Covid-19 crisis payments and effect on benefits

The government has introduced a number of measures since the start of the covid-19 crisis, including payments to employees under the Coronavirus Job Retention Scheme (CJRS) — commonly referred to as ‘furlough’ payments; and to the self-employed under the Self Employed Income Support Scheme (SEISS). In addition, there are a range of loans and grants available to businesses. This article considers how these payments affect entitlement to various benefits.

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Universal Credit

Coronavirus Job Retention Scheme

Under the CJRS the employer makes payments to employees as ‘normal’ wages which are subject to tax and NI in the usual way. For UC purposes, therefore, these are treated in the same way as ‘normal’ earnings (1), and taken into account as earnings in the assessment period in which they are paid, as per Reg 54. Note, however, that the recent Court of Appeal decision in ‘[Johnson](https://www.bailii.org/ew/cases/EWCA/Civ/2020/778.html)’ has held that Reg 54 operates unlawfully for clients whose salaries are paid on a variable date close to the start/end of their UC assessment period where this results in two payments of earnings being taken into account in one assessment period. Clients in this situation may wish to seek advice about running a discrimination argument — CPAG have a [template MR request](https://cpag.org.uk/welfare-rights/legal-test-cases/universal-credit-assessment-period-inflexibility) for such cases.

Self Employed Income Support Scheme

Before 21 May 2020, there was some confusion about how SEISS payments would be treated for UC, but since that date [regulations](http://www.legislation.gov.uk/uksi/2020/522/made) clarify that these payments will be treated as a ‘receipt’ under self-employed earnings (2), and taken into account for the assessment period in which the SEISS payment is made. As SEISS payments are made in lump sums, this could mean some clients see a large reduction in their UC entitlement for the month in which the SEISS payment is received, or even a loss of UC altogether. The same regulations allow for those clients whose entitlement ends to be treated as having re-claimed UC for the following 5 months. These clients may well be subject to the surplus earnings rule on the new claims (3), although it is worth noting that losses from a previous assessment period can be carried forward to offset the SEISS income (4).

Grants/loans

From 21 May 2020, the above regulations also clarify that any payment made to a self-employed person “*by way of a grant or loan to meet the expenses or losses of the trade, profession or vocation in relation to the outbreak of coronavirus disease*” is disregarded as capital for 12 months from the date it is received. [Explanatory notes](http://www.legislation.gov.uk/uksi/2020/522/pdfs/uksiem_20200522_en.pdf) to the regulations confirm that this disregard includes payments from the Small Business Grant Fund; the Retail Hospitality & Leisure Grant and the Bounce Back Loan Scheme. [DWP guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897312/adm11-20.pdf) suggests that the payments could be disregarded indefinitely if held as a business asset.

Tax credits

Coronavirus Job Retention Scheme

Payments to employees made under the CJRS are earnings and therefore taken into account for tax credits. It should be noted that since 23 May 2020, [regulations](http://www.legislation.gov.uk/uksi/2020/534/made) provide for people to continue being treated as though they are working the relevant number of hours for entitlement to working tax credit (WTC) until the end of the CJRS scheme (currently the end of October 2020) and for a further 8 weeks in some cases. Note that, for tax credits, increases/decreases in income only have an effect on the current tax year’s entitlement if the increase/decrease exceeds £2500 (when compared to the previous year’s income). Any changes below that limit will not affect tax credit entitlement until the following year.

Self Employed Income Support Scheme and grants/loans

From 23 May 2020, the above regulations also clarify that “*any grant or sum paid to the claimant under a coronavirus support scheme*” will be treated as trading income for the self-employed. This includes SEISS payments, as well as payments from the Small Business Grant Fund; the Retail Hospitality & Leisure Grant; and “*any other support scheme established in the tax year 2020–2021 in response to coronavirus*”.

Housing Benefit

Coronavirus Job Retention Scheme

Payments to employees made under the CJRS are earnings and therefore taken into account for HB in the normal way. Where earnings fluctuate, the local authority (LA) can average earnings over “*such period as is appropriate*” so that average weekly earnings can be estimated accurately (5). For those who were furloughed before claiming HB, it may be possible to argue that CJRS payments should be ignored as income under provisions which allow certain payments as an employed earner to be ignored where a person is still employed but not engaged in remunerative work (6). However, these provisions only apply if the client is accepted as no longer being in remunerative work, and the LA have power to average hours over any length of time as may be appropriate to determine hours of work to be calculated accurately (7).

Self Employed Income Support Scheme

[Guidance](https://www.gov.uk/government/publications/la-welfare-direct-bulletins-2020/la-welfare-direct-42020) issued to HB departments states that SEISS payments will be treated as taxable income from self-employment. HB Regs allow self-employed earnings to be assessed over “*such period as is appropriate*” for average weekly earnings to be estimated accurately (8) — the guidance suggests that any decreases/increases in self-employed income should allow HB to be re-calculated “*based on the claimant’s new statement of income and expenditure*”. It may be arguable that SEISS payments do not constitute self-employed earnings anyway for HB, as these are defined as being the “*gross income of the employment*” (9). The fact that legislation had to be introduced to classify a SEISS payment as a ‘receipt’ for the purposes of self-employed earnings under UC suggests that without such an amendment, it would not be. No equivalent legislation has been passed for HB (although it is noted that the wording of self-employed income for HB is slightly different to that of UC, and does not specifically refer to ‘receipts’)

Grants/loans

Unlike UC (where grants/loans are specifically disregarded as capital) and tax credits (where grants/loans are specifically included as income), there is no specific provision to specify how these payments should be treated for HB. As UC guidance suggests that such payments can be disregarded as business assets, it is arguable that this should also be the case for HB (10) — appeals may be possible if payments are not ignored.

Job Seekers Allowance (references to new-style JSA include ‘old’-style contribution-based JSA, unless otherwise stated)

Coronavirus Job Retention Scheme

Both new-style JSA and income-based JSA are normally not payable if a client is in ‘remunerative’ work, i.e. work done for payment (or for which payment is expected) of 16 hours or more a week (11). If a person is on ’furlough’ and not actually working, this rule should not prevent them from claiming JSA. However, where a person’s hours of work fluctuates, DWP have power to average their hours over any length of time as may be appropriate to allow their average hours of work to be calculated accurately. Perhaps because of this, [DWP guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897313/adm8-20.pdf) states that people on furlough will not be eligible for new-style JSA (and presumably also income-based JSA) unless their pre-covid hours were less than 16 per week. This may be challengeable, but note that any earnings received by the client will normally reduce entitlement to both types of JSA by £1 for every £1 of earnings over the earnings disregard (12). However, if a person successfully argues that they are no longer in remunerative work, then any CJRS payments they receive could be disregarded under provisions which allow payments as an employed earner to be ignored where a person is still employed but not engaged in remunerative work. But this rule does *not* apply if a person has been ‘suspended’ from work and it is not clear whether a furloughed employee would fall under that definition (13).

Note there are separate provisions under the JSA regs to ‘treat’ a person as in remunerative work if they are absent from work “*without good cause*” (14) — this is unlikely to be the case if the employer has agreed to furlough the client.

Self-Employed Income Support Scheme

(For new-style JSA, those who were formerly self-employed need to satisfy the national insurance conditions, which require payment or credits of sufficient Class 1 national insurance rather than Class 2 (self-employed) contributions. However, for a claim to new-style JSA made in 2020, the relevant tax years to consider will be 2017/18 and 2081/19, so some people may still meet this requirement).

Similar to the CJRS, [DWP guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897313/adm8-20.pdf) also states that those in receipt of SEISS payments will be considered to be in ‘remunerative’ work for the periods in respect of which the SEISS payments are made, unless their pre-covid hours of work were less than 16. This may be challengeable (as above for CJRS payments), although again any self-employed earnings would normally reduce entitlement to JSA. It may be arguable that SEISS payments do not constitute self-employed earnings anyway for JSA, as these are defined as being the “*gross receipts of the employment*” (15). The fact that legislation had to be introduced to classify it as a ‘receipt’ for UC purposes suggests that it is otherwise not. There have not been any equivalent regs to clarify the position for JSA. However, guidance in relation to both [new-style JSA](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897313/adm8-20.pdf) and [income-based JSA](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897319/m-13-20.pdf) both state that DWP *will* treat it as self-employed earnings, apportioned over three months from the date of payment. Averaging over a three month period may also be challengeable, as the assessment of self-employed earnings is normally averaged over a period of one year, or (where there is a change to the pattern of business), any other period which enables earnings to be determined more accurately (16).

Grants/loans

Grants/loans will not affect entitlement to new-style JSA as they are not paid in respect of hours worked. [Guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897319/m-13-20.pdf) issued in relation to income-based JSA says that DWP will treat such payments as capital and disregard them if they are business assets.

Employment Support Allowance (references to new-style ESA include ‘old’-style contribution-based ESA, unless otherwise stated)

Coronavirus Job Retention Scheme

Both new-style ESA and income-related ESA are normally not payable in any week “*in which the claimant does work*” (17). However, any work done in a week does not fall under this exclusion if the earnings in that week are below certain limits (often referred to as the ‘permitted’ or ‘exempt’ work rules). So if the client is not actually working (or if their actual earnings in a week are within the permitted limits) then ESA should not be excluded (assuming they have limited capability for work). [DWP guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897313/adm8-20.pdf) confirms that CJRS payments do not affect new-style ESA entitlement for those who are not working, but also says that where a client is doing some work, then any CJRS payments will be taken into account when deciding if the earnings limit for permitted work has been exceeded. It is arguable that this is not correct, as the CJRS payments are not payments in respect of work done that week (18). In any event, there may be a separate argument (if accepted that the client is no longer in ‘remunerative’ work), that when calculating earnings for the permitted work rule in both contribution-based ESA and income-related ESA, any CJRS payments could be disregarded — these provisions (19) allow payments as an employed earner to be ignored where a person is still employed but not engaged in remunerative work. But this provision does not apply if a person has been ‘suspended’ from work and it is not clear whether a furloughed employee would fall under that definition. Note, also that there is no equivalent of these provisions for new-style ESA.

Even if CJRS payments do not prevent entitlement under the ‘work’ rule, note that any CJRS payments are still included as income under the income test when income-related ESA is calculated, regardless of whether the work is done for them (20), so even if not excluded on ‘work’ grounds, income-related ESA may still not be payable on income grounds (unless the same argument regarding the provisions above could be made (21).

Self Employed Income Support Scheme

[DWP guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897313/adm8-20.pdf) confirms that SEISS payments do not affect entitlement to new-style ESA, but that permitted work rules should still apply in the normal way.[Later guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897319/m-13-20.pdf) stated that SEISS payments should be treated as income when deciding whether permitted work rules were met (para 16). However, it remains arguable (as above for CJRS payments) that a SEISS payment is not a payment in respect of work done in that week and therefore does not prevent entitlement to new-style ESA (or income-related ESA), even if other work (within the permitted work limits) is being done. In any event, it may be arguable that SEISS payments do not constitute self-employed earnings anyway for ESA, as these are defined as being the “*gross receipts of the employment*” (22). The fact that legislation had to be introduced to classify it as a ‘receipt’ for UC purposes suggests that it is otherwise not. There have not been any equivalent regs to clarify the position for new-style ESA. However, guidance in relation to [income-related ESA](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897319/m-13-20.pdf) states that DWP *will* treat it as self-employed earnings for 3 months from the date of payment. Averaging over a three month period may also be challengeable, as the assessment of self-employed earnings is normally averaged over a period of 1 year, or (where there is a change to the pattern of business), any other period which enables earnings to be worked out more accurately (23).

Grants/loans

Grants/loans will not affect entitlement to new-style ESA as they are not paid in respect of work done in any week. [Guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897319/m-13-20.pdf) issued in relation to income-related ESA says that DWP will treat these payments as capital and disregard them if they are business assets.

Income Support (IS)

The position in relation to IS is the same as for income-based JSA (above)

Pension Credit (PC)

There are no hours or work rules which prevent entitlement to PC.

Coronavirus Job Retention Scheme

CJRS payments are earnings and will be taken into account as income in the normal way. Where earnings fluctuate under PC, the DWP can average earnings over such period as enables the most accurate assessment of earnings (24).

Self Employed Income Support Scheme

Self-employed earnings are defined as being the ‘receipts’ of the employment (25). Where self-employed income fluctuates, self-employed earnings can be assessed over “*such period as is appropriate*” for average weekly earnings to be estimated accurately (26). It may be arguable that SEISS payments do not constitute self-employed earnings for PC. Again, the fact that legislation had to be introduced to classify a SEISS payment as a ‘receipt’ for the purposes of self-employed earnings under UC suggests that without such an amendment, it would not be. No equivalent legislation has been passed for PC. However, DWP [guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897319/m-13-20.pdf) states that SEISS payments *will* be treated as self-employed income for PC purposes over three months from the date of payment — it may also be arguable that this is too simplistic an approach to the requirement to average earnings over an ‘appropriate’ period, especially given that a SEISS payment is paid in respect of loss of work for a past period.

Grants/loans

[DWP guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897319/m-13-20.pdf) states that grants/loans will be treated as capital for PC purposes, and disregarded if they are business assets.

Carers Allowance (CA)

There is no entitlement to CA if a person is in ‘gainful employment’ — this applies if a person’s earnings in the preceding week exceed £128 (27). The position in relation to CA is the same as for PC (above).

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Footnotes

(1) Reg 55 UC Regs 2013

(2) Reg 57 UC Regs 2013

(3) Reg 54A UC Regs 2013

(4) Reg 57A UC Regs 2013

(5) Reg 29(3) HB Regs 2006

(6) Sch 4 para 1(c) HB Regs 2006

(7) Reg 6 HB Regs 2006

(8) Reg 30 HB Regs 2006

(9) Reg 37 HB Regs 2006

(10) Sch 6 para 8 HB Regs 2016

(11) Reg 42 JSA Regs 2013: Reg 51 JSA Regs 1996

(12) Reg 50 JSA Regs 2013: Regs 80 & 88 JSA Regs 1996

(13) Sch para 1(1)(b)(i) JSA Regs 2013: Sch 6 para 1(1)(b)(i) JSA Regs 1996

(14) Reg 43 JSA Regs 2013; Reg 52 JSA Regs 1996

(15) Reg 60 JSA Regs 2013: Reg 100 JSA Regs 1996

(16) Reg 55(1) JSA Regs 2013: Reg 95(1) JSA Regs 1996

(17) Reg 37 ESA Regs 2013: Reg 40 ESA Regs 2008

(18) Reg 37(8) ESA Regs 2013; Reg 40(7) ESA Regs 2008

(19) Reg 88 & Sch 7 para 1(1)(b) ESA Regs 2008

(20) Reg 93 ESA Regs 2008

(21) Reg 90(1) ESA Regs 2008

(22) Reg 82 ESA Regs 2013: Reg 97 ESA Regs 2008

(23) Reg 92(1) ESA Regs 2008

(24) Reg 17(2) SPC Regs 2012

(25) Reg 17B(1) SPC Regs 2002 & Reg 12 SSB (CE) Regs 1996

(26) Reg 11 SS (CE) Regs 1996

(27) Reg 8 SS (ICA) Regs 1976

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