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A guide to the Coronavirus Job Retention Scheme & Self-Employed Income Support Scheme

5 February 2021

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This note is current as at 5 February 2021.

On 5 November 2020, the Government announced**:**

— that the Coronavirus Job Retention Scheme ("**CJRS**") was being extended from 1 November 2020 until 31 March 2021, with a review of the Government's contribution expected in January 2021; and

— further support for the self-employed under the Self-Employed Income Support Scheme ("**SEISS**") offering "*the same level of support*" for the self-employed as is being provided to employees under the CJRS.

However, with the detection of a more infectious strain of coronavirus spreading across the UK and the resurgence of high infection rates and deaths, on 17 December 2020 the Chancellor, Rishi Sunak, announced that the CJRS was being extended again until 30 April 2021. He also committed that the Government's contribution to the CJRS will not reduce after the end of this month as had been anticipated but will continue at 80% of employees' wages until the end of the CJRS. The SEISS has also been extended until the end of April 2021.

We examine the grants available under both schemes below.

CJRS: 1 December 2020 to 30 April 2021

We have previously produced updates in relation to the numerous incarnations of the CJRS. The latest version of the CJRS runs from 1 November 2020 until 30 April 2021 and offers employers a grant of up to 80% of their employees' normal monthly wages for unworked hours, capped at £2,500 per month, with the ability to furlough employees on a flexible basis on terms similar to those that applied from 1 August 2020.

Special rules applied in respect of the period 1 to 30 November 2020. As the deadline for making claims during that period has now passed, this note covers the operation of the CJRS from 1 December 2020 to 30 April 2021.

According to data published by HMRC, by 13 December 2020, 9.9 million jobs had been furloughed under the CJRS, providing support to 1.2 million employers. Just nine months after its creation the total value of claims made under the CJRS reached £46.4 billion. In addition, the Government has announced that businesses in England in the retail, hospitality and leisure sectors may be eligible to receive a one-off

"lockdown" grant worth up to £9,000 following the announcement on 4 January 2021 returning the UK to lockdown and forcing the closure of all non-essential businesses.

The Government has updated the following main guidance documents (together the "**Guidance**") which govern the operation of the extended CJRS:

Claim for wages through the CJRS

Check which employees you can put on furlough to use the CJRS

Check if you can claim for your employees' wages through the CJRS

Calculate how much you can claim using the CJRS

Steps to take before calculating your claim using the CJRS

Reporting employees' wages to HMRC when you've claimed through the CJRS

Examples of how to calculate your employees' wages, National Insurance contributions and pension contributions

Full examples of how to calculate the amount you should claim for an employee who is flexibly furloughed

Pay CJRS grants back

Check if your employer can use the CJRS

The Government has also extended the Treasury Direction (originally published on 15 April 2020) on 25 January 2021 (available here), which sets out the legal framework for the CJRS (the "**Direction**").

ACAS's Furlough and the Coronavirus Job Retention Scheme guidance document for employers and employees can be accessed here. It provides a step-by-step guide which mirrors the Guidance and details the extension of the furlough scheme to April 2021.

Eligibility

Who can claim?

The Guidance states "*if you cannot maintain your workforce because your operations have been affected by coronavirus (COVID-19), you can furlough employees and apply for a grant to cover a portion of their usual monthly wage costs where you record them as being on furlough*.".

The aim of the CJRS is therefore to support those businesses who are adversely affected by coronavirus and this is reinforced by the Direction which states: "*The extension of CJRS by this direction is necessary for the purpose of CJRS… arising from the emergency resulting from the resurgence of the incidence of coronavirus and coronavirus disease and the measures taken to reduce further transmission, loss of life, demands upon healthcare resources and damage to economic activity in the United Kingdom*.".

Employers are able to claim for any "qualifying employees" that they have furloughed, regardless of whether or not they have made a claim before, provided that the employer:

— created and started a UK PAYE payroll scheme on or before 30 October 2020;

— is enrolled for PAYE online; and

— holds a UK, Isle of Man or Channel Island bank account.

Unlike the previous version of the flexible furlough scheme, there is no maximum number of employees that can be claimed for.

There is no right of appeal if an employer or employee is not eligible for the CJRS. However, the Guidance states that contact should be made with HMRC if ineligibility is due to an HMRC error or unreasonable delay caused by HMRC.

Administrators and publicly funded bodies

As has always been the case, Administrators can furlough employees of the company they have been appointed to manage and can claim under the CJRS, but they should not do so unless "*there is a reasonable likelihood of retaining the employees*" (e.g. in pursuit of a sale of the business). However, it is not entirely clear whether this exception could also include circumstances where the Administrators will need to retain staff in the short to medium term for the purposes of winding up the business and selling the assets where no transfer of a going concern is likely to be achieved.

Those businesses whose staff costs are publicly funded (whether or not they are public sector bodies) are expected to use those funds to continue to pay their staff, and not to claim under the CJRS, although the CJRS is potentially open to those organisations which are not fully funded by the public purse (and who are advised to contact their sponsor department or administration for further guidance).

Qualifying employees

The Direction provides that an individual is a qualifying employee for the purposes of the CJRS if:

— the employer making the CJRS claim made a payment to the employee which was reported to HMRC in an RTI submission after 19 March 2020 and before 31 October 2020; and

— the employer has not reported to HMRC a cessation of the employee's employment after the payment or the latest of such payments has been made (except in respect of those who "*stopped working*" after 23 September 2020 and were "rehired" (see **Redundancies and rehiring** below).

As the Guidance therefore makes clear, as well as traditional employees and apprentices, the following types of employee and worker are also covered by the CJRS:

— office holders (including company directors);

— salaried members of Limited Liability Partnerships (LLPs);

— agency workers (including those employed by umbrella companies);

— limb (b) workers (e.g. casual workers);

— contingent workers in the public sector; and

— contractors with public sector engagements in scope of the IR35 off-payroll working rules (IR35).

(See Other types of employees you can claim for (www.gov.uk) for further information).

Furthermore, as grants under the CJRS are not regarded as "*access to public funds*", employees on all categories of visa are eligible for CJRS grants.

Redundancies and rehiring

The Guidance makes it absolutely clear that any employees who were employed and on the payroll on 23 September 2020 but who were made redundant or "*stopped working*" for their employer (including those on fixed term contracts that had expired) on or after that date can be re-employed and claimed for under the CJRS. An RTI submission for the employee must have been made to HMRC between 20 March 2020 and 23 September 2020. However, there appears to be no deadline by which employees have to be re-employed to be eligible for the grant.

As we have noted previously, any employer who is considering re-employing former employees should bear in mind that it is not cost neutral to do so and they will need to consider issues such as when employees' employment should be backdated to, whether continuity of service will be preserved and, if so, whether they will have unfair dismissal rights when the furlough period is over and how termination payments already made should be dealt with.

Employees under notice of termination

In respect of claim periods ending on or before 30 November 2020, where employers needed to make redundancies during a period of furlough or employees resigned or retired, the employer could still claim under the CJRS in respect of the period of statutory or contractual notice that the employee served whilst still furloughed.

However, for claim periods commencing on or after 1 December 2020, whilst it remains the case that there is no prohibition on serving notice of termination whilst an employee is furloughed, employers will not be able to recover the grant in respect of a period of notice (whether statutory or contractual).

For those whose contracts terminate during a period of furlough, it remains the case that statutory redundancy pay and statutory notice pay must be calculated on the basis of their normal wage rather than the reduced furlough wage.

Clinically vulnerable and sick employees

Employers can furlough employees who are "*clinically extremely vulnerable*", at the highest risk of serious illness, or off work on long-term sick leave. The guidance on shielding and protecting people who are clinically extremely vulnerable from COVID-19, which can be found here, was updated following the announcement on 4 January 2021 that the UK was to revert to a national lockdown.

The guidance on shielding strongly advises that those who are "*clinically extremely vulnerable*" should work from home and, where they cannot work from home, they should not attend work. Where employees cannot work from home and no alternative arrangements can be made to enable them to work from home, their employers may furlough them under the CJRS.

The Guidance remains that short term illness or self-isolation should not be a consideration in deciding whether to furlough an employee. The Guidance further states that "*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 should be re-classified as a furloughed employee instead.

This suggests that, if an employee becomes unwell (for any reason) or is required to self-isolate and cannot work from home, their employer could in principle (re-)furlough them or move them from being flexibly furloughed to fully furloughed, "*for business reasons*".

There is also a "Test and Trace Support Payment" of up to £500 available for those employees on low incomes who cannot work from home and have lost income as a result. This payment was made available from 28 September 2020 and just under four million people who are in receipt of benefits in England will be eligible for this payment, which is available to those who must self-isolate by law.

Notably, fines of up to £10,000 may be enforced against both individuals who breach self-isolation rules and business owners who encourage non-compliance with the self-isolation directions, for example by threatening self-isolating staff with redundancy if they do not attend work.

Caring responsibilities

Employers are also able to furlough employees who have caring responsibilities that result from coronavirus. The Guidance provides examples of situations in which this may arise, and specifically references

employees caring for children who are at home as a result of the closure of school or childcare facilities or caring for a vulnerable individual in their household.

It is important to note that employers are under no obligation to furlough employees who have caring responsibilities, but they will still need to consider being flexible in other ways to help employees balance work and their caring responsibilities in the current lockdown, particularly as a result of school closures.

Furlough to cover seasonal reduction in business and paid leave

The Guidance specifically states that employers "*can only place employees on furlough if coronavirus… is affecting [their] operations*", inferring that normal seasonal changes to their business operations should not be a reason to place someone on furlough.

It also now unequivocally states that employers should not place employees on furlough just because they are going to be taking paid leave.

Employee transfers

Group company payroll

Where, in the context of a group of companies, at least two PAYE schemes registered on or before 30 October 2020 have been consolidated as a result of a reorganisation of the employer's business, and the employees on these schemes have been transferred into the consolidated PAYE scheme, the employer is able to continue to furlough and claim for employees under the new scheme.

TUPE and business succession rules

A new employer is eligible to claim for the employees of a previous business transferred if the TUPE or PAYE business succession rules applied to the change in ownership. The employees who are the subject of the claim need to fulfil the following criteria:

— they should have been transferred from the old employer to the new employer on or after 1 September 2020;

— they need to have been employed by either the old or new employer on 30 October 2020; and

— they must have been the subject of a PAYE RTI submission by the old or new employer between 20 March 2020 and 30 October 2020 which notified HMRC of a payment of earnings for that employee.

Agreements and record keeping

Employers must reach an agreement with their employees that they will go on furlough. There is however no obligation on employers to furlough employees in any circumstances, nor is there any obligation for an employee to agree to being furloughed unless there is already an express provision to this effect in their contracts of employment.

The Direction provides that any such furlough agreement may be individual or, where there is a recognised trade union, collective. It must provide that the employee will undertake no work or work reduced hours and set out the main terms that will apply to the arrangement.

Any agreement must be made before the commencement of the period to which the CJRS claim relates, although it may be varied afterwards to reflect any subsequent variations to the terms previously agreed, and it will be expressly or impliedly incorporated into the employee's contract of employment.

The Guidance states that the agreement need not be made in writing, but it must at least be confirmed in writing (and such confirmation may be by email). However, (confusingly) it goes on to state that "*if you*

flexibly furlough employees, you will also need to agree this with the employee (or reach collective agreement with a trade union) and keep a new written agreement that confirms the new furlough arrangement." It is not clear if written confirmation of the new agreement will suffice in this circumstance.

The Guidance is clear that all agreements (or written confirmations) must be kept for at least five years. In addition to a copy of the agreement, employers need to keep a copy of all relevant records for six years, including the furloughed employees' usual hours (with any calculations that were needed) and how many of those hours the employees are actually working.

During any periods of furlough, employees retain the same employment rights including:

— their right to statutory sick pay;

— their right to annual leave;

— maternity and other parental rights;

— unfair dismissal rights; and

— their right to a redundancy payment.

"Full" furlough -v- flexible furlough

An employee can be "fully" or "flexibly" furloughed. The Guidance uses the term "*flexible furlough*" to describe the situation where employees are partially working and partially on furlough. Employees can rotate in and out of furlough and between different types of furlough (full or flexible).

For those who, in any CJRS claim period, are flexibly furloughed, employers can make a claim in respect of the portion of their "*usual hours*" that they do not work during the flexible furlough period.

Furlough arrangements can last for any length of time (and can be agreed more than once) but the claim period must be for a minimum period of seven calendar days except where it relates to the beginning or the end of a month (see below).

Calculating "*usual hours*"

The Guidance ("*Steps to take before calculating your claim*") sets out how an employer should work out an employee's usual hours and furloughed hours. In summary, it provides that:

— the employer does not need to work out the usual hours of any employee who is fully (rather than flexibly) furloughed;

— if an employee is flexibly furloughed, the employer must calculate the employee's usual hours, and record both the actual hours they work and the hours for which they are furloughed for each claim period;

— there are two calculation methods depending on whether the employee works fixed hours, or variable hours (i.e. they are not contracted for a fixed number of hours or their pay depends on the hours they work);

— the employee's working pattern does not have to match their pay period (for example, they could be contracted to 40 hours a week but be paid monthly); and

— there are different reference periods for calculating usual hours depending on whether:

  - employees are fixed rate employees or variable pay employees; and
  - employees were on the payroll on 19 March 2020 or validly claimed for prior to 31 October 2020.

Fixed hours employees

If:

— the employee has fixed contractual hours of work and their pay does not vary according to the hours they work; and

— they were on their employer's payroll on 19 March 2020 or were validly claimed for under the CJRS as it applied prior to 1 November 2020,

the employer must calculate their usual hours of work for each pay period (or part of a pay period that falls within the claim period) based on the employee's contracted hours at the end of the last pay period ending on or before 19 March 2020, with any time that the employee was on leave during that pay period disregarded.

Otherwise, the reference period is the last pay period ending on or before 30 October 2020.

Variable hours employees

If:

— the employee works variable hours; and

— they were on their employer's payroll on 19 March 2020 or were validly claimed for under the CJRS as it applied prior to 1 November 2020,

the employer must calculate their usual hours of work based on the higher of either: (1) the average number of hours worked by the employee in the 2019/2020 tax year; or (2) the hours worked in the corresponding calendar period in the 2019/2020 tax year. As the furlough scheme will have been in operation for a full year by March 2021, an employee who is furloughed in March or April 2021 could have also been furloughed in the corresponding 2020 period, and as result their hours during that period will be artificially low. Therefore, both the Guidance and the Direction clarify that the "lookback periods" for March and April 2021 should be March and April 2019.

The Direction amends the "calendar look back" method to clarify that where the first and last calendar days do not correspond exactly with the first and last days of the salary period, the employer must:

— identify the calendar days occurring in the relevant reference month corresponding to the calendar days covered by the CJRS claim period;

— identify the salary periods that include one or more of the relevant refence month calendar days;

— apply the formula used when calculating the claim separately to each of the relevant reference month salary periods to identify the number of usual hours in each of those salary periods; and

— total the usual hours referred to in each salary period to determine the number of usual hours worked.

Where the employee works variable hours but did not receive a payment of earnings in the 2019/2020 tax year which was reported on an RTI submission before 19 March 2020, usual hours should be calculated by reference to the average number of hours worked from 6 April 2020, being the beginning of the 2020/2021 tax year, up to the employee's first day spent on furlough where that occurred on or after 1 November 2020.

The calculation should include any hours worked as overtime where the pay for those hours was not discretionary, and any hours of leave for which the employee was paid their full contracted rate such as annual leave (with any hours of leave for which the employee was not paid their full contracted rate presumably, although not expressly, disregarded).

The Guidance assumes that an employer is "*likely to have records of the number of hours worked*" where pay varies by the amount of time worked, since this should be shown on employee's payslips. It also explains that time sheets, records, rotas and work diaries may be used to calculate "*variable hours*".

Task/piece-rate employees

The employer must calculate these employees' usual hours of work in the same way as for other employees who work variable hours if possible, but if not, the employer can estimate their hours based on the number of "*pieces*" they produced (query over what period) and the average rate of work per hour which the employer should already have worked out to comply with NMW rules.

Calculating the number of furloughed hours

This is not as simple as it sounds.

When calculating the number of furloughed hours for each employee, the employer should start with the employee's usual hours and subtract the number of hours they actually worked over the claim period in according with the Guidance (Examples of how to calculate your employees' wages). This may turn out to be different to the number of hours the employee agreed to work, requiring a repayment to HMRC where the employer claims in advance (see further below), so employers are encouraged (but not obliged) not to claim until they "*have certainty about*" the number of hours the employee is working in the claim period.

Calculating wages

The Guidance still provides that the payments employers should use when calculating 80% of their employees' wages are the "*regular payments you are obliged to make, including: regular wages you pay to employees; non-discretionary overtime; non-discretionary fees; non-discretionary commission payments; and piece rate payments*". They should not include "*payments made at the discretion of the employer or a client - where the employer or client was under no contractual obligation to pay, including: tips; discretionary bonuses; discretionary commission payments; non-cash payments; non-monetary benefits like benefits in kind (such as a company car) including benefits received in exchange for giving up an amount of pay under a salary sacrifice scheme, employer pension contributions including pension contributions received in exchange for giving up an amount of pay under a salary sacrifice scheme (you can still include pension contributions that the employee makes from their wages, such as through a Net Pay Arrangement pension scheme) and amounts of pay given up under a salary sacrifice scheme*".

Non-discretionary payments are payments which the employer is contractually obliged to pay and to which the employee has an enforceable right. In addition, variable payments specified in a contract and always made "*may become non-discretionary*" in which case they should be included in an employee's wages.

The wording used in the Guidance remains very different from (and far more straightforward than) that used in the Direction, but the consistent principle is that only regular payments which employers are contractually obliged to pay employees are covered, for example non-discretionary paid overtime. The Guidance now includes extensive examples to help employers calculate their employees' wages.

Both fixed-rate employees whose first pay period ends after 30 October 2020 ,and variable-rate employees whose first wages are payable after they begin furlough, can be claimed for, providing that they are eligible and HMRC receives an RTI submission on or before 30 October 2020. The Government have provided examples of these calculations in their published Guidance.

If an employee is returning to work after a period of sickness, furlough hours must be calculated on the basis of the employee's salary, not the pay received whilst on sickness absence. For employees on variable hours, furlough pay is determined on the basis of the calculation for those employees whose pay varies.

Where an employee is returning from family-related statutory leave - which includes maternity, paternity, shared parental, adoption, parental bereavement and unpaid parental leave - and is being furloughed, their pay should be calculated based on their fixed pay before tax, not the pay they received on leave, and the usual CJRS scheme and eligibility rules apply.

The Direction and Guidance also make it clear that if an employee was paid a statutory payment in the claim period, such as Statutory Maternity Pay or Adoption Pay, this must be subtracted from the claim amount.

Amounts that can be claimed

Fully furloughed employees remain entitled to receive at least 80% of their regular wages up to a cap of £2,500 per month, with employers only responsible for employer National Insurance contributions and pension contributions.

The Guidance makes clear that if employees are flexibly furloughed, the £2,500 per month wages cap is proportional to the hours the employee is furloughed – so for example if they are placed on furlough for 60% of their "usual hours" (calculated in accordance with the Guidance) and work the other 40%, the wage cap is reduced pro rata to 60% of £2,500 (£1,500). It remains the employer's choice whether or not to top up furlough payments, but employers have to pay their employees in full as normal for any hours they actually work (presumably unless they are able to agree something different with them).

The grant must be used to pay employees their furlough wage. It cannot be used to fund redundancy payments.

Additionally, the Direction clarifies that a CJRS claim may not be made in respect of any days on which an employee is taking unpaid leave or an unpaid sabbatical between 1 February 2021 and 30 April 2021.

Employment Allowance

Employers may however be eligible for the Employment Allowance, see guidance here. This allows eligible employers to reduce their annual National Insurance Liability by up to £4,000. Employers will be eligible if they are a business or charity and their Class 1 National Insurance liabilities were less than £100,000 in the previous tax year. The allowance can be claimed at any point in the tax year that they are claiming for or for 4 years afterwards.

Between 1 March and 31 July 2020, employers were able to claim under the CJRS for their National Insurance Contributions. Employers who took advantage of this relief under the CJRS must ensure that they did not also claim Employment Allowance for the same contributions. The Guidance states that "*attempting to get relief for the same costs twice is fraudulent and may result in claims being investigated*".

Furlough pay and National Minimum Wage ("NMW")

If furloughed staff are paid 80% of their wages, this may amount to them being paid below the NMW. This is permissible as long as the employee is not working or undertaking work-related training, in which case the employer must "*top-up*" the furlough pay to reach the NMW.

Taking holiday during a period of flexible furlough

Holiday will continue to accrue as usual, whether an employee is fully or flexibly furloughed. The Guidance expressly notes that if any furlough hours are taken as paid holiday, the employer will need to top up the employee's pay to full pay for those hours.

Earlier this year, the Working Time Regulations were amended to extend the provision for statutory leave to be carried over into subsequent holiday years. Where it has not been "*reasonably practicable*" for an employee to take some or all of their statutory leave entitlement "*as a result of the effects of coronavirus*", the employee shall be "*entitled*" to carry forward their untaken statutory leave into the following two years. This "*entitlement*" only applies to the statutory minimum leave; any contractual excess will continue to be governed by the terms of the employee's contract.

Where it is reasonably practicable for holiday to be taken, employers can still require (and should still encourage) employees to take their paid holiday before the end of the leave year.

It is likely that most employees who are furloughed will be able to take leave as normal. However, there may be circumstances where it may not have been reasonably practicable for a furloughed individual to take their leave. The Holiday entitlement and pay during coronavirus guidance includes the following examples:

— where an employer cannot fund the difference between furlough pay and holiday pay due to the impact of coronavirus; and

— where an employee is under restrictions (such as self-isolating and social distancing) that would prevent them from resting during their annual leave.

As the position surrounding this area is yet to be fully clarified, employers should consider any employee concerns relating to annual leave during furlough carefully.

Working during furlough

It remains the case that during any hours when the employer records their employees as being on furlough, they cannot undertake any work for their employer or any associated or linked organisation. However, they can undertake training (provided that undertaking the training does not involve providing services to or generating revenue for or on behalf of the employer or an associated organisation, and they are being paid at least the NMW for any compulsory training), volunteer for another employer or organisation, work for another employer (if permitted), undertake union/non-union representative duties, and/or undertake pension trustee duties.

The employer-facing Guidance advises that where employees are employed by more than one employer they can be furloughed by each employer. The employee-facing Guidance highlights that where an employee undertakes work for another employer during a period of furlough this will not affect the grant that the employer can claim. The Guidance makes it clear that if an employee has more than one employer, *"[they] can be furloughed for each job*". Each job should be treated as separate and the £2,500 monthly cap applies to each claim. It is also acceptable for an employee to receive furlough payments from one job but to receive normal wages from another job. The ACAS *guidance Furlough and the Coronavirus Job Retention Scheme* confirms that employees who are placed on furlough for more than one job will be able to claim financial support through the CJRS scheme.

The Guidance also clarifies that if an employee has worked multiple jobs over the past year but not worked for both employers simultaneously, the employee cannot be furloughed by the previous employer, only the employer that they are currently working for.

The claim period

The claim period is made up of the days in respect of which the employer is claiming a grant.

Claim periods must start and end within the same calendar month. Employers can only make one claim in each claim period so employers must ensure that they include fully furloughed and flexibly furloughed employees in the same claim. Claim periods must be at least seven days, unless the employer is claiming for the first few days or the last few days in a calendar month – where this is the case, the claim period must include either the first or last day of the calendar month, and the employer must have already claimed for the period ending immediately before it.

Making claims

Claims cannot be submitted more than 14 days before the claim period end date but must be submitted by 11:59pm 14 calendar days from the month that the claim is made in respect of. Therefore, for example, claims for "*furlough days*" in March 2021 must be made by 14 April 2021. HMRC may, however, accept a late claim which is submitted past the relevant deadline if a "*reasonable excuse*" is evidenced, the employer has taken reasonable care to try to claim on time, and the employer has claimed without delay as soon as

they were able to. Examples of "*reasonable excuses*" include the death of a partner or close relative, an unexpected hospitalisation or serious or life-threatening illness which prevented the claim being made, or failure of computer software whilst submitting the claim. Service issues with HMRC online services, unforeseen postal delays, periods of self-isolation and fire, flood or theft are also cited as "*reasonable excuses*" for late claims.

Payments are made six working days after an employer makes a claim. Any payments that employers receive under the scheme must be included as income for the purposes of calculating taxable profits for Income Tax and Corporation Tax purposes.

Once an employer has submitted a claim, they must keep a copy of all records for six years, inform the employees that a claim has been made and no further action is needed, and pay the employee their wages. Employers must not enter into any transaction with a worker which reduces the wages below the amount claimed. Examples of prohibited transactions include administration charges, fees or other costs in connection with employment.

HMRC have provided an updated file upload template to complete when furloughing more than 100 employees. The online calculator can still be used although it cannot be used for employees in certain situations including if they:

— "*started a notice period or went back off a notice period in the same claim period on or after 1 December 2020*";

— "*returned from statutory leave such as maternity leave in the 3 months prior to the claim period, and the claim period is in July 2020 or earlier*"; or

— "*ended furlough then began again during the same claim period*".

In such cases employers will need to work out what they can claim manually using the Guidance.

Publication of CJRS claimant details

The Guidance provides that from February 2021 "*as part of HMRC's commitment to transparency and to deter fraudulent claims*" HMRC "will" publish information about employers who makes claims in respect of periods from 1 December 2020.

The information that may be published includes the name of the employer or qualifying PAYE scheme, the company reference number (if applicable) and an indication of the value of the claim in a banded range (see Guidance). HMRC has reserved the right to publish an amount which gives a "*reasonable indication of the claim*", rather than a specific amount. HMRC will however not publish details of employers claiming through the scheme if the employers can demonstrate that publicising these would result in a serious risk of violence or intimidation to certain individuals, or any individual living with them.

Repayment of fraudulent or incorrect claims

The Guidance states that HMRC will check claims made under the CJRS and payments may be withheld or may need to be paid back if a claim is found to be fraudulent or based on incorrect information. There is a link embedded in the Guidance to allow individuals to report fraud to HMRC.

If an employer has over-claimed a grant and not repaid it, the employer must notify HMRC by the latest of either 20 October 2020, 90 days after receipt of the grant the employer was not entitled to, or 90 days following the date of receipt of the grant that the employer was not entitled to owing to a change in circumstances. More information relating to paying CJRS grants back can be found here.

The Finance Act 2020, which received Royal Assent on 22 July, provided a 90 day "*amnesty window*" during which employers could report claims made in error without penalty. This window expired on 20 October 2020 and it should be noted that the Finance Act places a legal obligation on businesses to notify HMRC of any

overclaimed or wrongly claimed payments. The Finance Act provides HMRC with a wide range of civil and criminal penalties in respect of "*furlough fraud*" which include the risk of being recorded on HMRC's publicly available list of deliberate tax defaulters, the power to charge 100% tax on wrongly-claimed furlough payments, and the ability to make an officer of the company pay an element of the company's penalty (up to a maximum of 100%) where the penalty is due to a deliberate act or failure by that company officer.

If an employer has under-claimed, they must still ensure that they pay their employees the correct amount. Employers can no longer add to existing claims for periods on or before 31 October 2020, however for claims relating to periods after 1 November 2020, employers have 28 calendar days after the month to which the claim relates to contact HMRC to amend the claim. For example, claim amendments relating to February 2021 must be modified by 29 March 2021.

HMRC retain the right to retrospectively audit claims made for a six-year period from the 20 October 2020 deadline.

Self-Employed Income Support Scheme – extended support for the self-employed

On 24 November 2020, the Government published Guidance on the extension of the SEISS, including further details on eligibility requirements, and a further Treasury Direction was issued.

In summary:

- the SEISS was extended for a further six months from November 2020 to April 2021;
- to be eligible for a grant under the SEISS, individuals must:
  - have been eligible for the previous two grants under the SEISS, irrespective of whether grants were, in fact, claimed;
  - either:
    - currently be actively trading but impacted by reduced demand because of coronavirus; or
    - have previously been trading but are temporarily unable to do so due to coronavirus; and
  - declare that:
    - they intend to continue to trade; and
    - "*reasonably believe*" there will be a "*significant reduction*" in their trading profits.
- an "*honest assessment*" is required by the individual about whether they meet the requirement for "reasonable belief" that their business will suffer a "*significant reduction*" in their trading profits due to reduced business activity, capacity, demand or inability to trade due to coronavirus, and they should keep evidence supporting their claim;
- one grant covered the period 1 November 2020 to 29 January 2021, paying up to 80% of average monthly trading profits, capped at £7,500 in total, which was payable in a single instalment; and
- a further grant will cover the period February 2021 to April 2021, although the amount it will pay and when it will pay is currently unclear. The Government has stated it will set out further details, including the level of the grant, on 3 March 2021.

Background to the SEISS

The SEISS was first announced in March 2020 with the aim of supporting the self-employed who had been adversely affected by coronavirus.

The first grant covered the period from March 2020 to May 2020, providing up to 80% of average trading profit (capped at a total of £7,500) (the "**First Grant**"). The SEISS was extended over the summer with a second grant providing up to 70% of average monthly trading profits (capped at £6,570) if an individual's business had been affected by coronavirus on or after 14 July 2020 (the "**Second Grant**").

In September 2020, the Chancellor announced the extension of the SEISS in the form of two further grants to cover the winter period from November 2020 until April 2021. The third grant covered the period from 1 November 2020 to 29 January 2021 (the "**Third Grant**"). The extent of support offered by the Third Grant increased after the initial announcement, to take into account the impact of increased Government restrictions and the extension of the CJRS, providing up to 80% of average monthly trading profit (capped at a total of £7,500).

According to data published by HMRC, as of 31 December 2020, the total number of claims made under the Third Grant reached 1.9 million with a total value of £5.4 billion.

Eligibility

To be eligible for the Third Grant, self-employed individuals, including members of partnerships, must:

— have been previously eligible to claim a grant under the SEISS (although they do not need to have claimed the previous grants) – see further details from our previous briefing note here;

— either be:

  - currently actively trading but impacted by reduced demand due to coronavirus; or
  - previously trading but are temporarily unable to do so due to coronavirus; and

— declare that:

  - they intend to continue to trade; and
  - reasonably believe that there will be a significant reduction in their trading profits.

It remains the case, therefore, that only those who receive the majority or all of their income from self-employment can benefit from the grants available under the SEISS. All those who are 'on payroll' and taxed through Pay-As-You-Earn (PAYE) will not be eligible. Individuals must also have traded in the tax year 2018 to 2019 and the tax year 2019 to 2020, therefore those who became self-employed more recently will not be covered.

HMRC will work out the individual's eligibility based on their 2018 to 2019 self-assessment tax return which must show that trading profits were no more than £50,000 and at least equal to their non-trading income. Where individuals are not eligible based on this tax return, HRMC will look at the tax years 2016 to 2017, 2017 to 2018 and 2018 to 2019.The Guidance contains information on how different circumstances can affect eligibility for the SEISS, in particular, for:

— members of a partnership - each partner in the partnership is required to make a claim based on their own circumstances. Eligibility will be determined based on each partner's share of the partnership's trading profits; and

— individuals who have had a new child – who may be able to claim if either:

  - their trading profits or total income reported for the tax year 2018 to 2019 was affected, or
  - it meant a self-assessment tax return was not submitted for the tax year 2018 to 2019.

In order to claim, the individual must have been self-employed in the tax year 2017 to 2018 and have submitted their self-assessment tax return for that year on or before 23 April 2020 and meet the other eligibility criteria.

Reasonable belief

To be eligible for the Third Grant, an individual must have had a "reasonable belief" before making a claim that their business would "*suffer a significant reduction in trading profits due to reduced business activity, capacity or demand or inability to trade due to coronavirus during the period 1 November to 29 January 2021*".

The Guidance provides examples of what the Government considers would satisfy the eligibility requirement for "*reasonable belief*" that there will be a significant reduction in trading profits due to reduced demand or temporary closure, such as a café owner having fewer customers as a result of Government restrictions which reduces takings, or a plasterer who cannot get materials due to supply chain issues due to coronavirus.

Although this requires an "*honest assessment*" on the part of the individual and, what actually constitutes a "*significant reduction*" is not defined (instead, this must be determined according to "*individual and wider business circumstances*"), the Guidance states that the individual is required to keep evidence to support their claim, demonstrating that eligibility to claim under the SEISS may need to be justified at a later stage. The Guidance includes examples of types of evidence for reduced demand, or being temporarily unable to trade - these can be found here.

What can be claimed?

The Third Grant, which is taxable, could be claimed by eligible self-employed individuals or members of partnerships, for up to 80% of their average monthly trading profits, with a maximum available grant of £7,500. The Third Grant will be paid in one instalment. The Guidance provides further details on how the Third Grant will be calculated, including a worked example.

The Guidance also highlights other help available from the Government for the self-employed including:

— Universal Credit;

— grants for businesses that pay little or no business rates;

— the Business Interruption Loan Scheme;

— the Bounce Back Loan; and

— Test and Trace support payments.

How to claim?

The online service for the Third Grant opened on 30 November 2020. Claims must have been made on or before 29 January 2021.

Claims must be made by the individual. Records must be kept of the amount claimed and the grant claim reference number.

Further details about a fourth grant will be provided by HMRC on 3 March 2021. However, it is unclear whether or not the eligibility criteria and the support available will remain the same.

CMS Cameron McKenna Nabarro Olswang LLP

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