

Q&A – Changes to the Furlough Leave Scheme

The Government's furlough leave scheme (the Coronavirus Job Retention Scheme) has gone through various changes since it was first introduced in March. We have therefore produced an updated Q&A document to take into account the most recent changes that have been brought in by the Second Treasury Direction on 22 May and the Government's latest guidance on 12 June.

1. Who can now be placed on to the Furlough Leave Scheme?

The scheme will close to new entrants on 30 June 2020. This means that employees must have been furloughed for the first time by 10 June 2020 in order for them to have been furloughed for the minimum 3 weeks.

This exemption does not apply to those who have been on statutory parental leave, as they are entitled to be placed on furlough leave for the first time following this date if i.) others in your organisation have been furloughed before 10 June 2020; ii.) your employee was on parental leave before 10 June 2020; and iii.) they were on your payroll before 19 March 2020 (see 2 of the Q&A Guidance dated 24 April 2020).

The number of furloughed employees at any one time must not exceed the highest number of furloughed employees that the business had prior to 30 June 2020. For example, if in the week commencing 18 May 2020 the business had 30 employees on furlough, and this was the highest number of employees that had been furloughed at any one time, following 1 July 2020 the business could not furlough more than 30 employees at a time.

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

The Second Treasury Direction dated 22nd May 2020 in an attempt to clear up the confusion on this issue states "*where SSP is being paid or is due to be paid, the furlough period cannot begin until immediately after the end of the period of incapacity for work which SSP is paid or due to be paid, provided that the timing of the end of the period of sickness has been agreed with the employee*"

Unfortunately, the wording on this issue remains unclear. It is clear that employees who are signed off sick cannot be placed on furlough leave until the sick leave has ended. However, it isn't clear whether i.) the employer and employee can agree between them to end sick leave so that the employee can be moved onto furlough leave, or ii.) the employee must be medically fit for work before they can be furloughed. We believe the former to be the case, however we would advise you to seek legal advice on your specific circumstances if this situation arises within your business because there is some inconsistency between the wording of the First and Second Treasury Directions.

3. Does the agreement to be placed on Furlough Leave need to be in writing?

Following the Treasury Direction issued on 22nd May 2020 the guidance changed and indicated that it was not necessary for there to be an agreement in writing in order to place an employee on to furlough leave, but the employee must have simply agreed to the same and be provided with specific terms

The new guidance is not entirely consistent on this point as there are discrepancies between the Direction and the information on the direct.gov website. It therefore remains best practice for employers to seek the employee's agreement to furlough leave in writing and to then retain this agreement on file.

4. Is there a minimum period in which employees must be furloughed?

No, not anymore.

Following the amendments to the furlough leave scheme, from 1 July 2020 the requirement to be furloughed for a minimum of 3 weeks has been removed. There is no longer a minimum requirement.

However, employers' claims through the CJRS portal must be in respect of a minimum 1-week period (i.e. employers can only put 4 claims in a month, not 31)

5. Are payments that are 'conditional' included in the calculation for a regular wage?

Prior to 22nd May 2020, 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.

The Treasury Direction dated 22nd May 2020 removed the reference to payments not being conditional. Therefore, some payments that may have been excluded pre-22nd May 2020 may now be included in this calculation.

If employers are not sure whether a payment should be included under the scheme, they should take legal advice on their specific circumstances.

6. Can Employees study or carry out training while on Furlough Leave?

Yes, according to the Second Treasury Direction dated 22nd May employees can study or carry out training while on furlough without breaching the "no work" requirement, provided the purpose of this is to improve the effectiveness of the employer's business or the performance of it and does not constitute providing a service to the business, generating any income or profit for it or contributing significantly to the production of goods or services for sale.

Following the introduction of the flexible furlough scheme post 1 July 2020 (see 7 below) employees will be able to carry out any training or studying as required by the employer.

7. Can employees now work part time and still remain on Furlough Leave?

Yes, employees will be able to return to work on a part time basis. This means employers must pay employees in full for days worked and claim under the CJRS for those days not worked.

Employees and employers are free to agree any number of days and any shift pattern. This new agreement should be recorded in writing detailing how the working hours will operate. This record should be maintained for 5 years.

Employees still cannot undertake any work for their employer during periods that they are regarded as being on furlough however, so it is important for employers to keep an accurate record of which days will count as working days and which days will count as furlough.

8. What records must be kept if using the Flexible Furlough Scheme?

The Guidance states that the following records should be retained for 6 years:

- The amount claimed and claim period for each employee;
- Claim reference number;
- Calculations used to reach the figures claimed including usual hours.

When an employer places employee on a flexible furlough, they will pay them for their usual hours worked and then make claim for the remainder of their usual hours not worked, subject to the caps, detailed in 9 below.

9. How will the CJRS change from 1 August 2020 onwards

From **August 2020** employers will be required to pay employer national insurance contributions and pension contributions on the furlough pay.

From **September 2020** employers will also be required to pay 10% of employees' pay, capped at £312.50. The government will pay 70% of employees pay, capped at £2,187.50.

From **October 2020** employers will be required to pay 20% of employee's pay, capped at £625. The Government will pay 60% of employees pay, capped at £1,875.

10. What is the claim period from 1 July 2020?

The claim period must not straddle two calendar months. This is the case even if the employee is on continuous furlough leave, so any claims up to and including 30 June must be made separately to those in July.

Claim periods starting on or after 1 July must end in the same calendar month and must last at least 7 days, unless you're claiming for the first few days or last few days in a month.

When claiming under the scheme for those employees on flexible furlough, employers should not claim until they are sure of the exact number of hours the employees have worked during the claim period, as it won't be possible to submit another claim for the same period.

11. How to work out your employee's usual hours and furloughed hours?

Employers will not need to do this calculation if employees are fully furloughed.

If an employee is flexibly furloughed, employers will need to work out the employee's

- Usual hours;
- Actual hours worked; and
- The number of furloughed hours.

12. What are usual hours?

Usual hours are either:

- Contracted hours for salaries employees; or
- The employer must use the specific formulae for those with variable or zero hours rounded up to a whole hour.

The formula is available on the direct.gov website and a worked example can be found below

<https://www.gov.uk/government/publications/find-examples-to-help-you-work-out-80-of-your-employees-wages/examples-of-how-to-work-out-80-of-your-employees-wages-national-insurance-contributions-and-pension-contributions#morethanonepayperiod>

13. How to calculate furloughed hours?

To work out the furloughed hours, the number of actual hours worked should be deducted from the employee's usual hours.

When submitting a claim through the portal, employers will need to report both the usual hours and the actual hours.

14. Can employees who are shielding or with care responsibilities stay on furlough leave post 1 July 2020

Yes, as long as they have been on furlough leave prior to 30 June 2020 for the required 3-week minimum period.

**Bermans
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