

Furlough: uses and abuses

Michelle Sloane and Alice Kemp examine HMRC's new powers to investigate abuse of the CJRS.

The Government's (CJRS) was announced on 20 March 2020, with the aim of protecting UK jobs during the global coronavirus pandemic. The CJRS had been originally set to end on 30 June 2020; however, following lobbying from various industry groups the Government extended it and it is now due to end on 31 October 2020. Under the CJRS, businesses have been able to furlough staff rather than make them redundant. Furloughed staff are able to receive up to 80% of their wages from the Government in the form of a grant, with an upper limit of £2,500 per month.

From 1 July 2020, the Government introduced a new flexible furlough scheme which permits employers to bring furloughed employees back to work for any amount of time and any shift pattern, while still being able to claim the CJRS grant for the hours not worked. From 1 August 2020, the level of grant will be reduced each month. To be eligible for the grant employers must pay furloughed employees 80% of their wages, up to a cap of £2,500 per month for the time they are being furloughed and employers will pay National Insurance contributions and pension contributions for the hours the employee is on furlough.

HMRC reported that, as at 21 August 2020, the total number of jobs furloughed in the UK is 9.6 million (32% of eligible employments) with 1.2 million employers furloughing staff members and the total value of claims to date is £35.4 billion, with this figure likely to increase before the CJRS ends.

The British Chamber of Commerce has stated that, since its inception, CJRS has been used by two-thirds of British businesses. Further, use of the scheme has by no means ceased with the Office for National Statistics reporting that, as at 20 August 2020, 12% of UK employees remain on the scheme.

Although the CRJS may have protected many jobs during the pandemic it was, by necessity, introduced quickly with little and complex guidance, which has made it, in the words of HMRC's Chief Executive, Jim Harra, a "magnet for fraudsters".

How might the CJRS be abused?

Examples of how the CJRS may be abused, include:

- i. placing employees on furlough and then requesting that they continue to work as normal;
- ii. pressurising or encouraging employees to work on a 'voluntary' basis;
- iii. claiming on behalf of an employee without their knowledge and recovering 80% of the employee's salary, while the employee continues to work as normal;

- iv. claiming on behalf of a 'ghost' employee – someone who has been dismissed before the CJRS's start date of 19 March 2020, or a nonexistent employee who 'commenced work' following this date;
- v. employers misrepresenting the working hours of staff, so that they can maximise payments recoverable from the CJRS.

How prevalent is furlough fraud?

The full extent of furlough fraud is difficult to accurately determine at this stage. Given the speed of its implementation and the complexity of its rules, it is of little surprise that the CJRS has left many employers and employees unsure as to how to correctly utilise the scheme.

Government guidance has alternated between being indistinct to outright contradictory, which has only served to add to the confusion. As such, HMRC has acknowledged the inevitability of some employers inadvertently falling foul of the rules.

However, HMRC has also stressed that it will be proactive in their investigations of anyone who is suspected of abusing the scheme. To this end, it has been reported that HMRC has recently written to around 3,000 employers querying claims that they have made under the CJRS.

HMRC has written to employers who may have:

- claimed more in CJRS grants than they were entitled to; and
- not met the conditions to receive a CJRS but have made a claim regardless.

HMRC has said that it is investigating nearly 8,000 reports of potential furlough fraud. Protect, the whistle-blower protection charity, has stated that furlough fraud is the single biggest issue that they have dealt with in their 27-year history, with 59% of its cases since 23 March 2020 relating to furlough fraud. The Policy Exchange, a UK think tank, has said that fraud in relation to the Government's various Covid-19 financial rescue schemes could result in losses of as much as £7.9bn.

It is clear from the scale of suspected furlough fraud, that HMRC will dedicate significant resources to counter it.

Which industries are most affected?

HMRC published some statistics on 21 August 2020, which set out the industries that are making the greatest use of CJRS. See table, top right.

In addition to the above, employees of small employers are more likely to have been furloughed than those working for medium-sized or large employers: 57% of employments at businesses with five to nine employees had been furloughed against just 21% at businesses with 250 or more employees. Businesses with 10-19 employees have the highest take-up rate of all businesses, with 81% of employers of this size making use of the CJRS HMRC have also published some interesting regional data in relation to the CJRS (see table, below).

What this data demonstrates is not only the far-reaching impact that the pandemic has had across different industries, business sizes and regions, but also how vital the CJRS has been in lessening its impact, as many businesses fight for their survival.

What new powers do HMRC have to pursue those who have mistakenly or fraudulently made a claim under CJRS?

Given the opportunity for abuse of CJRS, it is not surprising that Finance Act 2020 (the Act), which received Royal Assent on 22 July 2020, provides substantial enforcement powers to HMRC in relation to the CJRS.

Section 106 and Schedule 16 to the Act, gives HMRC the power to claw back CJRS payments made to businesses which were not entitled to receive such payments, or where the payments were not used to pay employment costs.

Under paragraphs 8 and 9 of Schedule 16, an income tax liability can now be imposed, by way of an assessment, on anyone who has received a coronavirus support payment to which they were not entitled. The charge is to income tax even if the recipient is a company chargeable to corporation tax. The amount of income tax is equal to the CJRS grant the person was not entitled to ie a 100% tax charge. The timing of the income tax charge is:

- a.** if the person was entitled to receive the amount when it was paid, but subsequently ceases to be entitled, at the time of ceasing to be entitled to retain the sum, or
- B.** in all other cases, at the time the payment is received. If an assessment is issued under paragraph 8 and is disputed, it can be appealed in the usual way pursuant to section 31 of the Taxes Management Act 1970.

Where a business has become insolvent or insolvency is considered likely, paragraph 15 of Schedule 16 empowers HMRC to impose stringent individual accountability on company officers through joint and several liability with each other and the company for the company's income tax liability where there has been a deliberate act to claim or retain CJRS grants to which the company was not entitled.

Under paragraph 13 of Schedule 16, penalties can be imposed for failure to notify the chargeability to income tax where the person knew, at the time the income tax first became chargeable, that the person was not entitled to the CJRS grant. Arguably, a person that makes a CJRS claim in good faith and then subsequently realises that it should not have been claimed, could repay the CJRS grant when they become aware that it should not have been made and avoid a penalty. The penalty can be up to 100% of the potential lost revenue if deliberate and concealed. If remedial action is taken swiftly then this may be reduced, but the penalty will not fall below 30%. HMRC has warned that it will consider criminal charges in cases of deliberate misuse of the CJRS.

HMRC has power to investigate where it considers there has been a failure by an employer to self-report errors and, in more serious cases involving corporates, there is a real possibility that HMRC may seek to bring a prosecution for the offence of failing to prevent tax evasion under the Criminal Finances Act 2017.

Innocent mistakes

HMRC has said that it will not actively seek out those who have made innocent mistakes in relation to the CJRS. HMRC has said that it has made it “as easy as possible to pay back any money” that has been incorrectly claimed.

Paragraph 12 of Schedule 16, provides recipients of CJRS payments with the opportunity to self-report to HMRC if they have received, or retained, such payments erroneously. They must notify HMRC of a charge to income tax within:

- a. a 90-day window from when the CJRS grant was incorrectly received;
 - b. 90 days after the day that any circumstances changed so that a CJRS claim is no longer valid;
- or
- c. the later of the date of Royal Assent (ie by 20 October 2020).

In line with HMRC's stated approach, this gives those who either knowingly, or innocently, misused the CJRS, the opportunity to self-report and avoid possible wrongdoing penalties. Failure to do so may result in a penalty of up to 100% of the amount of the CJRS wrongly claimed. Additionally, there is potential for HMRC to launch a criminal investigation or 'name and shame' those who are found to have overclaimed and not notified HMRC within the above stipulated time period.

Conclusion

In view of the short timeframe in which to notify HMRC of any CJRS misuse and the fact that HMRC is already actively investigating claims, businesses should, as a matter of priority, carefully review their internal records and systems in order to identify any discrepancies. Where discrepancies are detected, a more detailed and forensic examination may be required before making a disclosure to HMRC.

Employers should ensure all paperwork is up to date and consider collating any documentation which details the business rationale underpinning why certain roles or employees were furloughed. They should also review any CJRS claim they have made and ensure not only that they have acted in accordance with the law but also can evidence this with a clear audit trail.

For those businesses that do discover that they have received, or retained, CJRS payments when they were not entitled to do so, they need to urgently consider what action they now need to take, including self-reporting to HMRC within the above specified time frame. Now is the time for businesses to take stock, consider their position and where necessary, take action!

| Sector | Employer take-up rate | Total value of claims made (£ billion) |
|--|-----------------------|--|
| Accommodation and food services | 87% | £4.7bn |
| Arts, entertainment, recreation and other services | 76% | £1.3bn |
| Construction | 76% | £2.9bn |
| Manufacturing | 76% | £3.8bn |
| Wholesale and retail; repair of motor vehicles | 74% | £6.1bn |

| Region | Employments furloughed | Take-up (%) |
|--------------------------|------------------------|-------------|
| London | 1,385,500 | 32 |
| South East | 1,294,600 | 30.5 |
| North West | 1,035,600 | 31.6 |
| East | 879,600 | 30.4 |
| West Midlands | 866,400 | 33.6 |
| South West | 808,900 | 32.1 |
| Yorkshire and the Humber | 749,700 | 31.2 |
| East Midlands | 696,700 | 31.6 |
| North East | 350,700 | 31.5 |
| Northern Ireland | 249,600 | 31.6 |
| Scotland | 779,500 | 31.5 |
| Wales | 400,800 | 30.6 |

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