



Furloughed Workers under the Coronavirus Job Retention Scheme

On 20 March 2020, the Chancellor announced the introduction of a brand-new temporary scheme, the Coronavirus Job Retention Scheme (Scheme). The Scheme due to expire on 30 June 2020 but has recently been extended to 31 October 2020.

The Scheme is to be administered by HMRC and, in simple terms, employers utilising the Scheme will receive a grant to reimburse 80% of monthly salary costs of ‘furloughed’ employees, up to a maximum of £2,500 per employee, plus the associated Employer National Insurance contributions and minimum auto-enrolment employer pension contributions on that lower wage.

There is explanatory Guidance to accompany the Scheme which has been issued (and, at various points, updated) by HMRC. Given the ever-changing nature of the guidance, employers should have reference to the latest guidance via: [Coronavirus: support for businesses](#) when taking decisions around furlough and furlough leave. ACAS have also issued non-statutory guidance which includes a section on how furloughed workers can use their holiday during periods of furlough leave, an area not expressly covered, to date, in any of HMRC’s updates. This note has been updated to take account of the latest HMRC and ACAS guidance.

Employers can now access to the Scheme portal, which opened yesterday, 20 April 2020, and the first grants are expected to be paid on or before 28 April 2020. HMRC have published a step-by-step guide to making a claim, with various worked examples, which is recommended reading for anyone submitting a claim [click [here](#) to view]. This paper seeks to summarise what we know now about the Scheme now that it is fully operational.

When does the Scheme run from?

The Scheme will run from 1 March 2020. It will remain open until **30 June 2020** and may be extended beyond that (already extended date) if necessary.

Which employers are eligible?

Any UK employer, regardless of size or sector, that operated a PAYE payroll scheme and had a UK bank account on or before **19 March 2020** is eligible to participate in the Scheme.

When will the Scheme open?

The Scheme opened on 20 April 2020, with the first payments expected to be made within 4-5 working days of the first claims being submitted. Early indications are that the portal is holding up well to demand.

Which employees will qualify?

Those employees on the employer’s payroll on or before 19 March 2020 will be eligible to be furloughed, regardless of length of service or pay. This includes full-time employees, part-time employees, employees on agency contracts, office holders (if paid via PAYE) and employees on flexible or zero-hour contracts.



The Scheme will also be available to employees who were employed as of 28 February 2020 and on payroll, but who were made redundant or stopped working for that employer after that (e.g. they went on unpaid leave) and before 19 March 2020. To access the Scheme these individuals should be re-hired by their employer and immediately furloughed.

Employers can furlough employees who are shielding (in line with public health guidance) or who are off sick, including those on long-term sick leave, if there are good business reasons to do so (nb: redundancy does not need to be the driving factor any longer). It is up to the employer whether to furlough these employees or not. For those who are sick, the employer can claim back under the Scheme and the SSP rebate scheme for the same employee, but not for the same period of time.

Employees with caring responsibilities as a direct result of the COVID-19 crisis and who are unable to work as a result (e.g. to look after children) can also be furloughed.

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed. However, for time spent training, the apprentice must be paid the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage as appropriate.

If employees are transferred to a new employer following a change in ownership or restructure under TUPE, and that transfer takes place after 19 March 2020, the new employer can claim under the Scheme in respect of the transferring employees.

Which employees do not qualify?

Over recent weeks, the categories of excluded employees have been whittled down significantly. The main exclusions remaining are:

- employees who continue to work short or part-time hours; and
- self-employed, off-payroll workers - this category of worker will be entitled to statutory self-employed pay instead

What does furlough mean?

Furlough is not a previously recognised concept in employment law but, in essence, it means sending employees home, where there is no expectation or requirement for them to work, whilst retaining them on payroll.

Furloughed employees remain in employment throughout any period of furlough leave and continue to accrue continuous service (relevant for future redundancy exercises).

Employees who agree to be placed on furlough leave, will continue to be bound by other express and implied terms in their contract e.g. to obey reasonable management instructions, as well as ongoing obligations to protect confidentiality and to act in good faith.

It is important for employers to write to all furloughed employees to make clear the terms that will apply during furlough leave, to remind them of their continuing obligations and to signpost other assistance.



How does the Scheme work?

Employers will still have to pay furloughed employees via payroll. Wages costs up to the relevant limits will be repaid by HMRC as a grant (i.e. will not need to be repaid).

When making a claim, employers will need to submit:

- employer PAYE reference number
- number and names of furloughed employees, together with their national insurance numbers
- claim period
- amount claimed
- bank details

What sums can an employer reclaim and what sums are beyond the scope of the Scheme?

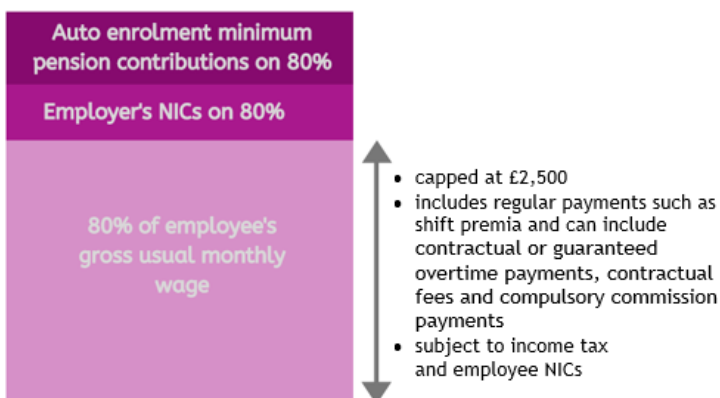
Eligible employers can submit a claim to cover wages for furloughed staff, equal to the lower of 80% of the employee’s regular salary (gross) or £2,500 a month, plus associated Employer NICs and minimum auto-enrolment pension contributions on the reduced wage. The relevant ‘wage’ for the first claim, is the salary they received in their last pay period prior to 19 March 2020.

In addition to basic pay, employers should include regular payments that they are obliged to pay such as shift premia, contractual or guaranteed overtime payments, contractual fees and compulsory commission payments. Discretionary bonus and commission payments and non-cash payments cannot be reclaimed.

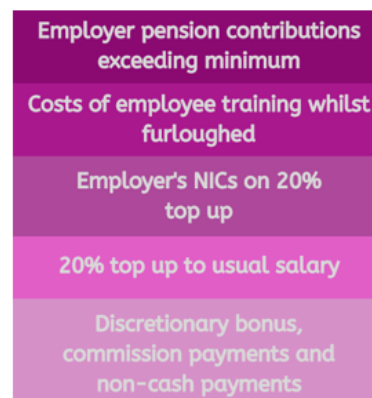
Employers can elect to provide a top-up of salary but are not required to do so. Employer NICs and pension contributions referable to that top-up will fall outside the Scheme. Salary levels can drop below National Living Wage/National Minimum Wage rates during periods of furlough leave.

This graphic summarises the payments that can be reclaimed under the Scheme and those that cannot:

What can an employer reclaim?



What might an employer pay but be unable to reclaim?





How do I calculate a claim where I have employees whose pay varies?

For salaried employees, the furlough calculation is relatively straightforward. It becomes more complicated for employees who have variable pay. The Scheme guidance provides two alternative methods of calculation in this scenario, with a direction to claim the higher of the two amounts, either:

- (i) the same month's earnings from the previous year; or
- (ii) average monthly earnings for the 2019-2020 tax year

If the employee has been employed for less than 12 months, the employer can claim for 80% of their average monthly earnings since they started work until the date they are furloughed.

For more worked examples, you should refer to the examples in the step-by-step guide [here](#)

How do I place someone on furlough leave?

It is important to recognise that furloughing staff is a change to their employment status and, in most cases, will result in a reduction in salary and so cannot be imposed without their consent. The only exception would be if there is an unusual express term in the contract which permits both the change in status and, if appropriate, pay.

In almost all cases, employers will need the employee's agreement before placing them on furlough leave. Faced with an alternative of redundancy, a period of lay-off or a process to procure agreement to become a furloughed employee, we anticipate that most employees will be willing to agree to become a furloughed worker and sign or do what is necessary to bring about that change.

Given it is a variation to terms, employers should forewarn employees of the possibility of furloughing (where circumstances allow), what this may mean and offer them some form of consultation prior to issuing a formal written request to designate them to become a furloughed worker. We recognise that in many cases time will be of the essence and therefore clear, unambiguous communications will be key. Employers should, ideally, ensure they obtain clear evidence of agreement to the change from the employee. Electronic or digital signatures should be acceptable as evidence of agreement to the variation in terms.

To be eligible for a grant, employers must issue written confirmation to their employee that they have been furloughed; verbal confirmation will not suffice. A record of this written communication must be kept for **five** years.

Is there a minimum period of furlough leave?

Employees who are placed on furlough must be furloughed for a minimum period of 3 consecutive weeks otherwise their claim will be rejected.



Can I take someone off furlough leave and then re-furlough them at a later point?

Yes, employers can place employees on furlough leave more than once during the lifetime of the Scheme and submit separate claims in respect of each period of furlough leave. Note: in each case, the period of furlough leave must last a minimum of 3 consecutive weeks.

Do I have free reign over who I can, or cannot, furlough?

In short, yes, it is an employer's choice who to furlough. Employers cannot discriminate in who they select to designate as a furloughed worker, and those they do not. Employers should select only those employees for whom there is no work to be performed, as this is a pre-condition of being placed on furlough leave. Where a selection process has been adopted, be prepared to explain (and evidence) that selection process.

Those scenarios aside, employer will be able to choose freely who / which roles to furlough and which roles are business critical or essential and still need to be performed, akin to a redundancy selection process.

NB: HMRC will retain the right to retrospectively audit all aspects of the Scheme with scope to claw back any fraudulent or erroneous claims and so employers will need to take care when submitting claims and retain appropriate documentation in support of their decision-making. There is also a new portal for employees and members of the public to 'blow the whistle' on employers mis-using or abusing the Scheme.

Can employees insist on being placed on furlough leave?

It is the employer's decision who to furlough. Employers can choose to accept voluntary requests from employees for furlough leave, but are not required to do so, particularly if there is still work for that employee to perform.

What if people refuse to agree to be put onto furlough leave, can I force them?

We would always advise that you try to obtain express consent prior to imposing a variation of this nature unilaterally. As has been said before, most employees will consent if redundancy is the natural next step.

If consent is not forthcoming, it may be possible to impose furloughed status on groups of employees through a dismissal and re-engagement process, but this should very much be viewed as an option of last resort, from an industrial relations perspective and given the risk of triggering complex and time-consuming collective consultation obligations. Specialist legal advice should be taken prior to embarking on a process to impose furlough leave on groups of staff.

What is the relationship between furlough and family leave e.g. maternity leave?

The normal rules for maternity and other forms of parental leave and pay still apply. The Scheme is only relevant to employers who wish to reclaim enhanced (earnings-related) contractual pay payable to eligible employees in addition to the normal statutory payments during periods of family leave.



Can employers compel employees to take annual leave while they are on furlough leave?

The relationship between holiday accrual / holiday pay and furlough leave is not addressed in any of HMRC's guidance. In an attempt to bridge that gap in information, ACAS have issued its own non-statutory guidance <https://www.acas.org.uk/coronavirus/using-holiday> which indicates that employees and workers can still take holiday (to include bank holidays) while they're furloughed, without them having to 'come off' furlough leave to be able to do so.

Despite the lack of binding HMRC guidance, we think it is likely that HMRC will follow the advice given by ACAS and that holiday (both statutory and contractual) will continue to accrue as if the furloughed work had been at work, and that employers will be permitted to require employees and workers to take bank holidays on the prescribed days as well as previously booked holidays in order to reduce holiday balances in the longer term.

As far as holiday pay is concerned, our view is that the proper rate of pay for holiday pay should be employees' contractual or normal remuneration and not the reduced furlough rate.

Changes to the Working Time Regulations have also been implemented to allow workers to carry forward some holiday entitlement if they have been unable to take it due to the pandemic. It is only the statutory period of 4 weeks' annual leave (20 days for full-time workers) that can be carried over into subsequent leave years under this provision, but some employers may wish to use this extension to help with workforce planning in the longer term.

More information

If you would like more information on the Scheme and how you might be able to utilise it for your business, please get in touch with Tiggy (07943 842404) or Emma (07912 395695) or drop us an email: info@torquelaw.co.uk.

14 May 2020