

Insights

CORONAVIRUS: UK JOB RETENTION SCHEME - PREVIOUSLY EXCLUDED EMPLOYEES NOW IN SCOPE TO BE FURLOUGHED

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Summary

Key points arising out of the revised guidance and the legislative framework include:

1. Eligibility cut-off date extended from 28 February to 19 March: This is the most significant change to the UK Coronavirus Job Retention Scheme (CJRS) guidance. It brings into scope many new recruits who previously could not be furloughed. Earlier versions of the guidance said that new recruits who joined after 28 February were excluded from the scheme. However, the latest guidance now says that individuals put on the employer's payroll on or before 19 March, and in respect of whom the employer has also made an RTI submission to HMRC on or before 19 March, can be furloughed.

It may well be that employers have already taken action to terminate new recruits who, according to previous versions of the guidance couldn't be furloughed. Employers still have the option to rehire these individuals and then furlough them, if they wish to do so.

2. Requirement for employer/employee agreement: the legislative underpin for the CJRS (the 'CJRS Direction') has now also been published and says that to be furloughed, the employer and employee must agree in writing that the employee will cease all work. This conflicts with the guidance, where the employer only has to confirm in writing that the employee has been furloughed, not that the employee has agreed to cease working. The best evidence of employee agreement is express confirmation from the employee that they agree to the furlough letter terms (which include the requirement that they must not do work for their employer whilst on furlough). However, for employers who are looking to furlough a large workforce quickly, it may not be practicable to obtain such express agreement first from their staff. In such cases, the employer may look to rely on implied consent, evidenced by the employees' acceptance of reduced pay in accordance with the furlough terms. Recent case law suggested that implied agreement to furlough may be obtained in this way. However, the wording of the CJRS Direction raises some doubt about whether this approach complies with CJRS requirements. Pending further clarification,

employers who have unilaterally furloughed staff and who want to manage this risk may wish to consider seeking express written agreement from their furloughed staff.

3. Deferring payment of furlough salary until employer has received those monies from HMRC: It appears from the terms of the CJRS Direction that employers may wait for receipt of monies under the CJRS before paying that on to furloughed staff. It is a fundamental condition of the CJRS that such monies are passed through to furloughed staff.

4. How to submit a CJRS claim: the government has indicated that it expects the CJRS online portal to go live on or around April 20th. The latest version of the guidance provides more detail of the information an employer needs to input in order to submit a claim, including details of how to make a bulk claim in respect of more than 100 furloughed staff.

5. Holiday rights whilst on furlough still unclear: Both the CJRS Direction and the latest guidance still fail to address employees' holiday rights during furlough, although as we have mentioned previously, [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](#).

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