

Job Retention Scheme - New Treasury Direction Issued - 25.05.20

On 20th May 2020, the Government's Treasury Department issued a revised Direction to HMRC instructing them on how to interpret and apply the rules of the Coronavirus Job Retention Scheme. A few important changes have been made which employers should take note of.

At the end of this note, the relevant wording from the two previous and new Treasury Directions has been reproduced.

1. Work permitted to be undertaken by a director

Summary: The guidance clarifies that a director may also make a CJRS claim in respect of their company and make payments of salary or wages of an employee without bringing furlough leave to an end.

2. Agreement to cease work

Summary: The requirement for an agreement between the employer and employee in writing has been amended; this now needs to be "made in writing or confirmed in writing by the employer" and retained until at least 30 June 2025.

3. Training

Summary: The training clause has been expanded to allow training which improves "the employee's effectiveness in the employer's business or the performance of the employer's business" as long as the training does not directly contribute to providing a service, generating income or profit, the production of goods or supply of services.

4. Calculating pay

Summary: When calculating pay under the Job Retention Scheme, the previous Direction required an employer to take into account only "regular salary and wages" and confirmed that any payment which is "conditional on any matter" is not regular salary and wages and should therefore be excluded.

The problem with this is that it arguably excluded overtime, bonus and commission from counting as regular salary or wages, as such payments are conditional on factors such as the employee's performance, sales figures, contribution or simply additional hours worked in the case of overtime.



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The position appears to have been made clearer in the current version of the guidance and, in simple terms, overtime, bonus and commission can now be included where there is a legally enforceable agreement, understanding, scheme, transaction or series of transactions, even where there is an element of discretion on the employer's part.



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1. Work permitted to be undertaken by a director

New wording:

6.6 Work undertaken by a director of a company must be disregarded for the purposes of paragraphs 6.1 and 6.2 if the work undertaken directly relates to-

- (a) fulfilling a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company,
- (b) making a CJRS claim in respect of an employee of the director's company, or
- (c) making a payment of salary or wages of an employee of the director's company.

2. Agreement to cease work

New wording

6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if-

- (a) the employer and employee have agreed that the employee will cease all work in relation to their employment (such agreement may be made by means of a collective agreement between the employer and a trade union),
- (b) the agreement (including a collective agreement)-
 - (i) specifies the main terms and conditions upon which the employee will cease all work in relation to their employment,
 - (ii) is incorporated (expressly or impliedly) in the employee's contract, and
 - (iii) is made in writing or confirmed in writing by the employer (such agreement or confirmation may be in an electronic form such as an email), and
- (c) the agreement (including a collective agreement) or confirmation is retained by the employer until at least 30 June 2025.

Previous wording:

An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing.

3. Training

New wording

6.8 Study or training undertaken must be disregarded for the purposes of paragraphs 6.1 and 6.2 if-

- (a) the purpose of the study or training is to improve-
 - (i) an employee's effectiveness in the employer's business, or
 - (ii) the performance of the employer's business,
- (b) except as generally improving an employee's effectiveness in, or the performance of, an employer's business, the study or training does not directly-

- (i) provide a service to the employer or the business activities of the employer,
or
- (ii) contribute to the business activities of the employer or anything generating income or profit for the employer, and
- (c) the study or training undertaken does not directly contribute to any significant degree-
 - (i) in the production of goods the employer intends to supply to another person as part of the making of a supply of goods or services for a consideration to that person, or
 - (ii) in the making to any person of a supply of services for a consideration by the Employee.

4. Calculating pay

New wording:

7.3 The following must not be included in the calculation of an employee's reference salary for the purposes of paragraphs 7.2 and 7.7-

- (a) benefits in kind;
- (b) anything provided or made available in lieu of a cash payment otherwise payable to the employee (including salary sacrifice schemes);
- (c) anything which is not regular salary or wages.

7.4 In paragraph 7.3(c) "regular" in relation to salary or wages means so much of the amount of the salary or wages as-

- (a) cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment (see paragraph 7.19), and
- (b) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

7.5 For the purposes of paragraph 7.4(a), the following are relevant matters-

- (a) the performance of or any part of any business of the employer or any business of a person connected with the employer;
- (b) the contribution made by the employee to the performance of, or any part of any business;
- (c) the performance by the employee of any duties of the employment;
- (d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).

7.19 A variation in an amount of wages or salary arises from a non-discretionary payment only if-

- (a) the payment-
 - (i) is in respect of overtime, fees, commissions or a piece rate,
 - (ii) is made in recognition of the employee undertaking additional or exceptional responsibilities,
 - (iii) is made in recognition of the circumstances in which the employee undertakes the employee's duties or time when they are undertaken, or
 - (iv) is made in recognition of other matters similar to those described in paragraph 7.19(a)(i) to (iii), and

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(b) a legally enforceable agreement, understanding, scheme, transaction or series of transactions prescribe the method of calculating the amount of wages or salary payable in respect of the payment (whether or not that method involves the exercise of discretion by the employer or a person connected with the employer).

Previous wording:

7.3 In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages.

7.4 In paragraph 7.3 "regular" in relation to salary or wages means so much of the amount of the salary or wages as-

- (a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d)
- (b) is not conditional on any matter,
- (c) is not a benefit of any other kind, and
- (d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

7.5 The relevant matters are-

- (a) the performance of or any part of any business of the employer or any business of a person connected with the employer,
- (b) the contribution made by the employee to the performance of, or any part of any business,
- (c) the performance by the employee of any duties of the employment, and
- (d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).