



Burgis & Bullock
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COVID-19 UPDATE JOB RETENTION SCHEME ["JRS"]



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FLEXIBLE FURLOUGHING SUPPORT AND TAPERING

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On 12 June 2020 HMRC published further detailed guidance on how Furlough (including how Flexible Furlough will work from 1 July 2020 to 31 October 2020).

How is the scheme changing?

From 1 July 2020, workers will be able to do part-time work while on furlough. It will be up to the employer and worker to agree what the working arrangements will be, but employers will be required to pay the worker's normal wages while the worker is working. The Government subsidy will only apply to hours when the worker is not working during furlough, and the cap will be pro-rated to reflect any hours worked. It is worth noting at the outset that there is no obligation to use the "flexible furlough" element and employers are free to continue full furlough for employees until the scheme ends on 31 October 2020.

The changes are now in ten different documents these are all included at the foot of this update.

The rules on calculating Flexible furlough are complicated because HMRC are still basing their calculations on a combination of normal hours that an employee would work (based upon the last pay before 19th March or an average based on prior years where they are on variable pay) the actual hours worked and a calendar day calculation basis rather than a working day basis.

If you adopt flexible furlough for employees then it is essential that you consider what your revised furlough letter to an employee states, Wages are normally calculated on a working day basis and if you have agreed that the employee will be paid 80% of their normal pay on the assumption that for July HMRC will pay all of the 80% then you would find that not all of these salary costs will be covered by HMRC despite government advice that would lead you to this impression .

Taking HMRC's own example of an employee in July who works for only half of their normal working days who was on a £3,000 salary HMRC Furlough calculation (excluding National Insurance and Employees' Pension) comes out at £1,159.95. On a working day basis, the employee would be entitled to £1,200. In this example you only recover 96.66% of the amount paid to the employee. if the employee worked only 25% of the time then you would recover only 89.99% at 75%. You would recover 98.88%.

Subject to the above comments a summary of the scheme is as follows:

	July	August	September	October
Government Contribution: Employer NIC and Pension contributions	Yes	No	No	No
Government Contribution: Wages	80% up to £2,500	80% up to £2,500	70% up to £2187.50	60% up to £1,875.00
Employer Contribution: Employer NIC and Pension contributions	No	Yes	Yes	Yes
Employer Contribution Wages (excluding any employer top up)	Nil	Nil	10% up to £312.50	20% up to £625

Eligibility to make a claim

From 1 July 2020 only employees you have successfully claimed a previous CJRS for will be eligible for further grants. These employees must have been furloughed for at least 3 consecutive weeks between 1 March and 30 June. The last date an employee could have been furloughed for the first time is 10 June. The only exception to this is where an employee is returning from Statutory parental leave.

The number of employees you can claim for in any claim period cannot exceed the maximum number of employees you claimed for under any claim made before 30 June 2020. For example, March 20, April 50, April 40, June 45 then the maximum number will be 50. This is likely to impact employers who have has rotated employees on furlough and is considering offering flexible furloughing.

How will part-time work during furlough affect the CJRS Grant?

Employers will be required to pay the worker's normal wages for any hours worked when not on furlough. Whilst on furlough hours the normal rules regarding not working apply. The guidance does not make clear whether a worker's "normal wages" for hours they work are permitted to be reduced by agreement and so we assume ordinary employment law considerations would apply, plus the consequential employee relations implications of such an approach.

Any hours worked will also reduce the maximum Government subsidy available on a pro-rata basis. To calculate the pro-rated subsidy, the employer will have to calculate the worker's usual working hours, then subtract the hours actually worked during the claim period. This will give the number of furlough hours in the claim period. Government funding under the Scheme will only be available in respect of furlough hours (i.e. hours when the worker is not working). The maximum funding under the Scheme will also be reduced proportionately to reflect the number of furlough hours as against the worker's usual hours. This is explained in more detail below.

How do you work out a worker's usual hours?

For a worker who has fixed contractual hours, the worker's usual hours will be their normal contractual hours at the end of the last pay period ending on or before 19 March 2020.

For a worker whose hours vary, the guidance states that the worker's usual hours will be the higher of the average number of hours worked in the 2019/20 tax year or the hours worked in the corresponding period within the 2019/20 tax year. Subject to the employer ensuring he pays the furloughed pay to the employee.

The employer will then need to calculate the number of usual hours in the relevant claim period. For example, a worker who is contracted to work 40 hours per week will have usual hours of 40 hours per week. If the employer claims for the whole month of July, it will need to calculate the number of usual hours in the month. This is done by dividing 40 (the weekly hours) by seven (the number of days in a calendar week), to give daily hours, and then multiplying this by the number of days in the claim period (in this case, 31 days in July). Where this does not produce a whole number (in this case, 177.14) the hours are rounded to the nearest whole number (i.e. 178). The worker's usual hours for July are 178.

How do you then work out furlough pay for flexible furlough?

Workers who are on full-time furlough must receive 80% of their regular wages up to the cap of £2,500 per month. Workers on flexible furlough must receive a proportionate amount based on the number of furlough hours. The number of furlough hours is calculated starting with the employees' normal wage prior to 19th March at 80% subject to the £2,500 and taking the worker's usual hours in the claim period and subtracting the number of hours actually worked in that period. The fraction of furlough hours against usual hours is then applied to the 80% of wages up to the £2,500 cap.

HMRC'S the example shows if the worker had a normal salary of £3,000 80% of this is £2,400 and works 92 hours in July, the number of furlough hours in July is 86 (178 minus 92). The fraction of furlough hours as against usual hours (86/178) is then applied to the £2,400 to give the maximum that can be claimed under the Scheme £1,159.55 for the wage's element. This is calculation for a normal 40-hour week. The links at the foot of this brief provide examples where people do not work a normal weekly pattern.

This is contrasted to a working days calculation where the employee has normal hours of 40 per week and in July works part time for 50% of his contracted hours. in this case there are 23 working days and the total hours would be 184(23*8) of which the employee worked 50% being 92 hours and was not working for 92 hours. In this case the calculation would have been $£2,400 / 23 * 11.5 \text{ days} = £1,200$

How does holiday impact on flexible furlough?

An employee on flexible furlough can take holiday during their periods of furlough (as is the case for fully furloughed employees). The guidance states that the employer is required to top up the employee's pay to their normal contracted rate, which aligns with the position to date for any holiday taken during furlough.

How can employers place workers on flexible furlough?

Employers must agree with the worker any new flexible furlough working arrangements and confirm that agreement in writing. The guidance states that you need to make sure the agreement is consistent with employment, equality and discrimination laws. The Government guidance talks about having a "new" written agreement. It is not yet clear whether a completely new furlough agreement is required or whether an amendment to any existing furlough agreement would suffice. While it is likely that an amendment would suffice, the safest approach (until further clarification is provided) would be to issue a fresh furlough letter which sets out all of the terms of the furlough. You need to consider for example whether flexible furlough will be paid in accordance with minimum furlough amount calculated as payable to the employee (this covers any employer top up to the minimum furlough in September and October or whether it will be 80% of normal salary or will include a top up).

From 1 July agreed flexible furlough can last any time. Employees can enter a flexible furlough period more than once. Where a previously furloughed employee started a new furlough period before 30 June they cannot be flexibly furloughed until they have had 3 consecutive weeks of furlough. For example, an employee who started a new furlough on 22 June could not be flexibly furloughed until after 12th July.

One challenge will be how to document the flexibility and the employee relations issues arising from the lack of clarity on working patterns and pay (where the employer is not topping up furlough hours and seeking to give itself maximum flexibility).

What records must be kept?

The employer must keep a written record of the agreed flexible furlough working arrangements. This must be kept for at least five years. In addition, employers must keep records of how many hours the worker works and the number of hours they are furloughed (i.e. not working). Records of all claims and calculations must be kept for at least six years and should include:

- amounts claimed and the claim periods for each employee.
- claim reference number.
- calculations used when preparing the claims.
- usual hours worked by flexibly furloughed employees (including the calculations used to reach those figures).
- actual hours worked by flexibly furloughed employees in each claim period

Claiming the Grant

Any claims for furlough ending on or before 30 June 2020 must be submitted by 31 July 2020.

From 1 July claims must start and end within the same calendar month. It is possible to make more than one claim in a month, but each claim must be for a minimum of 7 Days.

From 1st July where a payroll spans over a month then the claim will need to be split into claims for each calendar month.

Where the furlough spans June and July, any days of furlough in June must be claimed separately to any days of furlough in July, and the June days must be claimed by 31 July 2020. The same approach also applies to periods of furlough which span two subsequent months (i.e. they should be claimed separately) This will involve splitting payrolls that

HMRC guidance states when you are claiming for flexibly furloughed employees you should not claim until you are sure of the exact number of hours they will have worked during the claim period This will avoid having to correct claims. The earliest a claim can be made is 14 days before the end of the claim period.

If employers make an error when claiming

Overclaims

The portal now allows for overclaims to be dealt with as a deduction from your next claim. If you have no further claims to make HMRC is still working on a system for you to report overclaims

Underclaims

Unhelpfully HMRC will not allow you to correct an underpayment in the next claim If you have made an error. Their advice is that you should contact them because you are increasing the amount of your claim, they advise they need to conduct additional checks. In terms of contacting HMRC the only suggestions they make are for you to contact them by webchat or via telephone on 0800 024 1222.

HMRC Penalties a word of Warning

On 29 May HMRC opened a consultation which closed on 12 June which proposed legislation to enable HMRC to charge Penalties of up to 100% for incorrectly claimed Corona Virus support schemes.

The draft legislation gives HMRC the power to raise income tax or corporation tax assessments to recover CJRS and SEISS grants to which the claimant was not entitled, or where CJRS grants were not used to pay furloughed workers. The measures also allow HMRC to charge penalties in cases of deliberate non-compliance.

However, the draft legislation goes on to say that where it has been found that an error has been made, unless the amount assessable has been reported by the later of the 30th day following the date of the making of the incorrect claim, or the 30th day following the date of the passing of the proposed legislation, the incorrect claim will be treated as deliberate and concealed regardless of how it came about.

It would be expected that HMRC will follow up all reports made to its fraud line to start with and HMRC have always advised they will be checking claims. We would expect to see enquiries made into submitted claims to follow once the scheme ends.

Links to the various Government Guidance issued

[Coronavirus Job Retention Scheme summary page of guidance](#)

[Changes to the CJRS](#)

[Government CJRS guidance for employers](#)

[Check which employees you can put on furlough guidance](#)

[Steps to take before calculating your claim using the CJRS](#)

[Calculate how much you should claim](#)

[Claim for wages through the CJRS](#)

[Report a payment in PAYE RTI](#)

[Examples to help you work out 80% of your employees' wages - flexible furlough](#)

[Find examples to help you calculate your employees' wages](#)

[Check if you can claim for wages through the Coronavirus Job Retention Scheme](#)

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