

Insights

CORONAVIRUS: UK JOB RETENTION SCHEME – GUIDANCE (VERSION 3) PUBLISHED WITH IMPORTANT CLARIFICATIONS

Apr 10, 2020

As an update to our [6 April Coronavirus: UK Job Retention Scheme – government fills in some gaps in the guidance](#), the UK Government [has further revised its online guidance](#) to give welcome clarification on three important issues related to the operation of the Coronavirus Job Retention Scheme (CJRS).

- 1. Employees who TUPE transfer can be furloughed:** Employers can furlough employees they inherit from a previous business after 28th February 2020, provided either the TUPE or PAYE business succession rules apply to the change of ownership. This is an exception to the key qualifying requirement that employees must have been on the employer's payroll on or before 28 February in order to qualify for furlough. Removing this uncertainty is very welcome as the uncertainty was having a chilling effect on business sales and outsourcing transactions.
- 2. Sick employees can be furloughed:** Expressly reversing its previous position, the guidance now says employers have the flexibility to furlough employees who are claiming Statutory Sick Pay (SSP). Such employees will cease their SSP entitlement and will receive furlough pay instead. Long term sick employees and shielded employees can also be put on furlough. Employees who become sick while furloughed can either remain on furlough or can be taken off furlough and moved onto SSP. As furlough pay will typically be much higher than SSP, sick employees will very likely prefer to remain on furlough.
- 3. Foreign nationals can benefit from the scheme:** Grants under the CJRS won't count as 'access to public funds' in breach of certain visa requirements, and employers can furlough employees on all categories of visa.

This latest iteration of the CJRS guidance also includes some new anti-avoidance details:

- Whilst employees on furlough may work for other employers, they may not work for any organisation linked or associated with their employer.

- Reclaims of minimum auto enrolment employer pension contributions are based on furlough pay, and the employer must pay the whole amount claimed as an employer contribution into the pension. The UK Pensions Regulator has separately just published helpful COVID-19 guidance for employers on how to comply with auto-enrolment pensions duties.
- All of the furlough grant must be paid to employees in the form of money. No part of the grant can be diverted to pay for the provision of benefits or a salary sacrifice scheme.

Other helpful clarifications include:

- When furloughing employees returning from maternity and other types of statutory leave, furlough pay should be calculated by reference to their salary before they went on family leave, not by reference to the pay they received whilst on statutory leave.
- Where a group of companies have multiple PAYE schemes and there is a transfer of all employees from these scheme into a new consolidated PAYE scheme after 28 February 2020, the new scheme will be eligible to furlough those employees under the CJRS.

But holiday rights during furlough still not addressed in the guidance

The CJRS guidance still fails to address employees' holiday rights during furlough, although separate ACAS guidance indicates that employees can take holiday during furlough and should receive holiday pay based on their normal pre-furlough salary.

BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com

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