Coronavirus job retention scheme compliance

Tax voice

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Susan Ball, Carolyn Brown and Paul Marcroft discuss compliance activity surrounding the coronavirus job retention scheme (CJRS) now it has closed including correcting mistakes, tax return, charges, and penalties.

This is further to the article at The coronavirus job retention scheme – mistakes and corrections – are underclaims just as important as overclaims? | Tax Adviser (taxadvisermagazine.com)

The CJRS provided grants to employers so they could retain and continue to pay staff during pandemic lockdowns and restrictions by furloughing employees at up to 80 per cent of their wages. 11.7 million employees were furloughed through the scheme, at a cost of £70bn.

HMRC chief Jim Harra recently stated that the Government now expects to recoup £2.3bn of CJRS grant money over the coming months, less than the initial 5-10 per cent estimated error rate, or the revised rate of 8.7 per cent in HMRC's accounts.

HMRC expenditure aimed at recouping money lost to CJRS fraud and error was increased in the March 2021 Budget, with its new Taxpayer Protection Taskforce (TPT). This brought with it an investment of £100m and 1,250 staff members, representing one of the largest responses to a fraud risk by HMRC. It expects to recover £1bn from its on-going compliance work. As of November 2021, HMRC had around £408m returned to it by claimants who, unprompted, found an error in their claim, and over £719m was returned by claimants who were entitled to the grant but decided, for a range of reasons, to repay it.

It is clear HMRC expects employers to review the claims to ensure they are correct, with any overclaimed CJRS grant returned, or reported as taxable on their tax return.

The latest version of the CT600 corporation tax return guidance, updated on 15 November 2021, requires companies to report CJRS furlough payments received and the amounts that the company was entitled to during the relevant accounting period in boxes 471 and 472. Where any overpayments have already been disclosed to HMRC, that amount should be reported in box 473. The total amount over-claimed should then be entered in box 526. This amount will be assessed for income tax. Similar requirements apply for employers other than companies.

HMRC also considers that CJRS falls within the Senior Accounting Officer (SAO) regime. Claims should therefore be considered when deciding whether SAO certification should be qualified or unqualified. Compliance failures can potentially lead to personal liabilities for the SAO.

What action is HMRC taking?

HMRC has been undertaking several compliance intervention activities, including investigating over 30,000 reports to its hotline, issuing ‘one-to-many’ nudge letters and commencing one-to-one compliance reviews.

As of 30 November 2021, HMRC had opened over 27,000 compliance interventions. The TPT, where proportionate and necessary, refers more complex cases and those involving organised criminal groups for specialist investigation by appropriate expert teams within HMRC, including the Fraud Investigation Service (FIS). As of 30 November 2021, FIS had 21 ongoing criminal investigations and seven live civil investigations into the most serious attempted frauds involving CJRS claims. It uses the Code of Practice 9 investigation and fraud procedure which allows taxpayers an opportunity to make a complete and accurate disclosure of all deliberate and non-deliberate conduct which has led to irregularities in tax affairs in order to avoid criminal prosecution. Some of these cases have recently hit the news, for example, in October 2021 HMRC obtained forfeiture orders of £26.5m obtained during a furlough fraud under the Criminal Finance Act 2017.

HMRC provided some examples of its analysis work resulting in CJRS funds being recovered in Our approach to error and fraud in the COVID-19 support schemes - GOV.UK (www.gov.uk).

Employers may have received a CJRS compliance letter from HMRC, which set out a time for them to take certain actions. Whilst most of these requests are based on an HMRC risk assessment, there are some random enquiries as well. They are largely

desk based reviews with HMRC requesting information digitally.

The reviews include requests for details on every employee for whom furlough support was claimed, the makeup of reference pay and the calculations, along with copy payslips, usually for a specific claim period/reference number (and sometimes including all subsequent claims) with short timescales. Employers receiving these detailed requests need to engage with HMRC.

If HMR doesn't receive a response to an informal request, and there is no good reason for the delay, it may issue a formal information notice to obtain the information. This may increase the likelihood of CJRS penalties being charged where mistakes are discovered.

These checks are there to ensure employers have met the conditions of receiving the grants and have claimed the correct amounts.

Our experience has shown that HMRC has been supportive in extending the deadline if an employer engages with it proactively and, where hundreds or thousands of employees are involved, reducing the information that needs to be provided by agreement. We understand these reviews are currently taking an average of six months for HMRC to complete which, considering the complexity of the rules, is perhaps not surprising.

What mistakes are we aware of?

Many employers have made mistakes due to the speed at which the rules were introduced and the complexity of the calculations, rather than any deliberate claim for employees who were not on furlough. These may include for example:

- incorrect day counts;
- reference pay including discretionary payments;
- the use of 2019/20 average pay details only, and no calendar look back undertaken for variable paid employees;
- the incorrect use of pre-salary sacrifice remuneration figures;
- employees only furloughed for holiday periods;
- the use of fixed pay calculations for employees with significant overtime, even after the rule change announced on 7th August 2020;
- incorrect calculation of usual hours where furlough ends during a claim period;

- reductions in, or deductions from, reference salary, due to incorrect categorisation of pay components, or salary sacrifice arrangements not being factored in correctly;
- claims being made from 1 March 2020 in cases where the employee was not placed on furlough until after that date ; and
- claims being made in respect of furloughed directors who continued to undertake work beyond that necessary to fulfil their statutory duties under the Companies Act.

There are some useful examples and details on the implications in the CIOT guidance at 211126 CJRS PCRT combined - CIOT.pdf.

What penalties can HMRC charge?

In the event a CJRS claim is excessive, para 12 Schedule 16 Finance Act (FA) 2020 obliges the recipient to notify HMRC of its liability to income tax. In such circumstances, the notification must have been made by the latest of:

- 90 days from the date of receiving the excessive claim;
- 90 days from the date of a change of circumstances which led to that claim becoming excessive; or
- 20 October 2020.

Where no such notification has been made, an employer may be exposed to a failure to notify penalty under Schedule 41 FA 2008. In almost all instances where the notification has not been made within the required period, the offence would have already occurred, and the focus must turn to how to mitigate an exposure to penalties.

There are three key matters to consider:

1. **Does the employer have a reasonable excuse?**

Where an employer has a reasonable excuse for failing to notify HMRC of its exposure to income tax within the notification period, and that failure was addressed within a reasonable timeframe, no failure to notify penalty is due.

There may be a number of factors to consider in determining whether an employer has a reasonable excuse, including the numerous updates and changes to HMRC's guidance, the evidence of care taken by the employer during the period, and any relevant commercial factors which applied during the notification period and beyond. What constitutes a reasonable excuse for one taxpayer may not for another, so it is important to critically analyse the facts of each case.

As the offence of failing to notify will have already occurred prior to submitting the tax return covering the period for which the CJRS payment was claimed, it may be prudent to refer to any reasonable excuse within the supporting computation for companies, or in the white note space of the return for employers subject to income tax self-assessment.

2. **Potential lost revenue**

In the absence of a reasonable excuse, the employer will face the imposition of a tax geared penalty and the potential lost revenue (PLR) and the nature of taxpayer behaviour will provide the basis upon which the penalty is calculated. Assuming the failure is not due to what is deemed to be deliberate and concealed behaviour, details of which are explored below, the PLR is the income tax which remains unpaid 12 months after the end of the relevant accounting period for companies, or as at 31 January following the tax year for other employers.

Where an employer is able to calculate the adjustments accurately and reports the correct income tax liability on their return, or estimates an overclaim in the return pending an accurate calculation, so that the actual income tax payable overstates the liability, if income tax is settled in full within 12 months of the accounting period end date (companies) or by 31 January following the tax year (other employers), the PLR upon which any penalty is calculated will be nil. If the PLR is nil, the penalty is nil, irrespective of the penalty loading percentage that would apply according to the taxpayer's behaviour.

3. **Behaviour**

Where there is no reasonable excuse, and the employer has not paid the income tax liability in full within the required period, there will be a penalty exposure based on the PLR. The penalty percentage loading parameters that apply depending on the nature of taxpayer behaviour and can be found on factsheet CC-FS11a.

In the event a penalty falls to be due, there are three keyways to influence the level of penalty incurred.

- The behaviour is determined based on the employer's conduct during the notification period, as opposed to the behaviour demonstrated when filing the tax return. If the failure to notify offence occurred due to non-deliberate behaviour, the penalty threshold applicable will be 0-30 per cent, as opposed to 20-100 per cent in cases of deliberate, or deliberate and concealed behaviour.
- Where the disclosure has been made on an unprompted basis, whether within or outside a tax return, the starting point for penalties will be mitigated by 10-20 per cent across the behavioural spectrum.
- To determine where on the relevant penalty range a specific employer's offence will fall, HMRC will consider the quality and accuracy of the disclosure. Affording a reduction for telling, helping and giving, HMRC will determine the penalty loading based on the employer's conduct during the disclosure process.

The above sets out the failure to notify penalty for non-deliberate behaviour. There may, however, be a significant number of employers that are found to have or are deemed to have acted deliberately. If an employer knew that a claim was excessive or had become excessive due to a change in circumstances, but they failed to notify HMRC of the resulting liability to income tax within the notification period, para 13 Schedule 16 FA 2020 indicates that the behaviour in those instances should be treated as deliberate and concealed.

In those cases, employers not only face a higher penalty range as set out above, but the PLR is also calculated by reference to the total of the excessive claim that is not repaid at the end of the notification period and therefore cannot be reduced to nil by paying the income tax liability in full within 12 months of the accounting period end date. In most cases where the employer knew they had overclaimed, but failed to notify by the notification date, a penalty will therefore be due on the entirety of the overclaim.

Evidently, cases involving allegations of deliberate and concealed behaviour leave employers exposed to significant risk, not only to financial penalties but also criminal prosecution. In such cases HMRC expects to see clients registered within HMRC's Contractual Disclosure Facility and the disclosure provided in full via that regime.

Inaccuracy penalties

Some employers may be unable to determine the total of their excessive claims accurately by the tax return filing date and may therefore include estimates in their return. In those instances, it may be necessary to subsequently amend those returns to reflect the correct position in future. In the event those amendments increase the income tax liability, there is PLR and clients may be exposed to penalties under Schedule 24 FA 2007.

Where an estimate of the income tax liability is reported on the tax return, it is important to be able to demonstrate this is reasonable. It is the employer's behaviour during the tax return submission process that will dictate what inaccuracy penalties are due, reasonable care being the only defence against a penalty. If employers can demonstrate their estimate was calculated on a reasonable basis, this may also demonstrate reasonable care was taken.

In essence, an employer's exposure to the inaccuracy penalty regime is no different for CJRS grants than any other tax matter, but the need to estimate in some instances will lead to future amendments to tax returns, and therefore demonstrating the reasonable basis for those estimates will be important.

What if the employer discovers an issue with the amount of CJRS grant claimed?

Employers may discover they have an issue from an internal review or an external evaluation by auditors, investors, and potential purchasers.

Where such reviews are not part of an existing HMRC review, employers should consider the tax return filings and the new HMRC disclosure notification process published on 20 December 2021 at Pay Coronavirus Job Retention Scheme grants back - GOV.UK (www.gov.uk), notifying HMRC of the error as early as possible to minimise the scope for HMRC to charge penalties.

HMRC expects employers to resolve the position by doing their own recalculation, using the help provided, including the guidance on offsetting issued on 11 October 2021 and updated in December 2021, paying any overpayment or making any employee top up payments due.

HMRC will risk assess any returns filed and payments made. For example, it has 12 months from the filing date of a corporation tax return, or the following quarter day after the anniversary of making an amendment, to open a compliance check. Such checks may test the accuracy of the disclosures made or impose penalties for failure to notify under the inaccuracy regime.

Summary

Considering HMRC is already actively investigating claims, employers should, as a priority:

- review claims to ensure their CJRS claims are supportable, and that this can be demonstrated to HMRC and other stakeholders, such as auditors, investors, and potential purchasers;
- notify HMRC of any errors as soon as possible where claims cannot be supported, or relevant tax returns were not filed with the correct disclosure of CJRS overclaims;
- ensure any overclaims, such as any underpayments to furloughed employees, are made good within a reasonable period;
- take any compliance notification from HMRC seriously, make a note of the deadline, be proactive about locating the information needed and engage with HMRC;
- consider if external advice is needed; and
- make sure CJRS records are maintained for six years with a clear audit trail, we would recommend this includes ensuring key judgments are documented and supported by relevant HMRC guidance at the time, the data underlying submitted claims is maintained and robust, and that supporting calculations are accurate.