# Furlough errors

Employment Tax | Large Corporate | OMB



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Rob Woodward and Richard Morley consider the complexity of furlough claim calculations and how to notify HMRC of any errors made

## Key Points

### What is the issue?

HMRC has introduced a clawback mechanism for excess coronavirus support payments which involves a notification deadline and possible penalties for failure to

notify.

The complexity of the furlough claim calculations, compounded with the urgency in which the scheme was introduced, means that errors are likely to have been made.

**What does it mean for me?**

It is important to ensure that all CJRS claims are reviewed and checked and, if necessary, any corrections made as relevant.

**What can I take away?**

A process exists with HMRC to enable the repayment of any excess CJRS payments made. If excess payments are repaid within the relevant 90 day notification period, then no separate notification is required.

The Coronavirus Job Retention Scheme (CJRS) introduced the word ‘furlough’ to tax advisers’ vocabularies. When the scheme was launched, the initial focus of HMRC and the government was to deliver financial support. However, with the scheme coming to an end in October, attention is now shifting onto the detail of claims made, as HMRC reviews claims to ensure they were accurate.

In figures quoted by the chief executive of HMRC Jim Harra when he appeared before the House of Commons Public Accounts Committee in early September, HMRC is inquiring into 27,000 high risk claims (of which HMRC expects to check up on 10,000). Mr Harra said that the combined error and fraud rate in the furlough scheme could be between 5% and 10% (between £1.75 billion and £3.5 billion).

In many ways, it is understandable that errors may have been made. The scheme was implemented in a very short timeframe due to the urgent financial situation facing many employers and as a result did not benefit from consultation and testing usually associated with new government schemes. By its very nature, CJRS is complex as it cuts across multiple parts of businesses, including HR, payroll, pensions and tax. The complexity is further evidenced by the number of changes made early in its existence and the further evolutions of the scheme as the economy reacted to the developing economic crisis, built resilience and started to realise the new landscape.

As attention has now shifted to reviewing claims that have been made in an attempt to identify potential errors, it is useful to understand where errors may have occurred so that employers can take the necessary remedial actions.

**Where can errors occur?**

The main area likely to result in errors is the reference pay used to calculate the CJRS claim. While regular salary forms part of the reference pay, discretionary pay such as tips or commission do not. Whether pay was discretionary or not could be a matter of interpretation, leading to some employers taking a position with which HMRC may not concur.

Another area where errors may have arisen comes from the fact that at the start of lockdown, but before furloughing became a possibility, many employers requested employees to use their annual leave. The interaction between paid holiday, days furloughed and holiday pay meant that some errors were identified which required adjustments.

Also at the start of the pandemic, there was an increase in employees on sick leave as they self-isolated when displaying symptoms. The basis of claiming statutory sick pay was changed for those employees who had contracted Covid-19 or were self-isolating. Further complexities revolved around employees receiving sick pay, which may have led to errors.

For furloughed employees with variable pay, such as those on zero hours contracts, the calculation of reference pay was even more complex as it required a comparison with equivalent pay before furlough or the average pay since April 2019 (or later if employment started after that date).

Errors in calculating reference pay could also manifest itself where employees participated in a salary sacrifice arrangement as the reference pay was post-salary sacrifice, which may not necessarily have been immediately obvious if simply looking at employee payslips.

The number of hours worked for the purpose of calculating the claim also presented an issue, and whether the employee (whether on fixed or variable pay) worked during the furlough period added further complexity. In the first stage of the CJRS, furloughed employees were not able to work although there were some exemptions; for example, in relation to training and directors performing statutory duties. A

potential error could have resulted around misinterpretation of the guidance so that furloughed employees worked in addition to training or employers did not properly track which employees returned to work. From July, part-time working was allowed (known as ‘flexi-furlough’) and so errors could have arisen from incorrectly identifying hours worked compared to hours furloughed.

Following the introduction of flexi-furlough, changes were also made to the level of wage claim that could be made, as the initial 80% (capped at £2,500 per month) decreased to 70% in September; also, the covering of employer’s NIC and pension contributions ceased in August. Errors may have arisen in terms of claiming the incorrect rate of employer’s NIC (for example, where the employee was aged under 21 or where the employer is entitled to claim the employer’s allowance) or by mistakenly claiming employer’s pension contributions when in fact the employee had opted out.

In addition to the issue with pension claims and salary sacrifice, a further issue to consider relates to the actual pension contributions. In April, the Pensions Regulator (TPR) issued updated guidance on the interaction of CJRS claims, salary sacrifice and pensions contributions. This guidance carried two key messages:

1. Firstly, an employee cannot sacrifice CJRS pay in exchange for pension contributions. This is because employers must pay the full CJRS payment to the employee. Salary sacrifice can be operated on any ‘top up’ pay over the CJRS but this may cause issues in relation to the second key message from TPR.

2. For pensionable pay purposes, a CJRS payment is treated as a payment after salary sacrifice, and so may need to be grossed-up to calculate the pay in order to calculate the minimum contributions required under automatic enrolment legislation.

**What if a claim may be incorrect?**

As already highlighted in this article, it is perhaps inevitable that when claims are made in a rush and under huge pressure, as was seen with the introduction of the CJRS, mistakes can and will occur. Also, and rather unfortunately, it does seem to be the case that when a recession hits the likelihood of fraud tends to increase.

HMRC is understandably already gearing up to tackle incorrect and potentially fraudulent CJRS claims. If HMRC’s estimate of between 5% and 10% for the error and

fraud rate in furlough claims is realistic (and some may say this is even on the conservative side), this could equate to at least £3.5 billion of furlough payments that are at risk, so there is a large amount at stake for HMRC to check. This explains why significant HMRC resources are expected to focus on this area of reviewing and correcting claims made. Even companies with large HR departments are expected to have made errors, due in no small part to the often complex calculations and definitions of what constitutes ‘wages’.

**What is furlough fraud?**

In the past, HMRC has shown a zero tolerance towards fraudulent behaviour. But what do we mean by ‘furlough fraud’?

A fraudulent error may involve employers claiming despite not meeting the scheme’s criteria, for example:

- claiming CJRS despite keeping staff working;
- claims based on false payroll records;
- intentionally not using the CJRS money as required; and
- claims made by organised criminal gangs.

Other types of errors, which may be entirely innocent, include examples such as transposition mistakes in data, and an error in a date or computation when inputting the claims online. The rules are complex, particularly for partial furlough, National Insurance Contributions and salary sacrifice.

**What is HMRC’s response?**

As well as following up whistleblower reports – and reports suggest that there have been some 8,000 to date – we expect HMRC to use its ‘Connect’ computer system to flag anomalies in claims, while looking at industry and sector norms.

HMRC’s Fraud Investigation Service can conduct criminal investigations with a view to prosecution for cheating the public revenue or fraudulent evasion of income tax. In deciding whether to do so, it would consider HMRC’s Criminal Investigation Policy. HMRC has already shown that it will act decisively. There have already been three arrests involving suspected furlough fraud following an arrest of a businessman in the Midlands in July 2020; and more recently, it was announced that two further people have been arrested over a suspected £70,000 CJRS fraud.

We therefore expect more criminal cases to arise and further civil tax investigations, most likely by way of using the Code of Practice 9 or Contractual Disclosure Facility process.

On 22 July 2020, Finance Act 2020 was given Royal Assent and this now gives employers a 90 day deadline to disclose incorrect furlough claims. The 90 day window started either on 22 July 2020 for claims paid before this date or from the date the CJRS payment was received if paid after the 22 July 2020. The earliest deadline ended therefore on 20 October 2020. For future notifications, the excess amount of CJRS payments should then be declared on the businesses tax return as appropriate with the excess amount claimed taxable at a rate of 100% and payment due in accordance with the usual tax payment deadlines.

If a correction is required either to a claim where an error was made or from a claim made where the recipient knew they were not entitled to the claim, and the amount of excess CJRS payments are repaid before the expiry of the relevant 90 day deadline, there is then no requirement to notify HMRC of the incorrect furlough claim. Failure to notify penalties can apply in certain cases where notification of excess CJRS payments was not made within the relevant deadline.

**Next steps?**

Now that the first 90 day notification period has passed, we expect HMRC to initiate a ‘gloves off’ approach and to check claims made and pursue CJRS and SEISS claims using both criminal and civil powers. We expect these to focus on those who knowingly made incorrect claims and failed to notify HMRC, on whom HMRC may impose significant penalties.

For those where HMRC suspects fraud, we can expect in-depth investigations into not just CJRS claims but also the wider business affairs of those involved. The legislation includes penalties, as well as powers to publicise defaulters online and to pursue company office holders where businesses become insolvent, with joint and several liability.

**Conclusion**

Due to the complexity of the calculations themselves and the fact that many business owners implemented claims in a rush at the start of lockdown, there is real scope for errors in claims made. Therefore checking that the amounts claimed and supporting paperwork is accurate and the scheme criteria met is crucial. Anyone

concerned that they may have submitted an incorrect CJRS claim should review these as a matter of urgency.