant would continue to cover 80% of an employee's wages until 30 June 2021. From 1 July, the grant would cover 70% of wages and employers would be required to top up an additional 10%. From 1 August the grant would cover 60% of wages and employers will be required to top up 20%. HMRC published some basic [guidance on the forthcoming changes to the CJRS](#).

While it was not announced in the Budget, the updated guidance confirmed that from 1 May 2021, employers would be able to furlough any employee who was employed on 2 March 2021 on a payroll with a payment of earnings notified to HMRC through an RTI submission at some point between 20 March 2020 and 2 March 2021. On 15 April

⁹ See [Extending furlough via the Coronavirus Job Retention Scheme](#), Commons Library Insight, 3 November 2020

¹⁰ [HC Deb 2 November 2020 c53](#)

¹¹ TUC, [Extend job retention support to end of year before unemployment surges, says TUC](#), 26 January 2021; CBI, [CBI Budget submission letter](#), 14 January 2021

¹² Labour, [Labour calls for "smart" furlough scheme as part of emergency action to tackle Britain's jobs crisis](#), 4 February 2021

2021, the Treasury published a further Direction covering the period 1 May 2021 to 30 September 2021.¹³

1.3 Use of the CJRS

HMRC releases [statistics on the CJRS](#). As of midnight on 15 February 2021, a total of 11.2 million jobs had been furloughed. The numbers peaked on 8 May when 8.9 million jobs were furloughed at one time. On 31 July 2021, 1.6 million staff were on furlough, which was a decrease from 1.9 million jobs on furlough on 30 June 2021.¹⁴

The use of the CJRS varied significantly by sector. As of 15 February, 56% of jobs in accommodation and food services sector and 55% of jobs in the arts and entertainment sector were furloughed, compared to 21% in the retail sector and 15% in the professional sector.

A detailed overview of the CJRS statistics can be found in the Library Briefing, [Coronavirus Job Retention Scheme: Statistics \(CBP-9152\)](#).

The Government also [publishes details of employers using the CJRS](#).

1.4 Excluded workers

One of the areas of significant concern has been the workers who are 'excluded' from the CJRS.

On 15 June 2020, the Treasury Committee published a report, [Economic impact of coronavirus: Gaps in support](#), that considered which workers were excluded from the CJRS and the Self-Employment Income Support Scheme (SEISS). In October 2020, the National Audit Office (NAO) also published a report, [Implementing employment support schemes in response to the COVID-19 pandemic](#), which looked at workers who were excluded from both schemes.

There are a number of different groups who are 'excluded' from the CJRS. Some are excluded in the sense that they are not eligible. Others are eligible but do not receive adequate support. These groups include:

- Workers who were not employed on 19 March or 30 October (e.g. PAYE freelancers; unemployed workers);
- Workers who are not paid through PAYE (e.g. gig workers);
- Workers who were employed on 19 March or 30 October but whose entry on the payroll had not been notified to HMRC on an RTI submission on or before those dates (e.g. new starters);
- Workers who were employed on 28 February or 23 September whose former employers refused to re-employ and furlough them (e.g. newly unemployed workers);
- Eligible workers whose employers have refused to furlough them (e.g. zero-hours and agency workers; workers on maternity leave);

¹³ The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction ([Seventh Treasury Direction](#))

¹⁴ Official statistics, [Coronavirus Job Retention Scheme statistics](#): 9 September 2021

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- Eligible workers who receive a significant portion of their pay in the form of dividends (e.g. directors of limited companies); and
- Eligible workers who receive a significant portion of their pay through tronc systems and tips (e.g. hospitality workers).

There is no clear number of how many workers are 'excluded' from the CJRS. The NAO estimated that 1.1 million workers were 'excluded', including 400,000 freelancers and 700,000 limited company directors. The campaign group Excluded UK have [estimated that around 3 million workers have missed out](#) on the CJRS and SEISS.

The Treasury Committee called on the Treasury to find a solution to many of these problems and to alter the rules of the CJRS to help new starters, PAYE freelancers and directors of limited companies. Excluded UK has called for one-off payments for excluded workers, equivalent to what they would have received had they been furloughed.¹⁵

The Government's response to the Treasury Committee report said that in most cases it would not be possible to alter the rules of the scheme either because of administrative capacity or the risk of fraud.¹⁶

In an Oral Evidence session with the Treasury Committee the Chancellor explained that the Treasury had sought to extend the eligibility criteria as far as possible but that it was difficult to go any further:

The fact that we have been able to do so much that people thought we were not able to do ought to prove the point. If we could have done an easy thing at scale and speed, while protecting against fraud and making sure that support was targeted and affordable within all of that, we would have done it. I think your point actually proves the thesis. If it was straightforward, given that we have managed to do lots of other things, there is no reason why we would not have done it.

As I said, it is not as if there is no support available for the group of people you have mentioned ... It may well be that they have not got exactly what they have wanted, but they may well have been able to access other avenues. As I said in May, our focus now, and my focus for HMRC, and indeed everything else we are doing, is planning for and implementing policies for the recovery. That is where I think our focus should be.¹⁷

On 15 February 2021, the Treasury Committee published a report, [Economic impact of coronavirus: gaps in support and economic analysis](#), reiterating its calls on the Government to address gaps in support. In particular, it recommended that the Government consider how it could adopt a new Directors Income Support Scheme (DISS) in a way that mitigated fraud risk.¹⁸ The Financial Secretary to the Treasury, Jesse Norman, and the Permanent Secretary to the Treasury, Sir Tom Scholar,

¹⁵ Excluded UK, [Potential Solutions to the Exclusions in Government Covid-19 Support](#), 8 September 2020

¹⁶ Treasury Committee, [Economic impact of coronavirus: Gaps in support: Government Response to the Committee's Second Report of Session 2019–21](#), HC662, July 2020

¹⁷ Treasury Committee, [Oral evidence: Economic Impact of Coronavirus](#), HC271, 15 July 2020, Qs 860-862

¹⁸ Treasury Committee, [Economic impact of coronavirus: gaps in support and economic analysis](#), HC882, 15 February 2021, paras. 47-49

both told the Committee that as proposed, the DISS carried too large a fraud risk as it was reliant on self-certification by claimants.

These calls were echoed by the Business, Energy and Industrial Strategy Committee in its pre-Budget report on the impact of COVID-19.¹⁹

1.5 Furlough fraud

Another key area of concern has been the risk of fraudulent claims being made to the CJRS.

In an Oral Evidence session with the Public Accounts Committee in September, Jim Harra, the Chief Executive of HMRC, said that HMRC was assuming a fraud rate of 5% to 10% for the CJRS:

We have made an assumption, for the purposes of our planning, that the error and fraud rate in the scheme could be between 5% and 10%. I know that there has recently been an academic study that suggests it might be higher. I know also that the National Audit Office have recently carried out a survey, which I am sure they will report on to the Committee next month, which will also give us a bit of information, and in due course we will do more work on it ourselves. That is the kind of ballpark that we are planning the assumption on at the moment.

[...]

Our planning assumption is somewhere between £1.75 billion and £3.5 billion, and is the basis on which we will be planning our risk assessment and our compliance activity. That will range from deliberate fraud through to error. We have said that in our risk assessment we are not going to set about trying to find employers who have made legitimate mistakes in compiling their claims, because this is something new that everybody had to get to grips with at a very difficult time. We will expect employers to check their claims and repay any excess amounts, but we will be focused on tackling abuse and fraud.²⁰

Similar figures were provided in an Oral Evidence session before the Treasury Committee in December 2020.²¹

In that Oral Evidence session, Penny Ciniewicz, the Head of Customer Compliance at HMRC, explained some of the measures that HMRC was taking to address fraud risks:

Overall, we rejected around 15,500 claims from both SEISS and CJRS with a value of around £60 million, but we risked close to 140,000 of those where we made further checks as part of that process. In the case of CJRS, we rejected claims worth £12 million as part of our risking process. Our feeling is that this enabled us to block most suspect payments and indeed prevent a lot of the criminal attack that would otherwise have happened.

[...]

Having risked that many claims, 11.9 million, and put all of that effort into trying to make sure we do not let suspect claims out of

¹⁹ BEIS Committee, [The impact of Coronavirus on businesses and workers: interim pre-Budget report](#), HC1264, 26 February 2021, paras. 17-22

²⁰ Public Accounts Committee, [Oral evidence: Tackling the tax gap](#), HC 650, 7 September 2020, Qs 11-13

²¹ Treasury Committee, [Oral evidence: HMRC Annual Report and Accounts](#), HC 1061, 7 December 2020, Q30

the door, we have then done more. Before Royal Assent, we contacted high-risk claimants. We called around 5,000 claimants to nudge them to check their claims, and we also obviously have a fraud investigation hotline, where we have taken the reports from that fraud investigation hotline and we have used the data and information we already have to highlight risky claims. Around 5,700 investigations are open at the moment. Around 2,000 of those relate to investigations resulting from reports to the fraud hotline. We are continuing to work those investigations, and we will work more as and when we feel that we have reasons to make inquiries into suspicious claims.

Throughout that period, however, people have also been repaying. In the context of error overall, so far we have had £504 million made in terms of voluntary disclosures and corrections, including people who were entitled to the grant but decided to pay it back.²²

1.6 Other support schemes

The CJRS is one of a number of measures the Government has introduced to provide financial support to businesses and workers.

The Library Briefing, [Coronavirus: Support for Businesses \(CBP-8847\)](#), covers the business support schemes in detail.

The rules on Statutory Sick Pay (SSP) have been amended to cover eligible employees who are self-isolating or shielding. Employers can reclaim two weeks' worth of SSP payments under the [Statutory Sick Pay Rebate Scheme](#). The Government has also introduced Test and Trace Support Payments for low-income workers who are unable to work because they are self-isolating. For more information see the Library Briefing, [Coronavirus: Test and Trace Support Payments \(CBP-9015\)](#).

The Government created the [Self-employment Income Support Scheme \(SEISS\)](#) to provide support to the self-employed. Further information can be found in the Library Briefing, [Coronavirus: Self-employment Income Support Scheme \(CBP-8879\)](#).

A note on terminology...

A many different pieces of Government guidance that are referred to throughout this paper.

- "Guidance for employers" means the [general guidance for employers on the CJRS](#).
- "Guidance on eligibility" means the [guidance on employees who are eligible under the CJRS](#).
- "Guidance on preparing claims" means the [guidance on steps to take before calculating claims](#).
- "Guidance on calculating claims" means the [guidance on calculating what employers can claim](#).
- "Guidance for making claims" means the [guidance on how to submit claims to the online portal](#).
- "Guidance for employees" means the [general guidance for employees on the CJRS](#).
- "Government guidance" refers collectively to the documents above.
- "Seventh Treasury Direction" means [The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#) (made 15 April 2021)

²² Ibid. Q31

- “Sixth Treasury Direction” means the [Treasury Direction under Section 71 and 76 of the Coronavirus Act to extend the effect of the Coronavirus Job Retention Scheme \(CJRS\)](#) (made 26 January 2021)
- “Fifth Treasury Direction” means the [Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#) (made 12 November 2020)
- “First/Second/Third Treasury Direction” means the [first three Treasury Directions](#) (made 15 April, 20 May and 25 June) that covered the period from 1 March 2020 to 31 October 2020.
- “Treasury Direction” refers to the Fifth Treasury Direction as amended by the Sixth Treasury Direction.

The Treasury Direction says that ‘employees’ are eligible under the CJRS. The definition of ‘employee’ in the Direction is broader than the definition of ‘employee’ used in employment law. Likewise, this paper uses the term ‘employee’ to describe those who eligible under the Scheme.

2. Rules of the CJRS

Q1. Where are the rules of the CJRS set out?

The statutory basis for the Scheme is section 76 of the [Coronavirus Act 2020](#). This is a general provision that provides the Treasury with the power to direct HMRC's functions in relation to Covid-19.

On 15 April the Government published the [first Treasury Direction](#). This set out the rules that applied from 1 April to 31 May.

On 22 May the Government published the [second Treasury Direction](#). This replaced the first Treasury Direction and extended the Scheme. This set out rules that applied from 1 April to 30 June.

On 25 Jun the Government published the [third Treasury Direction](#). This set out new rules that applied from 1 July to 30 October.

On 12 November the Government published the [fifth Treasury Direction](#) (the fourth Treasury Direction did not concern the CJRS). This set out the rules that applied from 1 November 2020 to 31 January 2021. On 26 January 2021 the Government published the [sixth Treasury Direction](#). This extends the CJRS until 30 April 2021. The rules under the fifth Treasury Direction will continue to apply with some modifications to the rules on calculating the reference salary and usual hours of employees whose pay and hours vary (see Questions 38 and 39).

On 15 April 2021 the Government published [the seventh Treasury Direction](#). This set out the rules that applied from 1 May 2021 to 30 September 2021.

Main guidance

- 1 [Check if you can claim for your employees' wages through the Coronavirus Job Retention Scheme](#)
This guidance sets out which employers are eligible, how to furlough employees and the rules they need to follow.
- 2 [Check which employees you can put on furlough to use the Coronavirus Job Retention Scheme](#)
This guidance sets out which employees can be furloughed.
- 3 [Steps to take before calculating your claim using the Coronavirus Job Retention Scheme](#)
This guidance sets out how employers should decide a 'claim period', what to include as 'wages' and how to determine the 'usual hours' for employees who are flexibly furloughed.
- 4 [Calculate how much you can claim using the Coronavirus Job Retention Scheme](#)
This guidance sets out how to calculate 80% of wages and the NICs and pension contributions that employers can claim.
- 5 [Claim for wages through the Coronavirus Job Retention Scheme](#)
This links to the online portal through which employers make a claim. It sets out what information employers need to submit.

6 [Reporting employees' wages to HMRC when you've claimed through the Coronavirus Job Retention Scheme](#)

This sets out how employers should submit PAYE information to HMRC for wages paid to furloughed employees.

Additional guidance

- [Examples of how to calculate your employees' wages](#)
- [Other types of employees you can claim for](#)
- [Check if your employer can use the Coronavirus Job Retention Scheme](#)
- [Holiday entitlement and pay during coronavirus \(COVID-19\)](#)

Q2. What is the status of the Treasury Directions?

The Treasury Directions are made under the statutory power conferred by section 76 of the [Coronavirus Act 2020](#). They have legal force and are the documents that HMRC is bound to follow when making decisions about issuing grants under the Scheme.

The Directions are not subject to Parliamentary approval. However, the Directions are a form of legislation and are subject to the ordinary rules on statutory interpretation.

The Direction can be amended or superseded by new Directions.²³

Q3. What are the key changes from 1 November?

As noted above, the CJRS was extended from 1 November 2020 until 31 January 2021 and again until 30 April 2021. The key changes to the rules that applied from 1 November include:

- The cut-off date for eligibility is now 30 October 2020. Employees who were employed on 23 September 2020 but stopped working can be re-employed and furloughed. Employees do not need to have been previously furloughed in order to be eligible.
- If an employee was eligible under the initial CJRS, then under the extended CJRS their usual hours and reference salary must still be calculated by reference to the last pay period before 19 March 2020 or by reference to the 2019-20 tax year. If an employee was not eligible under the initial CJRS, then under the extended CJRS their usual hours and reference salary must be calculated by reference to the last pay period before 30 October 2020 or the period between when they began employment and when they were placed on furlough.
- The CJRS does not cover employer National Security or pension contributions but employers do not have to contribute towards an employee's reference salary. This is the same as in August 2020.
- There are new deadlines by which employers must make a claim. CJRS claims relating to a calendar month must be brought within 14 days of the end of the month. If employers have underclaimed, requests to amend the claim must be made within 28 days of the end of the month.

²³ [The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#) ('Treasury Direction'), para. 36.1

- From 1 December 2020, HMRC must publish information about employers that are using the CJRS, including their name, company number and the value of their claim.

Q4. What are the key changes in Budget 2021?

In [Budget 2021](#) the Chancellor announced that the CJRS would be extended from 30 April 2021 to 30 September 2021. On 15 April 2021 the Government published [the seventh Treasury Direction](#) to formally extend the scheme.

The key changes to the CJRS include:

- The deadline for the CJRS will be extended from 30 April 2021 to 30 September 2021;
- Until 30 April 2021, employees can be furloughed if they were employed on 30 October 2020 on a payroll notified to HMRC on or before that date. Those who were employed on 23 September but who stopped working can be re-employed and furloughed;
- From 1 May 2021, employees can be furloughed if they were employed on 2 March 2021 on a payroll notified to HMRC on or before that date;
- HMRC will continue to cover 80% of an employee's reference salary (up to £2,500 per month) until 30 June 2021;
- From 1 July 2021, HMRC will cover 70% of an employee's reference salary and the employer will be required to top up 10%;
- From 1 August 2021, HMRC will cover 60% of an employee's reference salary and the employer will be required to top up 20%.

HMRC also published an [overview of the changes to the CJRS](#).

Q5. What is the relationship between the Treasury Direction and the guidance?

There have been a number of Treasury Directions relating to the CJRS. There have also been numerous pieces of guidance which have each been updated multiple times.

On a number of occasions, in particular at the time surrounding the publication of the first Treasury Direction in April 2020, commentators noted that there were apparent inconsistencies between the Treasury Directions and the guidance.

At the time, the Treasury stated that there were no inconsistencies between the Direction and the guidance. Lord Agnew, a Treasury Minister, said that employers should consult the guidance first:

HMRC will act at all times in accordance with the HM Treasury Direction. HMRC's interpretation of the Direction is set out in their published guidance, and it is HMRC's view that the published guidance is consistent with the Direction. It is HMRC's expectation that employers should consider the guidance in the first instance when seeking to understand the operation of the scheme and HMRC's interpretation of the Direction.²⁴

²⁴ [PQ HL3019 \[on Coronavirus Job Retention Scheme\]](#), 6 May 2020

In April 2020, Daniel Barnett and Max Schofield, barristers at Outer Temple Chambers and 3BP Barristers, argued that employers who relied on the early versions of Government guidance that were not reflected in the first Treasury Direction may have been able to bring a Judicial Review.²⁵

Commentators have not highlighted any significant inconsistencies between the guidance and the Treasury Directions currently in force.

Government guidance can, in certain circumstances, be used by courts as a persuasive authority in the interpretation of a statutory provision.²⁶ However, where there are inconsistencies that cannot be reconciled, the language of the legislation (in this case, Treasury Directions) will prevail.

²⁵ Daniel Barnett and Max Schofield, [The Coronavirus Job Retention Scheme: Claiming Against HMRC](#), 3BP Barristers, 17 April 2020

²⁶ [Chief Constable of Cumbria v Wright and Anor \[2007\] WLR 1407](#) at [17]

3. Eligible employers

Q6. Which employers are eligible?

The [Treasury Direction](#) says that any employer who has set up a PAYE scheme and notified this to HMRC through a real time information (RTI) submission by 30 October can make claims to the CJRS.²⁷

The [guidance for employers](#) says that any organisation with a UK payroll is eligible, including businesses, charities, recruitment agencies (if they have agency workers on PAYE) and public authorities.

Individuals who employ someone (such as a nanny) can also put them on furlough and claim under the Scheme if that person is on PAYE.

TUPE

The Treasury Direction provides that an employee who is transferred from one employer to another under [TUPE rules](#) between 1 September and 30 October can be furloughed by their new employer. This is the case even if the new employer has not notified their entry on the payroll to HMRC on or before 30 October. However, immediately before the transfer the old employer must have had a qualifying PAYE scheme. The old employer must also have made a payment to the employee and this must have been notified to HMRC through an RTI submission between 19 March and 31 October or, if it is earlier, the date of the transfer.²⁸

The [guidance on eligibility](#) also suggests that if the new employer made a payment to the employee on or before 30 October and notified this to HMRC through an RTI submission, they will be eligible to furlough the employee on that basis.

Administrators

The [guidance for employers](#) says that where a company has gone into administration the administrator can furlough workers and make a claim under the Scheme.²⁹

Public sector organisations

The [guidance for employers](#) says that public sector organisations are not expected to furlough workers. This is because staff will still be required to provide essential public services and as in most cases funding for staff costs will continue. However, the guidance says this is not a hard rule.

This is a condition that has applied for all versions of the CJRS to date.

On 13 May, the Local Government Association published guidance it received from the Government in use of the CJRS by the public sector:

As such the Government expects that LAs will continue to pay their staff as usual. Where staff are not able to carry out their usual work, the Government expects Local Authorities and all

PAYE & RTI

Real time information (RTI) is a mechanism used by employers to notify HMRC of PAYE deductions each time the employee is paid.

See [Running payroll](#) (GOV.UK).

²⁷ Fifth Treasury Direction, para. 4.1

²⁸ Fifth Treasury Direction, paras. 29 and 30

²⁹ See [Carluccio's Limited \(in administration\) \[2020\] EWHC 886 \(Ch\)](#) and commentary in David Reade QC and Daniel Northall, [Carluccio's: the High Court issues guidance on the relationship between furlough, contractual variation and the administration of insolvent companies](#), LinkedIn, 14 April 2020 (accessed 21 April 2020)

other public sector employers to make every effort to redeploy employees to assist with the coronavirus response. This could include redeployment within the existing organisation, or to support another part of the public sector. However, as the guidance sets out there may be a small number of cases where the scheme may be appropriate.

Whilst these judgements are for Local Authorities to make, the Government expects that these circumstances would be limited to where the employee:

1. Works in an area of the business where services are temporarily not required, and their salary is not covered by public funding
2. Cannot be redeployed elsewhere in the organisation to support the coronavirus response
3. Would otherwise be made redundant or laid off.³⁰

A similar position was taken by Jesse Norman, Financial Secretary to the Treasury, in response to a Parliamentary Question on 19 November 2020.³¹

[Guidance from the Department for Education](#) says that where education providers receive part of their funding from public funds and part from private income, they can furlough employees whose pay, as a proportion of the total wage bill, reflects the proportion of their funding that is private.

It is unclear if this guidance still applies and to what extent it applies to the public sector more widely.

The Treasury Direction itself places no restrictions on the ability of public sector employers to furlough employees.

Q7. What can employers claim?

The [Treasury Direction](#) says if an employee is furloughed for the entire duration of a CJRS claim period (i.e. fully furloughed), an employer can claim 80% of their reference salary, up to £2,500 per month.³²

If an employee is furloughed for part of a CJRS claim period (i.e. flexibly furloughed), the calculation is a little more complex. An employer can claim the lower of: $A \times F / U$ or $B \times F / U$.³³

A is £2,500 if the CJRS claim period is the whole month or the relevant pro-rata amount of the claim period is part of a month.

B is 80% of the employee's reference salary, adjusted proportionately if the claim period is part of a month.

F is the number of furloughed hours. U is the employee's usual hours.

Further information on making these calculations can be found in the [guidance on calculating wages](#) and the [examples of calculating wages](#).

See also Question 38 and 39.

³⁰ Local Government Association, [LGA workforce: coronavirus job retention scheme](#).

³¹ [PQ115621 \[Coronavirus Job Retention Scheme: Public Sector\]](#), 19 November 2020

³² Fifth Treasury Direction, para. 10

³³ Fifth Treasury Direction, para. 9

Employers must pass on the entire CJRS grant to the employee, although the [usual deductions must be made](#) for income tax and employee National Insurance contributions.³⁴

Qualifying costs

The Treasury Directions say that employers are only entitled to reclaim 'qualifying costs'. These are earnings payable to a furloughed employee but only if they are equal to or more than the amount calculated in accordance with the formulas above.³⁵

The effect of this provision is that if an employer pays an employee less than this amount, they are technically not eligible for a CJRS grant.

A similar rule existed under the previous versions of the CJRS. When the First Treasury Direction was published, Jolyon Maugham QC, a barrister at Devereux Chambers, said that this provision was a "bear trap" for employers. He argued that if an employer miscalculated an employee's reference salary and paid them less than what was due, they would not be able to claim under the CJRS. By contrast, if an employer chose to be safe and paid the employee more than they were due, they may not be able to reclaim the entire amount.³⁶

The [guidance on calculating wages](#) suggests that HMRC will show some flexibility when it comes to how claims are calculated:

The way you should work out 80% of your employee's usual wages is different depending on the way they're paid. You must check what you can include as wages first.

Choose the calculation you think best fits the way your employee is paid this might not be the same way that you have worked out their usual hours. For example, if you pay your employee a fixed regular salary, use the calculation for fixed pay amounts. HMRC will not decline or seek repayment of any grant based solely on the particular choice of pay calculation, as long as a reasonable choice is made.

This rule might create potential complications for employers who pay enhanced maternity pay or other family-related pay (see Question 20).

Q8. What employer contributions are required?

Under the [Treasury Direction](#) which covers 1 November 2020 to 31 January 2021, employers are not required to make any contributions towards an employee's reference salary as the CJRS grant covers the full 80%. Under the [rules in September and October 2020](#), employers were required to cover 10% and 20% of reference salary, respectively. The Chancellor had initially said that the rate of support would be reviewed in January 2021. However, on 17 December the Chancellor announced that the rate of HMRC support [will remain at 80% of reference salary until 30 April 2021](#).

The current CJRS does not cover employer National Insurance or pension contributions. These costs must be covered by the employer.

³⁴ Fifth Treasury Direction, para. 9.9

³⁵ Fifth Treasury Direction, para. 9.2

³⁶ Jolyon Maugham QC, [Does the Job Retention Scheme apply to casual workers](#), Waiting for Godot, 18 April 2020.

Q9. Do employers need to prove they are unable to pay their employees?

The [Treasury Direction](#) say that the purpose of the CJRS is to support employers in paying employees whose work has been adversely affected by COVID-19:

2.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of employees who are within the scope of CJRS arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.

[...]

2.3 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a CJRS claim are only made by way of reimbursement of the expenditure incurred or to be incurred by the employer in respect of the employee to which the claim relates 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 [guidance for employers](#) says that the CJRS is designed to support employers who “cannot maintain [their] workforce because [their] operations have been affected by coronavirus (COVID-19)”.

Unlike the [proposals for the Job Support Scheme](#), businesses do not need to be closed nor do they need to satisfy a financial impact test.

Q10. When are the deadlines for making claims?

The [Treasury Direction](#) (as amended) sets deadlines by which claims relating to each calendar month must be made. For example:

- Claims for January 2021 must be made by 15 February 2021.
- Claims for February 2021 must be made by 15 March 2021;
- Claims for March 2021 must be made by 14 April 2021;
- Claims for April 2021 must be made by 14 May 2021.³⁷

The deadline for the last furlough claims for September 2021 must be made by 14 October 2021.³⁸

Q11. How do employers make a claim?

Claims are made through an online portal. The [guidance on making claims](#) sets out the various pieces of information an employer will need to submit through the portal. It also sets out specific rules for employers who are making claims for more than 100 employees.

Q12. What employer information will be published?

The [Treasury Direction](#) requires HMRC to publish information about employers that use the CJRS from 1 December 2020 onwards. The information that must be published includes the employer’s name, their company number and the value of their CJRS claim (in bands). HMRC

³⁷ Fifth Treasury Direction, para. 33 (amended by Sixth Treasury Direction, para. 10.1)

³⁸ Seventh Treasury Direction

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will not publish information if an employer can show that doing so would post a serious risk to individuals including directors or partners.³⁹

The [guidance for employers](#) provides further information.

³⁹ Fifth Treasury Direction, para. 34

4. Eligible employees

Q13. Which employees are covered by the CJRS?

The [Treasury Direction](#) says that employers can claim for all employees who were employed by them on 30 October 2020 on a PAYE payroll notified to HMRC between 20 March and 30 October 2020.⁴⁰

The CJRS was extended a number of times. See further in section 1.2 above.

Meaning of 'employee'

The term 'employee' is defined expansively by reference to tax law.⁴¹

It captures many workers who would not normally be 'employees' for the purposes of employment law.⁴² The [guidance on eligibility](#) explains:

You can claim for employees on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts. Foreign nationals are eligible to be furloughed. Grants under the scheme are not counted as 'access to public funds', and you can furlough employees on all categories of visa.

The Government has produced [guidance on 'other types of employees'](#) that can be furloughed, including limb (b) workers, agency workers, salaried members of partnerships and company directors.

However, the CJRS excludes those who are not paid through PAYE: that is, those who are not 'employees' for tax purposes. This could exclude some who may be found to be '[limb \(b\) workers](#)' or even '[employees](#)' for the purposes of employment law but who are paid through PAYE.⁴³

David Cabrelli and Jessica D'alton, Professor of Labour Law and legal researcher at the University of Edinburgh, have argued that this rule will exclude many atypical and casual workers who are falsely classified as self-employed for tax purposes.⁴⁴

The Independent Workers' Union of Great Britain (IWGB) brought a judicial review of the decision to limit the CJRS to those who are paid through PAYE. They argued that this violated Article 14 of the [European Convention on Human Rights](#) (prohibition of discrimination) read with Article 1 of Protocol 1 (protection of property). Specifically, they argued that limb (b) workers who are not paid through PAYE are analogous to those who are and that the differential treatment was unjustified.

The High Court accepted that limb (b) workers who are and are not paid through PAYE are analogous. However, it dismissed the claim on the basis that the different treatment was justified. The court accepted the Government's argument that a key feature of the CJRS is preserving employer/employee links. Moreover, it accepted that in order to set up

⁴⁰ Fifth Treasury Direction, para. 6.2

⁴¹ Fifth Treasury Direction, para. 35.1(h)

⁴² [Employment status](#), Commons Library Briefing Paper CBP-8045, 28 March 2018.

⁴³ See e.g. [Autoclenz Ltd v Belcher \[2011\] UKSC 41](#)

⁴⁴ David Cabrelli and Jessica D'alton, [Furlough and Common Law Rights and Remedies](#), UK Labour Law Blog, 8 June 2020 (accessed 11 June 2020)

the CJRS at pace while also protecting against the risk of fraud, the Government had been justified in using bright line rules.⁴⁵

The guidance for other types of employees says that limb (b) workers who are not paid through PAYE may be able to claim under the Self-employment Income Support Scheme.

Further details on the SEISS can be found in the Library Briefing, [Coronavirus: Self-employment Income Support Scheme \(CBP-8879\)](#).

Employees employed on a PAYE scheme on or before 30 October

The Treasury Direction says that an employee is eligible if they were employed on 30 October on a PAYE payroll that was notified to HMRC through a [Real Time Information submission](#) on or before that date.

As RTI submissions are typically made the first time an employee's payroll is processed, it is possible that new starters employed in October may not be eligible if their payroll was not processed until November.

A similar rule applied under the first version of the CJRS, where the cut-off date was 19 March. David Reade QC and Daniel Northall, barristers at Littleton chambers, explained:

However, making eligibility contingent on the existence of an RTI submission for the furloughed employee may have unintended consequences. For example, there may be no RTI submission for employees put onto payroll in late February 2020 if their pay was not processed for the first time until the March payroll. On the assumption the March payroll was processed at or around the end of the month, the RTI submission is likely to fall after the cut-off of 19 March. Similarly, new directors whose payroll is processed annually may have an RTI submission falling after 19 March.⁴⁶

Q14. Does the CJRS cover foreign nationals?

Yes. The [guidance on eligibility](#) confirms that payments under the Scheme are not public funds and that claims can be made for employees on all categories of visa.

Further information can be found in the Library Briefing, [Coronavirus: Calls to ease No Recourse to Public Funds conditions \(CBP-8888\)](#).

Q15. Does the CJRS cover company directors?

Yes. Directors who are salaried and paid via PAYE, including those who work through personal service companies (PSCs), fall within the expanded definition of 'employee'. The [guidance on other types of workers](#) says that directors can be furloughed by the company. In most cases, this decision would be made by the board. However, a company can only claim for a directors' salary which does not include dividends.

The [Treasury Direction](#) provides that directors can carry out certain tasks such as filing accounts or making CJRS claims for company employees and this will not count as 'work' that is prohibited under the Scheme.⁴⁷

⁴⁵ [R. \(Adiatu\) v HM Treasury \[2020\] EHC 1544 \(Admin\)](#)

⁴⁶ David Reade QC and Daniel Northall, [The Treasury Direction: Answers or more Questions?](#), LinkedIn, 16 April 2020 (accessed 20 April 2020)

⁴⁷ Fifth Treasury Direction, para. 28.7

The Low Income Tax Reform Group (LITRG) has produced [guidance for limited company directors on the CJRS and SEISS](#).⁴⁸

Q16. Does the CJRS cover employees who have left their job?

The [Treasury Direction](#) says that one of the conditions of an employee's eligibility is that the employer has not reported a cessation of their employment to HMRC. However, it also says that any cessation notified after 22 September 2020 should be disregarded.⁴⁹

The [guidance on eligibility](#) explains that if an employee was employed on 23 September but subsequently stopped working for any reason, they can be re-employed and furloughed. This includes employees who have been made redundant as well as those who left for other reasons, such as to start a new job. However, the former employer must have notified HMRC of a payment of earnings to the employee through an RTI submission at some point between 19 March and 30 October 2020.

Employees do not have a right to be re-employed. This is a decision for the employer. Commenting on the first version of the CJRS, where the same rule applied, Darren Newman, an employment law commentator, said that employers could be unwilling to re-employ workers:

But it is hopelessly unrealistic to expect that employers are going to reemploy people who have resigned or been dismissed purely so that they can be placed on furlough. To be blunt, what is in it for the employer? They incur the cost of administering the employee's furlough pay and face potential legal difficulties when the furlough period ends.⁵⁰

Q17. Does the CJRS cover new starters?

As noted in Question 13, the CJRS is limited to employees who were employed on 30 October on a PAYE payroll notified to HMRC. This would exclude those hired after this date and those whose entry onto the payroll was not notified to HMRC before that date.

The 30 October cut-off date is the day before the extension to the CJRS was announced. The previous 19 March cut-off date was the day before the CJRS itself was announced.

In a [June 2020 report](#), the Treasury Committee recommended that the Government find a way to extend the cut-off date from 19 March to 31 March 2020 or accept forms of evidence other than RTI submissions.⁵¹

The [Government response](#) said that the cut-off date had already been extended as far as possible and that extending it beyond 19 March would significantly increase the risk of fraud.⁵²

⁴⁸ LITRG, [Coronavirus: Support for limited company directors](#), 14 July 2020 (accessed 9 December 2020)

⁴⁹ Fifth Treasury Direction, para. 6.4

⁵⁰ Darren Newman, [New Starters and the Coronavirus Job Retention Scheme](#), A Range of Reasonable Responses, 6 April 2020 (accessed 20 April 2020).

⁵¹ Treasury Committee, [Economic impact of coronavirus: Gaps in support](#), HC 454, 10 June 2020, paras. 23-29

⁵² Treasury Committee, [Economic impact of coronavirus: Gaps in support: Government Response to the Committee's Second Report of Session 2019-21](#), HC 662, 20 July 2020, pp. 2-3

It should be noted that in order to be furloughed under the extended CJRS from 1 November, an employee does not need to have previously been furloughed between March and October.

In most cases new starters will still have a contractual right to be paid, even if they cannot be furloughed under the extended CJRS. However, new starters will not normally be covered by the statutory protection from unfair dismissal which only covers employees who have worked for their employer for two or more years.⁵³ As such, if employers are unable to pay new starters, they will be able to dismiss them in accordance with the terms of the contract – usually by providing sufficient notice.

Q18. Can employees on sick leave be furloughed?

The [guidance on eligibility](#) says that employers should not furlough employees simply because they are required to self-isolate or because they are on short term sick leave:

If your employee is on sick leave or self-isolating as a result of coronavirus, they may be able to get Statutory Sick Pay (SSP). The Coronavirus Job Retention Scheme is not intended for short-term absences from work due to sickness.

Short term illness/self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.

Employers can furlough employees who are clinically extremely vulnerable, at the highest risk of severe illness from coronavirus or off on long-term sick leave. It is up to employers to decide whether to furlough these employees.

It says that if an employee becomes sick while on furlough, it is for the employer to decide whether to move them onto Statutory Sick Pay (SSP).

The [Treasury Direction](#) does not currently put restrictions on furloughing employees who are on sick leave. However, it does say that employers cannot reclaim statutory payments, including SSP, through the CJRS.⁵⁴

The Treasury Directions which applied from 19 March to 30 June 2020 said that employers could not furlough employees who were “due to be paid” SSP, causing concern about whether all those who were eligible for SSP, including those who were shielding, were excluded.⁵⁵

Q19. Can employees on unpaid leave be furloughed?

The [Treasury Direction](#) provides that an employer cannot make a CJRS claim for any day where an employee is on sabbatical or unpaid leave.⁵⁶

⁵³ Section 108, *Employment Rights Act 1996*

⁵⁴ Fifth Treasury Direction, para. 26.1

⁵⁵ Cloisters News, [Coronavirus Job Retention Scheme and Statutory Sick Pay: Robin Allen QC and Daniel Dyal retained by Unite the Union](#), Cloisters, 28 April 2020

⁵⁶ Fifth Treasury Direction, para. 27(b)

Neither the Treasury Directions nor the Government guidance provide information on whether or how an employee on unpaid leave can be taken off of leave and placed onto furlough instead.

Q20. Can employees on family-related leave be furloughed?

The Treasury Direction places no restrictions on furloughing employees who are on family-related leave. However, it does say that employers cannot claim statutory payments through the CJRS, including statutory maternity, paternity, adoption and shared parental pay.⁵⁷

The [guidance on eligibility](#) says that if an employee has a contractual right to enhanced pay during family-related leave, the employer can furlough them and claim the enhanced pay through the CJRS.

One point which remains unclear is how this applies to employees who receive a reduced rate of enhanced pay (e.g. 50% of pay). As noted in Question 7, the Treasury Direction says employers can only claim under the CJRS if they are paying employees at least 80% of their reference salary for furloughed hours. Commentators have questioned whether this excludes employers who pay reduced rates of enhanced pay.⁵⁸

⁵⁷ Fifth Treasury Direction, para. 26

⁵⁸ Daniel Dyal, [Furlough Furore: the Treasury Direction and the Coronavirus Job Retention Scheme](#), Cloisters, 17 April 2020

5. 'Furloughed employee'

Q21. What is a 'furloughed employee'

Employers can only make a claim for employees who are designated as 'furloughed'. This is a new concept in UK employment law.

The Treasury Direction provides that an employee is fully furloughed if:

- They have been instructed by their employer to stop working for the entire duration of a CJRS claim period;
- They stop working for the duration of the CJRS claim period; and
- They were instructed to stop working because of circumstances arising as a result of coronavirus.

Similarly, an employee is flexibly furloughed if:

- They are instructed not to work their full usual hours in a CJRS claim period;
- They do not work their full hours in the CJRS claim period; and
- They were instructed to stop working because of circumstances arising as a result of coronavirus.⁵⁹

The Treasury Direction says that time spent on training to improve the employee's effectiveness does not count as work, as long as the training does not provide a service to or generate revenue for the employer.⁶⁰

The [guidance for employers](#) does note that training could be 'work' for the purpose of the National Minimum Wage. In such cases, employers will need to top up the CJRS grant to make sure that the employee is being paid the relevant rate of NMW for the time spent on training.⁶¹

The guidance also says that union and non-union representatives can continue to carry out their duties and this will not count as work.

Q22. How do employers furlough employees?

Employers must furlough their employees in accordance with existing employment law. In most cases, this will require a variation to the employment contract (see Question 28).

The [Treasury Direction](#) also sets some conditions on how an employer must furlough staff in order to be eligible for the CJRS. Employers must:

- Enter into a full or flexible furlough agreement with employees setting out the terms and conditions that apply during furlough;
- Incorporate the agreement into the employee's contract;
- If the agreement is not in writing, give the employee written confirmation of the agreement; and
- Retain the agreement or confirmation for 5 years.⁶²

⁵⁹ Fifth Treasury Direction, para. 6.1

⁶⁰ Fifth Treasury Direction, para. 28.2

⁶¹ Department for Business, Energy and Industrial Strategy (BEIS), [National Minimum Wage and National Living Wage: Calculating the minimum wage](#), April 2020

⁶² Fifth Treasury Direction, para. 7.1

It is likely that the agreements of most employees furloughed between March and October will have expired on 31 October 2020, meaning that they will have needed to enter into new agreements.

The Treasury Direction provides that agreements that were made between 1 November and 13 November 2020 can be taken to have applied from 1 November. The [guidance for employers](#) explains that in all other cases, retrospective agreements are not permitted.

The Advisory, Conciliation and Arbitration Service (Acas) has published [template furlough agreements](#) that employers can use.

Q23. Does the CJRS cover employees working reduced hours?

The original rules of the CJRS, in force from 1 March to 30 June 2020, required furloughed employees to cease working for at least 3 weeks.

However, since 1 July 2020 employers have been able to ask employees to work any pattern while claiming under the CJRS for any 'usual hours' they do not work. This remains the position under the extended CJRS where employees can be fully or flexible furloughed.

Q24. Can employees be furloughed by multiple employers?

Yes. The [guidance on eligibility](#) says that each employer is treated separately. Employees can be furloughed by more than one employer or furloughed by one while still working for another.

Q25. Can employees do volunteer work while on furlough?

Yes. The [Treasury Direction](#) says that furloughed employees only need to cease working for their employer. The [guidance on eligibility](#) says that employees can undertake volunteer work while on furlough, provided it is for another employer or organisation.

Q26. Can employees work for new employers while on furlough?

Yes. The [Treasury Direction](#) says that furloughed employees only need to cease working for their employer. The [guidance for employers](#) says that employees can work for new employers if this is permitted by their employment contract. Any clauses prohibiting an employee from undertaking work for another employer (such as clauses that prohibit working for a competitor) would continue to apply.

Q27. Can employees come on and off furlough?

Yes. The [Treasury Direction](#) does not place any restrictions on the number of times an employee can be furloughed. The [guidance for employers](#) says that there is no minimum furlough period and that employees can be flexibly furloughed multiple times.

6. Selecting workers for furlough

Q28. Do employers have an automatic right to furlough workers?

The decision to furlough is one for the employer. However, as noted in Question 22, the [Treasury Direction](#) says that an employer must obtain an employee's agreement before they can furlough them. It will likely not be difficult to obtain this agreement as in many cases the alternative to furlough will be unpaid leave or redundancy.

The Treasury Direction notes that the agreement will need to set out the main terms and conditions that apply during furlough and that it must be incorporated into the employment contract.

One issue that needs to be agreed is what rate of pay an employee is entitled to for any furloughed hours. As a general matter, employees are entitled to be paid in full if they are ready, able and willing to work, even if there is no work for them to do.⁶³ If an employer wishes to pay an employee the CJRS grant during periods of furlough, they will need to agree that the employee will receive 80% of their reference salary.

An employer may agree to continue to pay the employee their normal wages during periods of furlough. In such cases, the employer will need to top up the CJRS grant.

Q29. Can employees demand to be furloughed?

No. The [Treasury Direction](#) provides that it is for employers to instruct employees to stop working and to make a claim under the Scheme.

Employees who wish to be furloughed, which could include those with caring responsibilities or those who are vulnerable to COVID-19, do not have an explicit right to place themselves on furlough. Such employees would need to rely on existing employment law rights, like the law on discrimination, to challenge any selection decisions.

Q30. Can agency workers and zero-hours workers be furloughed?

As noted in Question 13, agency workers and those on zero-hours contracts who are paid through PAYE fall within the expanded definition of 'employee'. The [guidance for other types of employees](#) says agency workers should be furloughed by the agency or an umbrella company if they are engaged through one, although it says that it will be good practice to also seek the agreement of the end client (the hirer).

The fact that the decision to furlough rests with the employer is a particular problem for agency workers and zero-hours workers. For such workers, the right to pay is contingent on work being provided and generally the employer is not under a contractual obligation to provide them with work. The employer or agency could simply reduce the worker's hours to zero instead of furloughing them.

⁶³ [Beveridge v KLM UK Ltd \[2000\] IRLR 765](#)

Alan Bogg and Michael Ford QC highlight that zero-hours workers and agency workers are ultimately dependent on their employers:

So, once the assignment has been ended, why should the agency bother to write to the workers and confirm they have been 'furloughed', as the Scheme requires? Unless it happens to be motivated by altruism, it is easier for it to rely on its existing contractual provisions and do nothing at all. That, after all, is often the economic point of these contractual arrangements for firms, giving agencies and end-users the flexibility to adjust quickly the supply of labour in accordance with demands.⁶⁴

Jolyon Maugham QC has argued that complexities of calculating the reference salary for casual workers could encourage employers to stop providing work instead of furloughing them.⁶⁵

Stuart Brittenden, a barrister at Old Square Chambers, has suggested that it may be possible to use the implied term of trust and confidence (which is implied into all employment contracts) to argue that employers have an obligation to take all reasonable steps to furlough eligible employees.⁶⁶ However, David Cabrelli and Jessica D'alton have noted that it is unclear whether implied terms apply to 'limb (b) workers', the category that many zero-hours and agency workers fall into.⁶⁷

Q31. What about extremely vulnerable employees?

The [guidance on eligibility](#) says employees who are clinically extremely vulnerable to COVID-19 can be furloughed. At present, employees who fall within this 'shielding' category can go to work if their workplace is safe. The [guidance on shielding](#) says employers may choose to furlough vulnerable employees if they cannot work safely.⁶⁸

Q32. How should employers select which employees to furlough?

In many cases employers who are operating at reduced capacity will need to select which employees to furlough. This could create problems if either too few or too many employees want to be furloughed.

The Treasury Direction and the Government guidance does not set out how an employer should select the employees that it furloughs.

When selecting which employees to furlough employers will be bound by general employment law.

Acas [guidance on furloughing](#) highlights that when deciding which employees to furlough employers must take care not to discriminate on the basis of protected characteristics.

⁶⁴ Alan Bogg and Michael Ford QC, [Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2](#), UK Labour Law Blog, 31 March 2020 (accessed 31 March 2020)

⁶⁵ Jolyon Maugham QC, [Does the Job Retention Scheme apply to casual workers](#), Waiting for Godot, 18 April 2020 (accessed 20 April 2020)

⁶⁶ Stuart Brittenden, [The implied term of trust and confidence & the Coronavirus Job Retention Scheme](#), Old Square Chambers, 14 April 2020 (accessed 20 April 2020)

⁶⁷ David Cabrelli and Jessica D'alton, [Furlough and Common Law Rights and Remedies](#), UK Labour Law Blog, 8 June 2020 (accessed 11 June 2020)

⁶⁸ For more information see [Coronavirus: Returning to work](#), Commons Library Briefing Paper CBP-8916, 4 December 2020

Daniel Dyal, a barrister at Cloisters chambers, explains:

There are also many equality implications arising out of the Scheme. The guidance makes clear that the employer must apply the Scheme in a way that is consistent with equality law. Some of these implications are obvious and simple: it would be unlawful to dismiss rather than furlough an employee because he is of a particular race. But others are complex and difficult. For instance, if furloughing decisions take into account the number of hours particular employees are able to offer in current circumstances that could easily engage indirect sex discrimination considerations, which would need to be carefully thought through. Likewise furloughing decisions may need to take into account what tasks particular employees can do and from where. They will often then engage challenging disability discrimination issues, particularly in respect of reasonable adjustments, indirect discrimination and discrimination arising from disability.⁶⁹

If an employee refuses to be furloughed and is dismissed, the fairness of the selection criteria will likely be a consideration in any subsequent unfair dismissal claim.

Alan Bogg and Michael Ford QC have also suggested that a failure to use a fair selection criteria could possibly amount to a breach of the implied term of mutual trust and confidence.⁷⁰

Q33. Do employers have to consult employees?

Employers need an employee's agreement before they can put them on furlough. As such, individual consultation will clearly be necessary.

Whether an employer is required to consult the workforce more broadly will again be determined by existing employment law.

Where an employer proposes to make 20 or more employees redundant within a period of 90 days, they have an obligation to consult employee's representatives.⁷¹ The [guidance for employers](#) notes that as the alternative to furlough will often be redundancy, employers with sufficient numbers of staff may have to collectively consult.

If there is an information and consultation agreement in place for a workforce, this may require an employer to consult employee representatives on furloughing decisions. A standard agreement will cover situations where there is a threat to employment within the organisation.⁷² If no agreement is in place, negotiations can be triggered by a request from 2% of the workforce.⁷³

⁶⁹ Daniel Dyal, [Covid-19: Furlough and job retention: Key issues for Employment Lawyers \(UPDATED 11.04.2020\)](#), Cloisters, 11 April 2020 (accessed 20 April 2020)

⁷⁰ Alan Bogg and Michael Ford QC, [Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2](#), UK Labour Law Blog, 31 March 2020 (accessed 31 March 2020)

⁷¹ Section 188, [Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

⁷² Reg. 20, [Information and Consultation of Employees Regulations 2004 \(SI 2004/3426\)](#)

⁷³ Reg. 7, ICE Regulations 2004; Reg. 16, [Employment Rights \(Miscellaneous Amendments\) Regulations 2019 \(SI 2019/731\)](#)

Q34. Can employees check if they have been furloughed?

As noted above, HMRC is now required to publish certain information each month about employers that are using the CJRS (see Question 12).

On 25 February 2021, the Government introduced a system that allows employees to check if their employer has been claiming a CJRS grant on their behalf. The [guidance for employees](#) explains:

If your employer claims for periods starting on or after 1 December 2020, HMRC will publish details of their claim on GOV.UK. We are doing this to:

- meet our transparency commitments
- deter fraudulent claims

We will publish this information monthly, updating the previous month's information with any amendments. You can [view the latest data for claims made through the scheme](#).

You can see if you were included in a December 2020 claim in your [personal tax account](#). This information will be updated monthly and January claims will be available to view from the end of March.

Q35. Can employers make redundancies while the CJRS is in effect?

The CJRS does not alter existing employment law rights and obligations. As such, employers can dismiss employees provided this is in accordance with general employment law.

Employees with two years' continuous service are protected from unfair dismissal. Limb (b) workers and employees without two years' service can be dismissed in accordance with the terms of their contract.

A dismissal will be unfair unless: a) it was for a potentially fair reason listed in the legislation; and b) it was fair in the circumstances.⁷⁴

Redundancy is a potentially fair reason for dismissal. Redundancy can occur if there is a closure of a business, a closure of a workplace of a diminished need for employees to undertake work.⁷⁵

The key question in this context will be whether it is fair for an employer to dismiss employees as redundant when the CJRS is available to provide employers with financial support to retain their staff. The answer to this question will vary depending on the facts of the case.

This is covered in detail in the Library Insight, [Coronavirus: Protections from redundancy](#).

Where an employer is proposing to make more than 20 redundancies, they will need to undertake collective consultation (see Question 48).

⁷⁴ Section 98, *Employment Rights Act 1996*

⁷⁵ Section 139, *Employment Rights Act 1996*

7. Preparing CJRS claims

Q36. What is a CJRS claim period?

The [Treasury Direction](#) says that employers must make CJRS claims in respect of a 'claim period'. The claim period is essentially the period of time to which a CJRS claim relates.

The Treasury Direction says that a claim period must be a minimum of seven days and must start and end in the same calendar month. If an employer wishes to make a claim for a period that spans two calendar months, they must make two separate claims. A claim period can be shorter than seven days if it starts with the first day of a month or ends with the last day of a month. So, for example, if an employer is claiming for a seven-day period that spans two calendar months, there would be a claim period of three days in one month and four days in the other.⁷⁶

The [guidance on preparing claims](#) says that employers should align their claim period with when the process payroll. For example, employers that pay staff monthly would use a claim period of one month. The guidance contains a number of examples of how claim periods can be structured.

The guidance also says that employers can make a claim up to 14 days before the end date of a claim period. Employers do not have to wait for the end of one claim period to make a claim for the next period.

Q37. What is the difference between being fully and flexibly furloughed?

The [Treasury Direction](#) says an employer can instruct an employee to stop working for the entire duration of a claim period (fully furloughed) or instruct them to not work some of their usual hours during the claim period (flexibly furloughed).⁷⁷

If an employer is fully furloughed, the claim process is simplified. An employer simply needs to calculate 80% of an employee's reference salary attributable to the claim period.⁷⁸

If an employee is flexibly furloughed an employer will first need to calculate their usual hours and furloughed hours in the claim period. They can then claim 80% of the employee's reference salary for their furloughed hours.⁷⁹

Q38. What are usual hours and furloughed hours?

If an employee is flexibly furloughed, their employer needs to calculate their usual and furloughed hours.

Furloughed hours are straightforward to calculate. They are determined by subtracting the number of hours an employee actually works in the CJRS claim period from their usual hours for that claim period.⁸⁰

⁷⁶ Fifth Treasury Direction, para. 8

⁷⁷ Fifth Treasury Direction, para. 6.1

⁷⁸ Fifth Treasury Direction, para. 10

⁷⁹ Fifth Treasury Direction, para. 9

⁸⁰ Fifth Treasury Direction, para. 23

Usual hours are more difficult to calculate. The method of calculation depends on whether an employee works fixed hours or variable hours.

The Government has published a series of [examples of how to calculate an employee's usual hours](#).

Usual hours for employees with fixed hours

If an employee's hours are set by their contract and their pay does not vary by the number of hours they work, they are considered under the [Treasury Direction](#) to be working on a 'fixed hours basis'.⁸¹

If an employee works on a fixed hours basis, their usual hours are calculated using the formula: $CP \times H / P$.

CP is the number of calendar days in the CJRS claim period. H is the number of hours they are required to work in a repeating shift pattern. P is the number of calendar days in the repeating shift pattern.⁸²

A 'repeating shift pattern' is the cycle by which an employee's hours are set. If an employee is contracted to work a number hours per week, the repeating shift pattern is seven days. If they are contracted to work four days on and four days off, the repeating shift pattern is eight days.

If an employee was employed by their employer on 19 March 2020 on a PAYE payroll notified to HMRC on or before that date, their contracted hours and repeating shift pattern is based on the last pay period before 19 March 2020. For other employees, their hours and shift pattern is based on the last pay period before 30 October 2020.

Example: Calculating usual and furloughed hours for fixed hour employees

An employee, X, is contracted to work 40 hours per week, Monday to Friday. X was flexibly furloughed from 1 November to 30 November 2020 and was instructed to work half days.

1. X's repeating shift pattern is 7 days. X is contracted to work 40 hours in that shift pattern. The number of days in the claim period is 30.
2. X's usual hours are $30 \times (40 \div 7) = 171.4$. This is rounded up to 172 hours.
3. There are 21 working days in November. X worked 4 hours per day (half days). The number of actual hours X worked were 82 hours.
4. X's furloughed hours are $172 - 82 = 90$ hours.

Usual hours for employees with variable hours

All employees who do not work on a fixed hour basis are considered to be working on a 'variable hours basis'. If an employee works variable hours, the method of calculation depends on whether they received a payment of earnings in tax year 2019-20.

If an employee received a payment of earnings in tax year 2019-20 and it was reported to HMRC on an RTI submission on or before 19 March, their usual hours are determined based on the higher of their average

⁸¹ Fifth Treasury Direction, para. 16

⁸² Fifth Treasury Direction, para. 17. If an employee's pay period does not align with the CJRS claim period then the employer can use the number of relevant days in the pay period as 'CP' instead of the number of days in the claim period (paras. 17.7-17.8). See the Government's [examples of calculating usual hours](#) (Example 2.1).

hours in the 2019-20 tax year ('averaging method') or their hours in the same calendar month in 2019-20 ('calendar look-back method').⁸³

The [guidance on preparing claims](#) explains that employers should use payslips or, if these are not available, pay records, timesheets or other records to identify the number of hours worked in the relevant period.

Averaging method

Under the averaging method, an employee's usual hours are calculated using the formula: $CP \times H / D$.

CP is the number of calendar days in the CJRS claim period. H is the number of relevant hours they worked in tax year 2019-20. D is the number of employed days in the 2019-20 tax year.⁸⁴

The guidance on preparing claims explains that employers should include any hours where the employee was on annual leave and any contractual overtime for which pay was non-discretionary. Any hours where the employee was on sick leave or family-related statutory leave should not be counted. The Government's [examples of calculating usual hours](#) (Example 2.6) provides an example of this method of calculation.

Calendar look-back method

Under the calendar look-back method, employers must identify the pay periods in the 2019-20 tax year that corresponds to the claim period.⁸⁵

If dates of the pay period in 2019-20 and the CJRS claim period align, the employee's usual hours are the hours they worked in the pay period in 2019-20. See the [examples for calculating usual hours](#) (Example 2.8).

If the dates of the CJRS claim period do not align with a single pay period in 2019-20 (i.e. they cover multiple pay periods), then the employer will need to calculate the proportion of hours worked in each pay period. See the [examples for calculating usual hours](#) (Example 2.9).

For CJRS claims for March and April 2021, employers must look back to March and April 2019.⁸⁶ See the [examples for calculating usual hours](#) (Example 2.10). This rule avoids an employee's usual hours being based on their hours in March and April 2020, when the national lockdown was already in effect. The [guidance on preparing claims](#) says that if an employee was not working for their employer in March or April 2019, the averaging method should be used to calculate their hours.

Employees whose reference day is 30 October 2020

If an employee was not employed by their employer on 19 March 2020 on a payroll notified to HMRC, their usual hours are calculated using the averaging method. The reference period for these employees is the time between 6 April 2020 (or, if later, the day they started employment) and the day they were furloughed.⁸⁷

⁸³ Fifth Treasury Direction, para. 18

⁸⁴ Fifth Treasury Direction, para. 20

⁸⁵ Fifth Treasury Direction, para. 21

⁸⁶ Fifth Treasury Direction, para. 21 (amended by Sixth Treasury Direction, para. 6)

⁸⁷ Fifth Treasury Direction, para. 20.7

For example, if an employee was employed on 30 July 2020 and was furloughed on 5 November, usual hours would be calculated using the averaging method with a reference period of 30 July to 4 November. See the [examples for calculating usual hours](#) (Example 2.11).

Q39. What is an employee's reference salary?

As noted in Question 7, the Treasury Direction says employers can claim 80% of an employee's reference salary, up to £2,500 per month.⁸⁸

How reference salary is calculated depends on whether an employee is a 'fixed rate' or whether their pay varies from one pay period to another. In addition, there are certain payments that can and cannot be included as reference salary.

The [guidance on calculating claims](#) sets out how employers should calculate 80% of reference salary for different types of employees. It also contains an online calculator. The definition of what types of pay count as 'wages' can be found in the [guidance on preparing claims](#).

Fixed rate employees

Under the Treasury Direction, a person is a fixed rate employee if their contract fixes an annual salary that they are paid in weekly or monthly instalments in return for working a fixed number of hours.⁸⁹

If a fixed rate employee was employed on 19 March 2020 and received a payment of earnings in the 2019-20 tax year which was reported to HMRC on an RTI submission on or before that date, then their reference salary is their regular salary in the last pay period before 19 March 2020. 'Regular salary' excludes any non-monetary benefits and discretionary payments such as tips or bonuses. However, non-discretionary payments such as contractual overtime or commission can be included.⁹⁰

If in the last pay period before 19 March, the employee was on unpaid leave, 'statutory payment leave' (e.g. statutory paid maternity leave) or 'reduced rate paid leave' (e.g. contractual paid maternity leave), their reference salary must be calculated as though they had been on paid annual leave under the [Working Time Regulations 1998](#).⁹¹

The [guidance on preparing claims](#) explains that for most employees this will be their contractual salary instead of what they were actually paid:

For employees on fixed pay, claims for full or part time employees furloughed on return from family-related statutory leave should be calculated against their salary, before tax, not the pay they received whilst on family-related statutory leave. The same principles apply where the employee is returning from a period of unpaid statutory family-related leave.

If a fixed rate employee did not have a payment of earnings notified to HMRC on or before 19 March 2020, their reference salary is determined in the same way but based on the last pay period before 30 October.

⁸⁸ Fifth Treasury Direction, para. 9

⁸⁹ Fifth Treasury Direction, para. 13

⁹⁰ Fifth Treasury Direction, para. 15

⁹¹ Fifth Treasury Direction, paras. 13.4-13.8

Variable rate employees

If an employee is not a fixed rate employee then they are considered to be a variable rate employee.

If a variable rate employee was employed on 19 March 2020 and had a payment of earnings reported to HMRC on or before that date, then their reference salary is the higher of:

- their average earnings in the 2019-20 tax year; or
- their earnings in the corresponding calendar period in 2019-20.

For CJRS claims relating to March and April 2021, when using the look-back method employers must look to March and April 2019.⁹² As with usual hours, this is to prevent an employee's reference salary being based on March and April 2020 when the lockdown was in effect. The [guidance on calculating claims](#) says if an employee was not employed in March or April 2019, the averaging method should be used.

The guidance also notes that 2020 was a leap year, meaning there were 29 days in February 2020. It says that employers may adjust claims to take account of this but that HMRC will accept either approach.

If an employee was not employed by their employer on 19 March 2020 on a payroll notified to HMRC, their reference salary is calculated using the averaging method. This is calculated based on earnings in the period between 6 April 2020 (or, if later, the day they started employment) and the day they were furloughed.⁹³

As with fixed rate employees, non-monetary benefits and discretionary payments must be excluded.

Unlike fixed rate employees, when calculating the average earnings or earnings in the corresponding period for variable rate employees, any statutory payment leave must be counted as such. This could mean, for example, that if a variable rate employee was on statutory maternity leave in the 2019-20 tax year, their average earnings across the year or their earnings in the corresponding period might be lower.⁹⁴

The Government's [examples of calculating reference salary](#) provide examples for different variable rate employees (Examples 3.7 to 3.13).

Q40. Do employers have to top up wages?

The [guidance for calculating claims](#) says that employers can decide whether to top up wages (the extra 20% or anything above £2,500).

However, as noted in Question 28, the default position under the contract will normally be that workers are entitled to their full wages if they are ready, willing and able to work. Unless the contract is varied, an employer would be in breach of contract by only paying 80%.

⁹² Fifth Treasury Direction, para. 14 (amended by Sixth Treasury Direction, para. 5)

⁹³ Fifth Treasury Direction, para. 14

⁹⁴ See [PO99650 \[on Maternity Pay: Coronavirus\]](#), 6 October 2020

Q41. Will employee NICs and pension contributions have to be deducted?

The [guidance on reporting payments](#) says the payments made to employees with CJRS grants will be subject to the usual deductions, including income tax, student loan repayments, employee National Insurance contributions and auto-enrolment pension contributions.

Q42. Do furloughed employees have to be paid the National Minimum Wage?

The [guidance on preparing claims](#) says that furloughed employees are not undertaking 'work' within the meaning of the [National Minimum Wage Act 1998](#) and so do not have to be paid the NMW. As such, it will be permissible to vary the employment contract to reduce a worker's pay to 80%, even if this puts their wages below the NMW.

However, the guidance notes that training will constitute work for the NMW purposes, meaning employers must top up the grant to the relevant rate. Workers cannot contract out of their right to the NMW.⁹⁵

Notably, if someone was employed on the NMW on 19 March 2020, their reference salary is calculated based on the last pay period before 19 March or based on their earnings in the 2019-20 tax year (i.e. based on the 2019-20 rate of NMW).⁹⁶

Q43. What happens if employers miscalculate their claims?

The Treasury Direction says that if an employer miscalculates and claims less than they were entitled to, they can request to amend the claim to increase the amount. For example, if an employer requested an amendment the following deadlines applied:

- 1 March 2021 for claims relating to January 2021;
- 29 March 2021 for claims relating to February 2021;
- 28 April 2021 for claims relating to March 2021; and
- 28 May 2021 for claims relating to April 2021.

The Direction says that HMRC may accept requests for amendments made after the deadline if the employer has a reasonable excuse for failing to make the request in time.⁹⁷

If an employer miscalculates and claims more than they were entitled to, this will be a breach of the Treasury Directions. HMRC has published [guidance](#) explaining that if an employer has overclaimed they must repay HMRC by either adjusting their next claim (i.e. claiming less) or by repaying HMRC directly. The guidance says that employers must repay HMRC within 90 days of the date they received the claim. Under the [Finance Act 2020](#), HMRC has [powers to claw back payments](#) and issue penalties to employers who have overclaimed under the CJRS.

⁹⁵ Section 49, [National Minimum Wage Act 1998](#)

⁹⁶ See [PQ119396 \[on Coronavirus Job Retention Scheme\]](#), 23 November 2020

⁹⁷ Fifth Treasury Direction, para. 33 (amended by Sixth Treasury Direction, para. 10.2)

8. Other employment issues

Q44. Does being furloughed affect maternity rights?

The Treasury Direction does not alter existing rules on maternity leave and statutory maternity pay (SMP). However, concerns had been expressed that being furloughed could impact a woman's eligibility for SMP or the rate of SMP she receives.

An employee who has worked for her employer for a continuous period of 26 weeks by the 15th week before the expected week of childbirth will be eligible for SMP. Her normal weekly earnings must be above £120. SMP is paid for 39 weeks. The first 6 weeks are paid at 90% of the woman's normal weekly earnings. The remaining 33 weeks are paid at the statutory rate of £151.20. Some women will have a contractual right to enhanced maternity pay.⁹⁸

'Normal weekly earnings' are calculated by reference to the eight weeks preceding the 'qualifying week' (the 15th week before the expected week of childbirth).⁹⁹ Groups including [Maternity Action](#) had expressed concern that a woman who was furloughed in the period preceding her qualifying week would be on lower pay and that this could impact either her eligibility for SMP or the rate at which she receives it.

On 23 April the Government made regulations to address this issue.¹⁰⁰ These provide that when an employee's 'normal weekly earnings' are being calculated for the purposes of SMP (or other statutory payments) and the employee was furloughed at any point during the eight week reference period, their earnings should be calculated as if they were paid at their full rate of pay rather than at a reduced rate.

Employers can already reclaim most of the cost of SMP from the Government.¹⁰¹ The [guidance on eligibility](#) says that those who pay enhanced maternity pay can claim this as 'wages' under the Scheme.

A woman who is ineligible for SMP will still be able to claim [Maternity Allowance](#). However, this is paid entirely at the statutory rate.

Q45. Does being furloughed affect continuity of employment?

The Government guidance does not address continuity of employment.

A number of employment rights are only available to employees who have a period of continuous employment with their employer. Examples include the protection from unfair dismissal, the right to redundancy pay and notice pay. Continuity of employment is generally broken by a

⁹⁸ See [Key Employment Rights](#), Commons Library Briefing Paper CBP-7245, 23 November 2018, (Section 9)

⁹⁹ Regs. 20-21, [Statutory Maternity Pay \(General\) Regulations 1986 \(SI 1986/1960\)](#).

¹⁰⁰ Reg. 3, [Maternity Allowance, Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay \(Normal Weekly Earnings etc.\) \(Coronavirus\) \(Amendment\) Regulations 2020 \(SI 2020/450\)](#)

¹⁰¹ Section 167, [Social Security Contributions and Benefits Act 1992](#)

period of more than one week where the relationship is not governed by the employment contract, although there are exceptions.¹⁰²

The generally accepted position is that the contract of employment continues to apply during periods of furlough and the employment relationship is not terminated. David Cabrelli and Jessica D'alton have suggested that furlough could be characterised as a 'partial suspension' of the contract which could impact on certain common law rights.¹⁰³

Nonetheless it appears settled that being furloughed should not itself affect continuity of employment.

A separate question concerns the continuity of an employee whose employment was terminated after 28 February or 19 March but who was then re-employed to be furloughed.

Under the 'temporary cessation of work' rule, continuity of employment can be preserved where an employee is made redundant following a reduction in the amount of work but is later re-hired.¹⁰⁴ However, it is unlikely that these rules would apply if an employee resigned in order to find a new job.

Alan Bogg and Michael Ford QC have called for statutory provision to specifically preserve continuity for coronavirus-related cases.¹⁰⁵

Q46. Does being furloughed affect annual leave?

The EU's [*Working Time Directive \(Directive 2003/88/EC\)*](#) sets out a right for all workers to 4 weeks annual leave. In the UK, this is implemented by the [*Working Time Regulations 1998*](#). This sets out a right to 4 weeks annual leave as well as a right to an additional 1.6 weeks annual leave.

The [*Working Time \(Coronavirus\) \(Amendment\) Regulations 2020 \(SI 2020/365\)*](#) allow workers to carry over up to four weeks of annual leave into the next two leave years where it was not "reasonably practicable" for them to take that leave because of coronavirus.

In the context of the CJRS, three key questions that have arisen:

- 1 Can workers take annual leave during furlough?
- 2 Can workers be required to take annual leave during furlough?
- 3 What rate is annual leave paid at during furlough?

Taking annual leave during furlough

The Government [*guidance on annual leave during Covid-19*](#) says that workers can continue to request to take annual leave while on furlough. It also says that an employee being on annual leave will not break the three week minimum furlough period.

No commentator appears to be contesting this position.

¹⁰² Section 212, *Employment Rights Act 1996*

¹⁰³ David Cabrelli and Jessica D'alton, [Furlough and Common Law Rights and Remedies](#), UK Labour Law Blog, 8 June 2020 (accessed 11 June 2020)

¹⁰⁴ See e.g. [Fitzgerald v Hall Russell & Co Ltd \[1970\] A.C. 984](#)

¹⁰⁵ Alan Bogg and Michael Ford QC, [Legislating in Times of Crisis: The Coronavirus Job Retention Scheme](#), UK Labour Law Blog, 23 March 2020 (accessed 31 March 2020)

Requiring workers to take annual leave during furlough?

A more difficult question is whether employers can require workers to take annual leave while they are on furlough.

Under the WTR, employers can require workers to take annual leave on particular days, either by notice or through the contract. For example, many workers will be required by their employment contract to use eight days of their annual leave on bank holidays.¹⁰⁶

David Reade QC and Daniel Northall, barristers at Littleton chambers, note that if employers can require workers to take annual leave during furlough this could lead to difficult outcomes:

The outstanding question is whether an employer is entitled to require its workers to take annual leave at times other than bank holidays. If the answer to this question is a simple, unqualified 'yes', one is forced to concede that it leads to a superficially unattractive proposition: an employer can run down annual leave entitlement to nought by requiring its staff to take lengthy or repeated periods of annual leave during periods of furlough. In this way, workers would receive neither additional leave nor additional pay and, so the argument would go, the right to annual leave would be illusory.¹⁰⁷

The [guidance on annual leave](#) says that employers can require workers to take annual leave during furlough, although it notes that employers should consider whether workers can properly enjoy a period of rest and relaxation.

CJEU case law suggests that there are circumstances in which workers cannot be required to take leave, such as during sick leave where a worker is unable to enjoy a period of rest and leisure.¹⁰⁸

Alan Bogg and Michael Ford QC have argued that as a matter of EU law workers cannot be required to take annual leave during furlough as, in the current circumstances, furlough is more akin to sick leave:

Although the CJEU case-law is not entirely clear, we think the better argument is that 'furloughing' for most workers in circumstances of the current lockdown is closer to sick leave, following the orthodox line in cases like *Stringer*, than it is to zero-hours working or taking parental leave. First, 'furlough' leave is not foreseeable and it is entirely beyond the control of the employee. The decision to furlough is the employer's, not the employee's, and the current situation as regards employment and economic activity could scarcely have been predicted a matter of weeks ago. While that cannot provide the complete answer, more important may be a second factor. 'Furlough' leave in the current circumstances, like sick leave, is subject to extensive physical and psychological constraints.¹⁰⁹

¹⁰⁶ Bank holidays are not, strictly speaking, holidays – although in practice most workers will take annual leave on these days. See Commons Library Insight, [Bank holidays: How are they created and changed?](#), 23 August 2019

¹⁰⁷ David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020)

¹⁰⁸ [Stringer and ors v HMRC \(C-520/06\) \[2009\] ICR 932](#)

¹⁰⁹ Alan Bogg and Michael Ford QC, [Furloughing and Fundamental Rights: The Case of Paid Annual Leave](#), UK Labour Law Blog, 6 April 2020 (accessed 7 April 2020)

In the *Transocean* case the UK Supreme Court held that workers could be required to take annual leave during periods when they would not have been working.¹¹⁰ However, Declan O’Dempsey, a barrister at Cloisters, argues that this case was not concerned with the nature of the leave:

The qualitative nature of the leave in *Transocean* was perhaps not significant because that was not a case in which a serious argument that the essence of the right was being undermined could have been mounted. However in cases where there are legal, health, and practical restrictions on what a worker foreseeably can and cannot do during their leave which mean that they will not be able to enjoy a period of rest, relaxation and leisure, a strong argument can be made that the *Transocean* analysis cannot be regarded as the ultimate word.¹¹¹

The Government guidance is, ultimately, just guidance. The question of whether an employer can legally require a worker to take leave while on furlough will need to be determined on the facts of each case.

Rate of pay during annual leave

Under the WTR, holiday pay is paid at the rate of ‘a week’s pay’. This is calculated using a 52-week reference period.¹¹²

The [guidance on annual leave](#) says that workers who take annual leave during furlough must be paid in accordance with the WTR. This means that employers will need to top up the CJRS grant for 80% of reference salary to the rate required under the WTR.

However, under EU law a worker must be paid their ‘normal remuneration’ for four weeks of annual leave. If a worker took annual leave after being furloughed and on reduced pay for some time, this could affect the ‘week’s pay’ calculation. In such circumstances, it is not clear whether this would be compatible with the EU definition of ‘normal remuneration’.

Reade and Northall have previously argued that “the safest course [...] which would eliminate all risk of litigation” would be for holiday pay to be paid at the full rate of pre-furlough remuneration.¹¹³

Q47. Can CJRS grants be used to cover notice pay?

There has previously been some uncertainty as to whether employers can use CJRS grants to pay employees who are serving contractual or statutory notice periods.

The Treasury Direction now confirms that from 1 December 2020, an employer cannot claim a CJRS grant for an employee who is serving their notice period.¹¹⁴ The [guidance on eligibility](#) explains that this applies to both statutory and contractual notice periods.

¹¹⁰ [Russell v Transocean International Resources Ltd \[2011\] UKSC 57](#)

¹¹¹ Declan O’Dempsey, [Guidance on making staff take holiday during the Coronavirus outbreak](#), Cloisters, 19 May 2020 (accessed 15 June 2020)

¹¹² BEIS, [Holiday Pay: Guidance on calculating holiday pay for workers without fixed hours or pay](#), April 2020

¹¹³ David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020)

¹¹⁴ Fifth Treasury Direction, para. 27

Q48. What happens when the CJRS ends?

The Treasury Direction says that the CJRS will end on 30 April 2021. However, as noted above, in March 2021 the Chancellor [announced that the CJRS would be extended until 30 September 2021](#). On 15 April 2021, the Treasury published a further Direction covering the period 1 May 2021 to 30 September 2021.¹¹⁵

Following the end of the CJRS, employers will need to consider whether they can retain some or all of their employees. In some circumstances, employers will need to make redundancies.

The deadline for the last CJRS claims is 14 October 2021.¹¹⁶

Collective redundancy consultation

The [guidance on making claims](#) acknowledges that once the CJRS has ended employers will need to decide between retaining staff and making redundancies.

If an employer believes that it cannot retain staff once the Scheme ends and is considering making redundancies, the obligation to undertake collective consultations may apply. The obligation applies when an employer is proposing to dismiss 20 or more employees within a period of 90 days.¹¹⁷

Employers proposing to make between 20 and 99 redundancies must begin consulting 30 days before the first dismissal. Employers proposing to make 100 or more redundancies must begin consulting 45 days before the first dismissal. An employer must also notify the Department of Business, Energy and Industrial Strategy. The consultation process can be shorter if employers have a “special circumstances” defence.

Acas has detailed guidance on [handling large-scale redundancies](#).

The term ‘propose’ does require a degree of intention, although Tribunals have found employers deciding between two alternative courses of action to be ‘proposing to dismiss’.¹¹⁸

For further details on redundancy protections see the Library Insight, [Coronavirus: Protections from redundancy](#).

Job Retention Bonus

In the [Plan for Jobs](#), published in July 2020, the Government announced a [Job Retention Bonus](#). Under this scheme, once the CJRS had ended on 31 October 2020 (as originally planned), an employer that retained any formerly furloughed employee until January 2021 would have received a bonus of £1,000 per worker.

When the Chancellor [announced that the CJRS would be extended](#) on 5 November 2020, he said the policy intent for the Job Retention Bonus

¹¹⁵ The Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction ([Seventh Treasury Direction](#))

¹¹⁶ The Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction ([Seventh Treasury Direction](#))

¹¹⁷ Section 188, *Trade Union and Labour Relations (Consolidation) Act 1992*.

¹¹⁸ [Scotch Premier Meat Ltd v Burns \[2000\] IRLR 639](#)

“falls away” and that the Government would “redeploy a retention initiative at the appropriate time”.¹¹⁹

No further information on the Job Retention Bonus was provided in Budget 2021. A June 2021 PQ response provided the following update:

The purpose of the Job Retention Bonus (JRB) was to encourage employers to keep people in work until the end of January 2021. However, when it was announced in December 2020 that the Coronavirus Job Retention Scheme (CJRS) would be extended to the end of April 2021, the policy intent of the JRB fell away.

As the health situation deteriorated rapidly last autumn and winter, it was right that the Government instead extended the CJRS to reflect the increased number of closures that were expected over autumn and winter. However, the situation has changed moving into summer 2021 with the roll-out of the vaccine and the firm footing that gives to economic reopening. In this context, extending the CJRS further at Budget 2021, to the end of September, allowed the Government to strike the right balance between supporting the economy as it reopens, continuing to provide support and protect incomes, and ensuring incentives are in place to get people back to work as demand returns.¹²⁰

¹¹⁹ [HC Deb 5 November 2020 c503](#)

¹²⁰ [PQ 12122](#) [on job retention bonus] 16 June 2021

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