

The Coronavirus Job Retention Scheme

We have set out below the answers to the Frequently Asked Questions that have come our way to date. It is not advice in itself. It is based on government advice updated to 4 April 2020.

Should you require specific advice on any question or require letter templates please do get in contact with Sally Phillips, the MD of Ward Williams HR Limited. Tel 01932 830664. Email sally.phillips@wardwilliams.co.uk

IMPORTANT: You must consult with your staff and gain their acceptance to being furloughed which must be confirmed in writing.

What does Furlough mean?

The word furlough generally means temporary leave of absence from work. Until now the expression has not carried any meaning in UK employment law.

Furlough leave has been temporarily introduced by the government during the coronavirus pandemic to mean leave offered which keeps employees on the payroll without them working. As the furloughed staff are kept on the payroll, this is different to being laid off without pay or being made redundant. The ability to furlough employees is designed to support employers who are severely affected by coronavirus.

People who get furloughed must not work for the employer during the period of furlough but usually return to their job afterwards unless redundancies follow.

Which employers does the Coronavirus Job Retention scheme apply to?

Any employer in the country (whatever size) will be eligible for the scheme. Charitable and non-profit organisations are included. UK employers that can apply includes:

- businesses
- charities
- recruitment agencies (if the agency workers are paid through PAYE)
- public authorities.

To be eligible the employer must have created and started a PAYE payroll scheme on or before 28 February 2020 and will need a UK bank account. The employer will need to have enrolled for PAYE online (this can take up to 10 days).

There is no financial limit to how much an employer can claim. The scheme is limited only by a cap on the maximum grant that can be claimed in respect of an individual employee.

When will the scheme and HMRC online portal be operational?

The ability to furlough employees under the Coronavirus Job Retention Scheme will be operational from the end of April. This is a major exercise for HMRC to undertake at any time let alone in current circumstances. HMRC would normally expect to takeover a year, not a month, to implement a new system. The information that HMRC have said they will request through the

portal has been simplified: a total claim by the company rather than by employee. However we should expect some glitches and delays.

The scheme is backdated and will apply from 1 March for at least three months until 31 May (unless extended which the Government said will happen if required).

How much can we claim?

You'll need to claim for:

- 80% of your employees' wages (even for employee's on National Minimum Wage) - up to a maximum of £2,500.
- minimum automatic enrolment employer pension contributions on the subsidised wage

You can choose to top up your employee's salary, but you do not have to. Employees must not work or provide any services for the business while furloughed, even if they receive a top-up salary.

Grants will be prorated if your employee is only furloughed for part of a pay period.

Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they written to confirming their furloughed status.

The way you work out your employees' wages is different depending on what type of contract they're on, and when they started work.

You cannot claim for:

- additional National Insurance or pension contributions you make because you chose to top up your employee's salary
- any pension contributions you make that are above the mandatory employer contribution

Does employees' wages include Past Overtime, Fees, Commission, Bonuses and non-cash payments?

You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

By "obliged" we interpret this to mean a contractual right.



Does employees' wages include Benefits in Kind and Salary Sacrifice Schemes?

The reference salary should not include the cost of non-monetary benefits provided to employees, including taxable Benefits in Kind. Similarly, benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should also not be included in the reference salary. Where the employer provides benefits to furloughed employees, this should be in addition to the wages that must be paid under the terms of the Job Retention Scheme.

Normally, an employee cannot switch freely out of a salary sacrifice scheme unless there is a life event. HMRC agrees that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly.

How can employers access the Coronavirus Job Retention Scheme?

Employers access the scheme through an HMRC online portal. Employers should have written to the affected employees confirming that they have been furloughed and should keep a record of this.

When the portal is operational employers will apply with their ePAYE reference number, bank account number and sort code and specify the:

- number of employees being furloughed
- claim period (start and end date)
- amount claimed (the minimum length of furlough is three weeks)
- employer's contact name and telephone number.

Timing

Employers are advised by the government to claim in advance of an imminent payroll or at the point when they run their payroll.

HMRC will retain the right to retrospectively investigate and audit employers' claims.

Once HMRC have the claim and agree the employer's eligibility a BACS payment will arrive directly into the bank account supplied.

Do employers make one claim for all employees under the scheme?

Employers make a collective claim for the group of furloughed employees under the scheme, but it is anticipated that employers may need to make more than one claim throughout the period of furlough.

It's anticipated that employers will submit one claim at least every three weeks. Three weeks is the minimum length of time an employee can be furloughed for.

Employers have to pay over the entire grant received for gross pay to the employees plus any top up employers are choosing to pay.

Which employees can be furloughed under the scheme?

The employees that can agree to being furloughed are those working for businesses that would otherwise have to dismiss as redundant or lay off part or all of their workforce. The furloughed employees must have been on the employer's PAYE payroll on 28 February 2020, including:

- full-time employees
- part-time employees
- agency employees on agency contracts provided they are not working at all
- zero-hour contract workers provided that they are employees albeit on flexible contracts.
- Foreign nationals are eligible to be furloughed.

How do I furlough my employees?

In order to be eligible for the subsidy, the guidance states that employers should write to their employee(s) confirming that they have been furloughed and should keep a record of this letter for 5 years. The potential implication is that without written evidence of such communication, there is a risk that employers may not be able to claim under the scheme. Our HR team can assist with the drafting of appropriate furlough letters where needed.

In deciding who to furlough, the government stresses that “equality and discrimination laws will apply in the usual way”. Nevertheless, it is still likely to be sensible to try to establish a fair selection process and criteria, which in these times, may include consideration of those who fall within vulnerable groups or have additional caring responsibilities as a result of the coronavirus outbreak.

The government has confirmed that any decision must be discussed with staff and any changes made “by agreement”. However that agreement should not be a problem in the majority of cases as the purpose of the scheme is to prevent redundancies and protect jobs in the longer term. Employees can be furloughed multiple times, but each separate instance must be for a minimum period of 3 consecutive weeks.



A summary of the process

1. Select fairly employees affected for being furloughed
2. Decide whether to pay 80% of salary or to supplement it.
3. Gain the employees' written consent unless contractual provisions already cover lay off.
4. Stop the employees from working if they are now working from home, or send them home from the workplace.
5. Calculate the amounts to claim from HMRC. (Employers will have to work out the employer NI and minimum automatic enrolment employer pension contributions for all employees. Where we run your payroll we can do this for you).

Can employers place new employees on furlough immediately and received an 80% contribution towards their pay?

No, if an employee starts a new job the employer cannot immediately furlough that new employee and claim reimbursement of 80% of their pay under the coronavirus job retention scheme. The scheme is only open to all UK employers that had created and started a PAYE payroll scheme on 28 February 2020. The relevant employees must have been on the payroll on that date and would otherwise be dismissed as redundant or laid off.

Some employers may have a recruitment process already underway and have made job offers which have just been accepted.

The following applies:

- Employees hired after 28 February 2020 cannot be furloughed or claimed for under the scheme.
- Employees on unpaid leave cannot be furloughed, unless placed on unpaid leave after 28 February 2020.
- Employees already made redundant or laid off between 28 February and 20 March (when the scheme was announced) are eligible under the scheme if reinstated.
- Employees on schedule to be made redundant after 20 March 2020 can be furloughed instead of proceeding with the redundancy process.

There is different legal commentary on this point but the above follows the Government guidance.

The scheme will then cover the cost of wages backdated to 1 March. This ensures that those people who already been made redundant as a result of the coronavirus are covered.

Can employers backdate the furlough period to 1 March for all employees, even those who have been working since then?

No employers cannot backdate the furlough period for all employees. The scheme is only backdated to 1 March to cover employees who have already been made redundant as a result of the coronavirus restrictions.

Employers are only eligible to claim the reimbursement once they have agreed the furlough with employees and they have stopped working.

We have just made a group of employees redundant; should we reinstate them and put them on furlough leave?

Employers who have just made a group of employees redundant can reinstate those employees and put them on furlough leave.

The government has confirmed the coronavirus retention scheme covers employees who have already been made redundant after 28 February 2020, if they are rehired by the same employer. It is not mandatory for employers to reinstate employees and place them on furlough, but for redundancies that are still in the pipeline, there is a risk of unfair dismissal claims if the furlough option is not considered along with all the usual method of avoiding redundancies.



Employers should remember that as part of the redundancy process they have to explore alternatives. Bearing in mind that the aim of the scheme is to ensure that employers who cannot afford to pay staff wages do not make redundancies, employees could at least argue that any redundancy decisions made between the scheme being announced on the 20 March and during the three month period of the scheme, would be unfair.

Employers who decide they have no alternative but to press ahead with redundancies now, despite the existence of the scheme, should fully consult and keep careful records to show why the redundancies will still be needed despite the scheme's availability.

When the government ends the job retention scheme at the end of May (unless extended) employers can decide whether there is sufficient work for employees to return. If the work has ceased or diminished, or is expected to cease or diminish, then redundancies can be implemented at that stage following full redundancy procedures for notice, consultation and selection.

What about part-time employees?

The government guidance has confirmed that for both full time and part-time employees, the employee's actual salary before tax, as at 28 February, is used to calculate the 80% payment. Fees, commission and bonuses are not to be included in calculating the amount.

Employees with two or more employers can be furloughed for each job separately. However, the £2,500 cap applies to each employer individually. So, an employee with two jobs can have 80% of salary reimbursed with a cap of £5,000.

For example, an employee who works two days a week for Employer A and three days a week for Employer B would receive their 80% of their actual salary for those two days if on furlough from Employer A. If their other role continues the employee could receive their normal salary from Employer B as well.

Employees can start a new job when on furlough (meaning they might end up earning 80% of the old salary and 100% of a new one). This was not prohibited in the earlier guidance, but the new guidance expressly allows it. The guidance does say it has to be allowed under the old employment contract, but presumably the old employer can waive that if it chooses to do so.

What about employees on a fixed term contract?

Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee's contract ends because it is not extended or renewed you will no longer be able claim grant for them.

Is the Grant repayable?

No, it is a grant, not a loan. Provided you do not breach the terms of the grant it is not repayable.

The government will retain the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claim.

Although it was speculated that the government might make it a requirement of the scheme that employees are retained for a period after the furlough scheme ends, the government has not imposed any such conditions.

Instead, the guidance states that, at the end of the scheme, employers will need to decide whether employees will be able to return to their duties, or whether it will be necessary to consider redundancies. These will be subject to the usual rules on carrying out a fair dismissal.

Can I place an employee on furlough rather than Statutory Sick Pay?

Employees on who are on sick leave or self-isolating should get Statutory Sick Pay. Employers can place them on furlough leave after the sick pay period if there is no work for them to do and they would otherwise be laid off or made redundant.

The government guidance says that employees who are shielding themselves in line with public health guidance can be placed on furlough. This means employees who are extremely vulnerable and who have been notified by the NHS to isolate for 12 weeks.



Do Employees have to agree to be furloughed?

Yes, employees must be consulted and agree to being furloughed. Changing the status of employees always is subject to existing employment law.

Depending on the wording of the employment contract there may be an ability to lay-off workers. Although lay-offs under the Employment Rights Act 1996 are a different legal concept the wording in contracts may enable some employers to impose a furlough period.

If there is no lay off provision in the existing contract the employer will need to agree with the employee that they going to become furloughed because no work is available. Inevitably employees will mostly agree to this. The main alternative would be dismissal by reason of redundancy with the possibility of a delayed redundancy payment or no redundancy payment (for employees who have worked for less than two years). In most cases employees will agree where the alternative is redundancy.

The reality is that some employees may be resentful that they are having to work as they are classed as being essential whilst others are being furloughed on 80% of salary. Others may be resentful that they are classed as dispensable whilst others are working and receiving their full package.

If employees do not agree to be furloughed can we dismiss them by reason of redundancy?

Yes, if employees do not agree to be furloughed employers can dismiss by reason of redundancy if the redundancy definitions are met and a proper process followed.

Some employers may feel that the long-term effect on their business will be inevitable closure or rationalisation. If employers feel furlough is likely to be followed by redundancies it may help to select employees for furlough using a process similar to redundancy selection. This would involve using objective criteria, such as a scores matrix based on skills, productivity, previous appraisals etc.

Is an employer required to make up the difference over the 80%?

No, employers can make up the additional pay, but they are not required to do so. For employees who have been furloughed employers can choose whether to:

- Only make the salary payment reimbursed by the government.
- Pay all of the difference between the grant and the employee's normal salary.
- Pay part of the difference between the grant and the employee's normal salary.
- Any extra payment the employer chooses to make will be either the additional 20% of salary, or any amount in excess of £2,500.

Again the reality is that many employers will not be able to supplement the government's payment.

There is no reason why employers could not choose to supplement the salaries initially and then choose not to in later months, although presumably then the employee's consent to the furlough could theoretically be withdrawn. An employee would be unlikely to withdraw consent when the alternative is redundancy.

How do employers calculate the 80% figure for employees who work variable hours

Employers claim for the higher of either:

- the same month's earning from 2019; or
- average monthly earnings from the 2019-20 tax year.

If the employee has been employed for less than 12 months before the claim, then the employer has to use an average of the actual monthly earnings since the employee's start date.

For employees who only started during February 2020 the employers will have to use those earnings on a pro rata basis.



Can employees staying at home to look after young children be placed on furlough? What about those on maternity, paternity and adoption leave and pay or shared parental rights?

Employees staying at home to look after young children are thought to be included in the furlough system in preference to being made redundant.

Employees eligible for statutory maternity pay or maternity allowance can claim up to 39 weeks of statutory pay or allowance as normal. The same principles apply for normal paternity, adoption or shared parental pay rights. If the employer offers enhanced contractual rights these are included as wage costs that can be claimed through the scheme.

Are furloughed payments taxable?

Yes, furloughed employees' wages are subject to Income Tax and National Insurance as usual.

Employees also pay their automatic enrolment pension contributions unless opted-out.

The Coronavirus Job Retention Grant payments are made to offset deductible revenue costs and must therefore be included as income for Income and Corporation Tax purposes. The amounts paid out as salary are still deducted as employment costs as normal when calculating taxable profits.

What if this means the employees receive less than the National Living Wage or Minimum Wage?

The normal minimum wage rules do not apply to furloughed employees, as they are not working. To state the obvious it is hard enough to live on the minimum wage let alone 80% of this figure.

The government have confirmed that if workers are required to complete online training courses whilst they are furloughed, then they must be paid at least the minimum wage for the time spent training, so for that period employers may need to top up the 80% of salary if the employee would slip beneath the minimum wage, although they would not have to do this for the remainder of the furlough period.

What if instead of furloughing employees we pay them reduced wages and/or cut their hours during the crisis instead?

You should take legal advice on any arrangement to reduce employees' contractual hours or wages.



Can a director be furloughed?

As office holders, salaried company directors are eligible to be furloughed and receive support through this scheme. Company directors owe duties to their company which are set out in the Companies Act 2006. Where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed. Where one or more individual directors' furlough is so decided by the board, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned.

Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.

However it remains unclear as to what 'statutory duties' actually cover for company directors.

This also applies, and in practice will be a more difficult test, to salaried individuals who are directors of their own personal service company (PSC).

Can Apprentices be furloughed?

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed.

However, you must pay your Apprentices at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) as appropriate for all the time they spend training. This means you must cover any shortfall between the amount you can claim for their wages through this scheme and their appropriate minimum wage.

Can an Agency Workers (including those employed by umbrella companies) be furloughed?

Where agency workers are paid through PAYE, they are eligible to be furloughed and receive support through this scheme, including where they are employed by umbrella companies.

Furlough should be agreed between the agency, as the deemed employer, and the worker, though in practice it will be driven by the needs of the end clients involved. As with employees, agency workers should perform no work for, through or on behalf of the agency that has furloughed them while they are furloughed, including for the agency's clients.

Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.

Can my employee undertake training while on furlough?

Furloughed employees can engage in training, as long as in undertaking the training the employee does not provide services to, or generate revenue for, or on behalf of their organisation. Furloughed employees should be encouraged to undertake training.

Where training is undertaken by furloughed employees, at the request of their employer, they are entitled to be paid at least their appropriate national minimum wage for this time. In most cases, the furlough payment of 80% of an employee's regular wage, up to the value of £2,500, will provide sufficient monies to cover these training hours.

However, where the time spent training attracts a minimum wage entitlement in excess of the furlough payment, employers will need to pay the additional wages.

