

## Corona Virus Job Retention Scheme: New HMRC Investigation Powers

HMRC have introduced new regulations which gives them greater powers of investigation in relation to Corona Virus Job Retention Scheme claims.

### Key points

- *Various factors have left the coronavirus job support scheme vulnerable to abuse.*
- *Have employees been pressurised to work?*
- *Could an employer be claiming for non-existent employees?*
- *Some business sectors may be more likely to be subject to CJRS abuse.*
- *FA 2020, Sch 16 allows recipients to report erroneous CJRS payments.*
- *Notification must be made within a 90-day timeframe.*
- *Excessive payments will be recovered by way of a 100% income tax charge and penalties may apply.*

### How might the CJRS be abused?

Examples of how the CJRS might be abused include:

- *placing employees on furlough and then requesting that they continue to work as normal;*
- *pressurising or encouraging employees to work on a 'voluntary' basis;*
- *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;*
- *claiming on behalf of a 'ghost' employee – someone who has been dismissed before the CJRS's start date of 19 March 2020, or a non-existent employee who 'commenced work' following this date;*
- *employers misrepresenting the working hours of staff, so that they can maximise payments recoverable from the CJRS.*

### Industries vulnerable to furlough fraud

The full extent of any fraud committed by employers is difficult to determine accurately at this stage. However, HMRC published some statistics in June 2020 which set out the industries that are making the greatest use of CJRS. These are:

- *wholesale and retail, with claims totalling £3.3bn;*
- *accommodation and food, claiming £2.6bn in support; and*
- *the construction sector, with claims of £1.8bn.*

On 22 July 2020, HMRC reported that it is considering 6,749 cases of potential misuse of the CJRS, including instances where employers have asked employees to work while on furlough or have withheld funds. The Policy Exchange, a UK think tank, has found that fraud or error in relation to the government's various Covid-19 financial rescue schemes could result in losses of as much as £7.9bn.

On 8 July 2020, HMRC made its first CJRS-related arrest of an individual based in the West Midlands as part of its investigation into a suspected £495,000 fraud. This arrest demonstrates that the department is taking abuse of the scheme seriously.

### **HMRC's new powers**

So, what new powers does HMRC have to pursue those who have mistakenly or fraudulently made a claim under CJRS?

Given the opportunity for furlough fraud, it is not surprising that FA 2020, which received royal assent on 22 July 2020, provides substantial enforcement powers to HMRC in relation to the CJRS.

Finance Act 2020, s 106 and Sch 16 gives HMRC the power to claw back CJRS payments made to businesses that were not entitled to receive such payments, or if the payments were not used to pay employment costs.

Schedule 16 para 8 and para 9 enable an income tax liability to be imposed, by way of an assessment, on anyone who has received a coronavirus support payment to which they are 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 and had not been repaid; in other words, it is a 100% tax charge. The timing of the income tax charge is:

- *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*
- *in all other cases, when the payment was received.*

If an assessment is issued under para 8 and is disputed, it can be appealed in the usual way under TMA 1970, s 31.

If a business has become insolvent or insolvency is considered likely, Sch 16 para 15 empowers HMRC to impose stringent individual accountability on company officers. They will be joint and severally liable with each other and the company for the entity's income tax liability if there has been a deliberate act to claim or retain CJRS grants to which the company was not entitled.

### **Penalties and investigations**

Under Sch 16 para 13, penalties will be imposed for failure to notify the chargeability to income tax if 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 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 powers of investigation if 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.

### **Avoiding penalties**

It is possible for employers who have wrongly claimed under the CJRS to avoid significant penalties. Schedule 16 para 12 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 the department of a charge to income tax within a 90-day window from the later of the date of royal assent (in other words by 20 October 2020) or the 90th day after the date on which the income tax became chargeable. This applies to knowing or accidental misuse of the CJRS and by self-reporting within the specified timeframe it should be possible to avoid any wrongdoing penalties.

The timeframe in which to self-report to HMRC to avoid significant penalties, or a criminal investigation, is relatively short. In view of this limited period, and the fact that HMRC is already actively investigating claims, businesses should, as a matter of priority, review their internal records and systems carefully to identify any discrepancies. If discrepancies are detected, a more detailed and forensic examination may be required before making a disclosure to HMRC.

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

### **Conclusion**

HMRC will wish to satisfy itself that any claim made under the CJRS was valid and the more detailed the information gathered during any internal investigation the more likely it is that the business will be able to demonstrate to HMRC that its claim was made in accordance with the rules and principles of the scheme. Businesses that do discover they have received or retained CJRS payments when they were not entitled to do so, should review urgently the action they need to take, including self-reporting to HMRC within the specified time frame. Now is the time for businesses to take stock, consider their position and, if necessary, take action.

If you have any queries please do not hesitate to contact us or visit our website for further information.

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