

Covid-19

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The purpose of this update is to let you know how HMRC expects companies to deal with staffing costs when calculating their Research and Development Relief (R&D) and/or Research and Development Expenditure Credit (RDEC) claims for periods in which they had furloughed staff.

The subsidy rules (s1138 CTA 2009)- this only applies to claims in the SME R&D scheme

The CJRS is not a notified State aid, so when furlough payments are met by the Government through the CJRS the specific notified State aid rule at s1138(1)(a) is not in point.

However, to the extent that furlough payments are met by the Government through the CJRS, the general subsidy rules at 1138(1) do apply, meaning that the expenditure has to be treated as having been subsidised and will therefore not qualify in the SME scheme. The only area where this is likely not to be the case is if annual leave or sick leave is taken during furlough. As I cover later in this update such leave, unlike time spent solely on furlough, is included in the staffing cost calculation.

The staffing cost rules (s1123 and s1124 CTA 2009)

Looking first at the payments made to staff where all or a part of those payments have been met by the Government through the CJRS scheme. Details about the CJRS scheme can be found here <https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme>.

Under the CJRS one of the key conditions for an employee to be furloughed is that they have been instructed by their employer to cease all work in relation to their employment. From 1 July 2020 it has been possible to be a flexibly-furloughed employee, which allows businesses to bring back employees part-time, but requires the employee to do no work in relation to their employment during a CJRS claim period. Furloughed staff are permitted to undertake study and training. As the furloughed employees have ceased all work during the CJRS claim period HMRC consider that those employees cannot be regarded as being directly or actively engaged in relevant research and development during those times. This means that during those times the conditions in s1124(2) CTA 2009 are not been met in respect of their costs. HMRC therefore expect to see these costs excluded from R&D and RDEC claims. This applies equally to furlough payments met under the CJRS and to any 'top-up' from the company itself.

Turning now to furlough payments made to staff where none of those payments have been met by the Government through the CJRS scheme. As with payments within the CJRS scheme, where furloughed employees have ceased all work HMRC consider that those employees cannot be regarded as being directly or actively engaged in relevant research and development. If some qualifying activity has been carried out then HMRC would expect companies to claim in the usual way and draw their attention to the appropriate proportion rules found in s1124(3) and (4) CTA 2009.

Absence from work for sickness or annual leave

HMRC consider that paying holiday pay and sick pay is a necessary cost of the employees undertaking R&D work and is, in effect, part of the cost of their working time. This means that HMRC allows claimants to apply the same apportionment between qualifying and non-qualifying activities to holidays and sickness as they do to working time. HMRC consider that any period during furlough which is taken as annual leave or is recorded as sick leave can be included in the staffing cost calculation. However, for the reasons outlined above, the staffing costs incurred on leave and sickness during furlough are subsidised to the extent that they are met under the CJRS. Whilst this will not affect companies which only claim RDEC it will prevent this element of the staffing cost from qualifying where a company is making a claim in the small and medium size enterprises scheme (chapter 2 of part 13 CTA 2009). The company would however be able to include these staffing costs in a claim for RDEC (s104F to s104H CTA 2009). HMRC will accept a fair and reasonable apportionment when calculating the element of subsidised staffing costs in these circumstances.

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