

Insights

CORONAVIRUS: NEW DETAILED UK GUIDANCE ON PART-TIME FURLOUGHING AND REDUCTION IN GRANTS UNDER THE UK FURLOUGH SCHEME – IMPLICATIONS FOR EMPLOYERS

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The UK government has now released its detailed guidance to implement flexible furlough and gradually wind down the Coronavirus Job Retention Scheme (“**CJRS**”) to its expected end date of 31 October 2020.

Key highlights of the new flexible furlough regime and winding down payments

From 1 July 2020, employers can bring furloughed employees back to work for any amount of time and any shift pattern, while still being able to claim a CJRS grant for the hours not worked. Some of the key aspects of the flexible furloughing regime are set out below:

- Employers will still be able to claim the CJRS grant for the hours that its employees are flexibly furloughed (that is, not working), compared to the hours they would normally have worked in that period.
- The existing three week minimum furlough period will be removed. CJRS claims made via the online portal will, however, need to be for a minimum period of one week.
- Wage caps will be proportional to the hours an employee is furloughed. For example, an employee is entitled to 60% of the £2,500 cap if they are placed on furlough for 60% of their usual hours.
- Save for employees returning from family leave:
 - employers will only be able to claim for employees who have previously been furloughed for at least 3 consecutive weeks taking place any time between 1 March 2020 and 30 June 2020; and
 - the number of employees an employer can claim for in any claim period starting from 1 July 2020 cannot exceed the maximum number of employees that it has claimed for under a claim up to 30 June 2020.

- The detailed guidance highlights how employers work out what they can claim for under the CJRS, taking account of the progressive reduction in the grant entitlement from 1 August 2020. As a reminder, the reductions are:
 - in August, employers must bear the cost of employer's NICs and auto-enrolment costs on furlough pay;
 - in September, employers must in addition pay 10% of furlough pay; and
 - in October, the employer contribution to furlough pay increases to 20%.

Implications for employers

- **New requirement for prior express written agreement with employees who are going to be part-time furloughed?** The flexible furloughing guidance requires employers to have a new written agreement about the flexible working changes with employees. It is not clear whether this requires employers to seek the express written agreement of employees before implementing flexible furlough, or whether (as is allowed for putting employees on furlough full-time) employers can implement the changes and subsequently simply confirm those in writing. For employers with a large workforce, seeking prior express agreement from each employee may be impractical. It is hoped that further guidance will confirm that (in the same way as full-time furloughing) flexible furloughing arrangements can be implemented and subsequently documented.
- **Does introducing part-time furlough trigger collective consultation?** To the extent that putting employees on part-time furlough results in changes to terms and conditions – for example where employers require employees to work new shift patterns that are not contemplated in the employment contract - employers need to consider whether this triggers collective consultation requirements. If so, this can again substantially slow down the speed at which employers can implement part-time furlough arrangements.
- **Significantly increased administrative overhead imposed on employers:** The introduction of flexible furloughing will render the CJRS more complex. This, in turn, will place an additional burden on employers when seeking to ensure compliance with the CJRS. Employers should check that their payroll and HR functions are properly geared up to comply with the new requirements. For example, when claiming a CJRS grant in respect of employees who are part-time furloughed, employers must specify the hours those employees will be working. If employees work longer than the working hours specified in the CJRS claim, employers will have received too much furlough pay and must repay the excess.

- **TUPE flexibilities:** Transferees who inherit employees under TUPE can furlough those transferring employees on condition that they had been furloughed by the transferor. To address the fact that the CJRS is now closed to new entrants, the transferee will need accurate furlough information from the transferor, to ensure that it meets its obligations under the CJRS.
- **Beware other collective consultation triggers:** As we highlighted previously, employers need to make early assessments as to whether, and if so how, they will continue to furlough employees going forward. The requirement to shoulder an increasing element of the CJRS costs from 1 August 2020 is likely to mean that some employers will be considering redundancies. Employers therefore need to be mindful as to whether these or other changes in circumstances trigger collective consultation obligations. One imminent “cliff-edge” date for conducting minimum 45 days’ collective consultation is 16 June 2020 - arising from the first increase in employer furlough costs under the CJRS - and the obligation to commence collective consultation may have started before that date if a proposal is already in place.

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@bcplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bcplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

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