

Covid-19: Furlough Leave Q&A

1. Who can be placed on Furlough Leave?

The scheme applies to all 'employees' and 'workers', provided they are paid through the employer's PAYE payroll.

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme

2. Which employees can you claim for?

Employees must have been on your PAYE payroll on or before 19 March 2020 (specifically, HMRC must have been notified of the employee via an RTI submission on or before 19 March 2020).

The scheme also covers employees who have been made redundant since 28 February 2020, if they are rehired by their employer and then agree to be placed on furlough leave.

Directors and office holders can be placed on Furlough Leave. They can only continue with a limited number of statutory duties *i.e. to fulfil a duty or other obligation arising from an Act of Parliament relating to the filing of company's accounts, or provision of other information relating to the administration of the director's company*

3. Can employees whose employment terminated before the scheme was set up be rehired by their employer and placed on furlough?

Yes, anybody who stopped working for their employer on or after 28 February 2020 can be rehired and placed on furlough leave.

This includes whether the employee left the business of their own accord or in situations of redundancy.

The discretion to rehire remains with the employer.

4. Can employees be placed on furlough leave to care for children following the school closures, or for the care of a family member or friend?

Yes, the government guidance states that those who are unable to work because of caring responsibilities arising from Covid-19 can be furloughed.

It is up to the employer to agree to this.

5. Can employees who are on sick leave be placed on to Furlough Leave

The recent Treasury Direction states that an individual cannot be put onto Furlough Leave until their period of sickness absence has ended; this contradicts the latest government guidance which stated that employees who are currently off sick can be furloughed for business reasons.

If they were furloughed whilst on sick leave, employees would then no longer receive sick pay and should be paid the same as other furloughed employees. However, the Government guidance also says that furlough is not intended for short-term absences from work due to sickness, and short-term illness or self-isolation should not be a consideration in deciding whether to furlough an employee.

Based on the conflicting guidance, employers should be cautious when placing those employees who are on sick leave onto furlough leave and it advisable to wait until the period of sickness absence has ended.

6. What can an employer claim for from the scheme?

Employers can reclaim up to 80% of wage costs up to a cap of £2,500 per month, plus (not including) the associated employer NICs and minimum auto-enrolment pension contributions on that wage.

An employer can claim for any regular salary or wages that they are obliged to pay their employees. This can include basic salary, compulsory/guaranteed overtime, fees and contractual commission payments. However, discretionary bonuses (including tips), discretionary commission payments and non-cash payments should be excluded

An employer can choose to top up furlough pay to 100% of full pay, but it does not have to.

7. Can you force an employee to go on to Furlough Leave?

If your employees' contracts contain a 'lay off' clause, then you can impose this on to your employees, however lay off clauses are quite rare in modern-day employment contracts.

If your contracts do not contain a lay off clause, then you must obtain agreement in writing from each employee in order to furlough them. The best way to do this is by way of a Furlough Leave Agreement.

If an employee doesn't agree to Furlough Leave, you could consider making the individual redundant.

If you force an employee onto Furlough Leave without their agreement, this would be a breach of contract and could result in a constructive dismissal claim.

It is likely most employees will agree to the Furlough Leave if the alternative is to be made redundant

Employers should notify the employee in writing that they are being placed on Furlough Leave, inform the employee that they cannot carry out any work for them during the Furlough Leave, and get the employee to confirm their agreement in writing. An email indicating acceptance will suffice. A record of this agreement must be retained for 5 years.

8. Can I furlough employees who are on short-time working?

No, employees must not do any work for their employer during a period of Furlough Leave.

You could consider whether you could reorganise reduced work patterns to allow for some of those on short-time working to go back to full hours and the others to be furloughed. You should discuss this with employees first (see above).

9. Does the employer have to continue to pay the employee until they receive the grant from the Coronavirus Job Retention Scheme (CJRS)?

Yes, it appears that the Government will then reimburse the employer for this payment, as opposed to the employer ceasing payment to the employee and demonstrating non-payment of this to HMRC.

The Government guidance suggests employers should seek alternative financial assistance in the interim (loan) as opposed to terminating employees' contracts by way of redundancy.

10. Which employees should be placed on Furlough Leave?

The Employment Tribunals are likely to give employers a wide discretion when making the decision to furlough staff given the time constraints and urgency of the leave.

You should ensure that you do not apply a discriminatory practice to make the decision e.g. gender or race.

11. Could you prioritise the vulnerable or elderly when deciding who to place on Furlough Leave?

Yes. You should however be cautious that this does not give rise to any discrimination claims i.e. disability discrimination.

12. Could you place the vulnerable and elderly on Furlough Leave even if the business does not have a need for redundancy?

Yes.

Furlough leave can be applied to vulnerable staff who are shielding in accordance with Public Health England advice. Those members of staff who are shielding should have been provided with a letter from the NHS requiring them to do so.

Employers can request to see an employee's letter if they have asked to be placed on Furlough Leave as a result of shielding.

The extension of Furlough Leave to cover shielding staff has also been extended to those who live with someone who has been advised by Public Health England to shield.

Since the Government changed its guidance on 9 April, there is no longer any requirement that the employee would have otherwise been subject to lay off or redundancy in order to be placed on Furlough Leave.

The latest guidance from the Government also suggests that the right to place an employee on Furlough Leave extends to those who are "vulnerable", yet who do not have Public Health England letter. This would include those with asthma or pregnant women for example since, although they would not have been made redundant, they are unable to work "*by reason of circumstances arising as a result of coronavirus*", which is the new Government criteria introduced on 15 April under the Treasury Direction (see below):

An employee is a furloughed employee if:

- a) the employee has been instructed by the employer to cease all work in relation to their employment,*
- (b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and*
- (c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.*

If employees do not have a shielding letter, but are nevertheless vulnerable and you are considering placing them on Furlough Leave you should take legal advice on their specific circumstances.

13. Can you rotate furloughed employees to make it fair?

Yes.

A worker must be furloughed for a minimum of 3 weeks for their employer to be eligible to claim under this scheme, therefore employers could rotate staff on a 3-weekly basis.

The Government guidance confirms that staff can be furloughed multiple times.

14. Does the 80% mean that employees might get paid less than the national minimum wage?

Yes.

Individuals are only entitled to the National Living Wage (NLW) / National Minimum Wage (NMW) for the hours they are working.

Therefore, furloughed workers who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW.

15. Can an employee have two jobs and be on Furlough Leave for one?

Yes, if an employee had two jobs before they were put on Furlough Leave, they are able to be on Furlough Leave for one and continue to work for the other.

The Government guidance permits employees to take a second job whilst on Furlough Leave, so employees could, in theory, be receiving 80% of their salary from one employer and 100% from another. Employees must seek consent from their employer if their employment contract prohibits this.

16. Can you continue with disciplinary or grievance proceedings whilst an employee is furloughed?

Yes.

The guidance suggests that employees are unable to provide services or generate revenue; it does not prohibit anything being done under the employment contract.

The proceedings could continue but you should ensure that you use social distancing measures to comply with Government guidance.

17. How is the 80% calculated for those with earnings that vary?

If an employee has been employed (or engaged by an employment business in the case of agency workers) for a full year, employers will claim for the higher of either:

- the amount the employee earned in the same month last year
- an average of the employee's monthly earnings from the last year

If an employee has been employed for less than a year, employers will claim for an average of their monthly earnings since they started work. The same arrangements apply if the employee's monthly pay varies, such as if they are employed on a zero hours contract.

If the employee started work in February 2020, the employer will pro-rata his/her earnings from that month.

18. Do individuals have to pay tax on this?

Yes, individuals will pay income tax and NI on any payments received through the job retention scheme.

19. Will this cover the cost of employer National Insurance contributions and employer pension contributions?

Yes, employers will be able to apply for a grant to cover the Employer National Insurance contributions and minimum auto-enrolment pension contributions.

20. How will this work for those on zero hours/flexible contracts/agency workers?

This scheme aims to support all those employed through the PAYE system regardless of their employment contract, including those on zero hours contracts. Zero hours and flexible contracts can cover a whole range of working arrangements.

The 80% grant is applied to the higher of: (1) the earnings in the same pay period in the previous year; or (2) the average earnings in the whole previous 12 months (or fewer, if they have worked for less time than this, including a part-month calculation if they were taken in February).

21. Does the scheme apply to those who have already been made redundant?

The scheme will be back dated to 1 March 2020 with a view to covering those who have already been made redundant due to the Coronavirus outbreak. If firms re-employ staff made redundant on or after 28 February 2020, they are eligible to then be furloughed and the employer would qualify for the grant.

22. Can my employer sack me while I'm on furlough? Is my employer allowed to sack me as soon as the furlough scheme comes to an end?

Yes, you can still be made redundant while on furlough or immediately after. There is no requirement to bring the employee back to work after the period of furlough. If an employee is made redundant during the period of furlough, then grant payments will cease. However, in both cases normal redundancy rules and protections will apply. Where a business feels that redundancy is the only option, this must still follow the rules which include giving a notice period and consulting staff before a final decision is reached

23. What happens if an employee is on Maternity Leave, contractual adoption pay, paternity pay or shared parental pay?

Individuals who are on, or plan to take, Maternity Leave must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth.

If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

If you offer enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs that you can claim through the job retention scheme.

The same principles apply where your employee qualifies for contractual (i.e. enhanced) adoption, paternity or shared parental pay.

24. Does the Employee's regular wage include overtime?

The Government guidance is still not completely clear on this point. The latest guidance states that 'non-discretionary' overtime can be claimed under the job retention scheme.

In order to qualify as a 'regular' wage and be eligible for the grant, overtime would have to be 'legally enforceable' and not 'conditional' upon anything. We have taken this to mean that compulsory or guaranteed overtime could be included in the calculation, but voluntary overtime should not.

25. If an employee left the business of their own accord, can the employer re-hire them and place them on Furlough Leave?

Yes, if the employee was on your payroll as of 28 February 2020.

This will apply in situations such as when an employee had given their notice, but following the Covid-19 outbreak, the start date for their new role has been postponed.

Employers must give their consent to this however; employees do not have an automatic right to be re-hired and placed on Furlough Leave.

Employers should carefully consider the legal implications of reinstating staff who have already left for reasons unrelated to coronavirus, particularly in respect of what will happen when the Furlough Leave ends.

26. Can annual leave be taken during a period of furlough leave?

Yes.

27. What should employees be paid for annual leave during a period of furlough leave?

Employees should be paid 100% of their salary for the days they are on annual leave. Employers can claim 80% of this holiday pay back from the CJRS.

28. Can employers require employees to take annual leave during a period of furlough leave?

The Government have not clarified whether or not this is possible, but under the Working Time Regulations, employers can require employees to take annual leave provided they give the necessary notice.

The required notice is twice as many days as the employer requires the employee to take by way of holiday; for example, if the employer wants an employee to take 5 days leave, they must give the employee 10 days' notice of this.

There has been some speculation whether the exercise of this right will be deemed to be lawful given the fact that we are in lockdown and employees cannot properly enjoy their annual leave. We feel that employers will be able to impose annual leave in this way provided it is done in a proportionate manner i.e. staff are not being asked to use up the vast majority of their annual leave whilst they are furloughed. We do still await formal guidance on this though.

29. What does an employer need in order to claim under the CJRS?

To claim, employers need:

- Their PAYE reference number;
- The number of employees being furloughed;
- The claim period (start and end date);
- The amount claimed (per the minimum length of furloughing of 3 consecutive weeks);
- Their bank account number and sort code;
- A contact name; and
- Their phone numbers.

Once the employer has submitted their claim, HMRC will check this and, if the employer is eligible, they will pay the grant by BACS to the employer

If employers have fewer than 100 furloughed staff, they will be asked to enter details of each employee they are claiming for directly into the system - this will include their name, National Insurance number, claim period and claim amount, and payroll/employee number (optional).

If they have 100 or more furloughed staff, they will be asked to upload a file with the information, rather than input it directly into the system. HMRC will accept the following file types: .xls .xlsx .csv .ods

30. Can funds from the scheme be used to pay redundancy payments?

No.

The rationale likely being that the purpose of the scheme is to prevent redundancy and an offer an alternative.

COVID-19: Sick Pay

Employees will qualify for Statutory Sick Pay (SSP) if:-

- They have symptoms of COVID-19 and are staying at home to self-isolate for 7 days.
- They live with someone who is self-isolating (as above) and are staying at home for 14 days.
- They are already self-isolating in accordance with the second bullet-point (above), develop symptoms of COVID-19 and are staying at home for 7 days (beginning with the day the symptoms started).
- They are defined in public health guidance as extremely vulnerable and at very high risk of severe illness from COVID-19 because of an underlying health condition.
- They have been advised by a notification (sent to, or in respect of, them) that, in accordance with that guidance, they need to follow rigorously shielding measures for the period specified in the notification.