

Furlough, schmerlow. Your FAQ's.

Last updated 20th April 2020

What's the Job Retention Scheme?

By designating employees as "furloughed", you will be able to recover 80 per cent of your wage costs via the Job Retention Scheme. This means that your furloughed employees will still receive at least 80 per cent of their wage from you even though they are not doing any work. It is a way of avoiding unpaid lay off or redundancy and allows you to keep employees on until you can provide work again.

Applications for the scheme opened on Monday 20 April and the online portal can be found at this [link](#).

What is a 'furloughed' employee?

The word furlough generally means temporary leave of absence from work.

A furloughed employee is someone who, rather than being dismissed for redundancy by their employer or being put on lay off, is kept on the payroll during a period where the employer does not have any work for them.

Do I need to get employees to agree to the furlough?

Unless there is a term allowing furlough in employees' contracts, you will need to get agreement from employees to designate them as furloughed them and reduce their pay (if that is what you want to do – you may decide to furlough and keep on 100 per cent pay by topping up the Govt grant).

You will need to agree the pay reduction with employees as part of the agreement to furlough because normal employment law principles apply.

On 15 April 2020, the Government released a Treasury Direction on the Scheme. It stated that employers must have agreement in writing that the employee will cease to do all work for the duration of furlough.

Do I have to collectively consult if 20 or more employees are involved?

Possibly. If there is a pre-existing consultation process in place, you may have to follow it. If there is no consultation process in place and to begin consultation on this would present difficulties with the election of representatives and actually fulfilling consultation, there may be a defence because of the special circumstances. In all but the most extreme cases, there is likely to be an expectation that some form of consultation is undertaken.

Who will the Scheme apply to?

The scheme is open to all UK employers that had a PAYE scheme in place on or before 19 March 2020, have enrolled for PAYE online and have a UK bank account. Any organisation with employees can apply, including charities, not for profit organisations and recruitment agencies.

Whilst the Government has said they do not expect many public sector employers to furlough employees, there is no complete bar on this. The guidance says "In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the Scheme may be appropriate for some staff."

When would I use the Scheme?

The Government guidance for employers says that the Scheme is for employers who have been severely affected by the coronavirus. The employee guidance says that it is to be used when the employer is unable to operate or "has no work for you to do". However, all employers are eligible to claim under the scheme and the Government recognises different organisations will face different impacts from coronavirus.

When does the Scheme start?

We are currently waiting for HMRC to release the online portal through which you can make the claim. The scheme can be backdated for furloughed employees from 1 March 2020 and it is expected that the first payments will be made by the end of April. The Scheme was initially in place for three months, but has now been extended for a further month and will run until June 2020. Further extensions may be announced.

Whose wages can I claim?

To be eligible, the individual must be PAYE and must have been on the payroll on 19 March 2020 and have been notified to HMRC through a RTI submission on or before 19 March 2020. Full time, part time, temporary and zero hours and fixed term staff can all be included as long as they are PAYE. Office holders, (including directors), salaried members of LLPs, agency workers and those who fall into the employment status category of 'worker' can be included.

Previous guidance had contained a cut off date of 28 February 2020 meaning that employers could not furlough, and claim the wages of, anyone who started after this date. The guidance was updated on 15 April 2020 to provide a new cut off date of 19 March 2020.

What do we use as the starting point for employee pay?

Salaried employees' pay is that which they earned in the last pay period prior to 19 March 2020. You can reclaim up to 80% of wage costs up to a cap of £2500 per month, plus the associated employer National Insurance contributions and minimum auto-enrolment pension contributions on that reduced wage.

Guidance published on 15 April 2020 clarifies that, if, based on previous guidance, you had calculated your claim based on the employee's salary as at 28 February 2020 (and that differed from their salary in their last pay period prior to 19 March 2020) you can choose to still use this calculation for your first claim.

The situation for those with variable/irregular pay is different. If the employee has been employed (or engaged by an employment business) for a full 12 months prior to the claim, you can claim for the higher of either:

The same month's earning from the previous year.
Average monthly earnings from the 2019-20 tax year.

If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work.

If you have previously calculated employee pay as at 28 February 2020, you can still use this calculation.

What is covered in terms of elements of pay?

The Government guidance is now that discretionary commission, bonuses and other payments are not included when calculating pay. All elements that you are obliged to pay your employees including wages, past overtime, fees, piece rate payments and compulsory commission payments can be included.

Will the payment be taxable?

Yes, payments you make to furloughed employees will be subject to PAYE and National Insurance contributions.

Will I be able to recover Employer's NI contributions and pension contributions under the Job Retention Scheme?

You remain liable for Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees. However, you can claim a grant from HMRC to cover:

- wages for a furloughed employee (equal to the lower of 80% of an employee's regular salary or £2,500 per month), plus
- the Employer National Insurance contributions associated with that (capped) payment, plus
- minimum automatic enrolment employer pension contributions in respect of that (capped) payment.

HMRC will issue more guidance on how you should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions before the scheme becomes live.

Do I have to pay 100% of the wages in order to claim?

No. You can choose to top up to 100% but do not have to. Those who choose to top up can still only claim the 80%.

Do I have to meet minimum wage with the 80 per cent?

Minimum wage applies to hours worked. So if employees are furloughed and do not work and 80 per cent of their normal earnings would take them below the NMW, this is fine.

How will I apply for the reimbursement?

You can make one claim at least every three weeks. The government will issue further guidance on the mechanics of claiming the payment, and the online portal to use, in due course.

What if I've already made redundancies?

Anyone on the payroll on 28 February 2020 who was made redundant before 19 March 2020 can be re-hired and put on the scheme. This means that the ex-employee must have been notified to HMRC through a RTI submission on or before 28 February 2020. There is no obligation to re-hire, just that you can agree to this. Employers can use the letter to withdraw a redundancy and offer furlough.

Can I agree to re-hire and furlough in any other circumstances?

Yes. Anyone who left your organisation after 28 February 2020 but before 19 March 2020 can be re-hired and placed on furlough. This means that the ex-employee must have been notified to HMRC through a RTI submission on or before 28 February 2020. However, this is not an obligation and you can decide whether to do this or not. Anti-discrimination laws are likely to apply here.

How long does furlough last?

Furlough must be taken in minimum blocks of three weeks in order to be eligible for the funding. For now, the maximum period would appear to be four months because that is how long the Government has said the Scheme will be available for. However, it may be extended.

Can I rotate employees on furlough?

Yes, it appears so. Employees can be put on furlough more than once so you can, for example, place Employee Set A on furlough while Employee Set B continue to work. Then Set B can be put on furlough while Set A come back to work. Set A can then be furloughed again etc.

Can the employee undertake any work during furlough?

No. The employee must not be working for you, or any linked or associated organisation. If they work for even an hour (during their minimum three week furlough period) you cannot claim the grant for this period. Are all types of work related activity banned during furlough?

Employees are able to undertake training and do volunteer work, as long as they do not provide services to or make any money for you or any linked or associated organisation. If training is done, it is likely that this will need to be online because of the social distancing measures in place. Furloughed employees undertaking training should be paid for the time because this will be work, albeit the kind permitted during furlough.

Can my employee get another job whilst on furlough with me?

Your normal rules on employees getting second jobs will still apply, however you may wish to be flexible in the circumstances. It will be in your best interests to continue any restrictions on other employment which may create a conflict of interest e.g. work with a competitor or client. If you do allow your employees to take on other work during their normal working hours, you should ensure that they understand that they must be available for duty when work is available again.

How do I select employees for furlough leave?

You must be careful not to discriminate when deciding who to furlough. In some cases it will be all employees, in others it will be certain departments. Where selection does need to take place, it may be appropriate to implement a similar selection period as would be used in a redundancy situation so that the most effective employees remain in work. See my separate guide "Selecting staff for furlough" for more details.

What about employees on sickness or self-isolating?

Government guidance published on 9 April 2020 confirmed that, whilst an employee receiving SSP cannot be placed on furlough, an employer is able to decide whether to place a sick employee on SSP or furlough them. This includes those who are already on sick leave, including long term sick leave, and those who fall ill during furlough. However, it is clear that it must be one or the other. Employers who decide to pay SSP (where they are eligible to receive it) to the employee cannot claim for wages under the Scheme. Where the employee is placed on furlough, SSP payments cannot be reclaimed.

What about employees who are 'shielding'?

Guidance published on 9 April 2020 appears to show a change in stance where those who are shielding are concerned. Guidance now states that employees who are shielding can be furloughed if they are unable to work. Previous guidance had stated that employers could only furlough those shielding where the employee would otherwise have been made redundant. This no longer appears to be the case.

On 16 April 2020, new legislation permitted employees who are 'shielding' to be entitled to statutory sick pay (SSP). As outlined above SSP cannot be claimed under the scheme. You will therefore need to decide if you want to furlough staff in this position or keep providing SSP to them. The government is also expected to refund up to two weeks of SSP for coronavirus related absences, but it is currently unknown when this come into effect.

What's the position with apprentices?

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed. However, apprentices must get at least the appropriate minimum wage rate for all the time they spend training which is not covered by the 80% reimbursement.

Where apprentices are furloughed or placed on unpaid leave, or where the nature of their employment changes and no longer supports their apprenticeship, the apprentice, employer and training provider should consider whether a break in learning would be appropriate.

Apprentices can be made redundant, however, specific advice should be taken on this as different rules may apply in different parts of the UK.

Employers who are subject to the apprenticeship levy payment must continue to pay this as normal; it is not recoverable under the scheme.

What's the position with agency workers?

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 it would be advised to discuss the need to furlough with any 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.

Does annual leave accrue during furlough?

Statutory minimum annual leave entitlement will continue to accrue because the contract of employment is still in existence. You may want to agree that contractual leave in excess of the statutory minimum does not accrue, however, this may present a blocker to obtaining employees' agreement.

Can annual leave be taken at the same time as furlough?

Yes. This was confirmed in guidance on 17 April 2020. However, employees must be paid their normal pay when on annual leave during furlough. The Scheme will only cover 80% of wages meaning that you will need to top up the rest to normal pay.

Can I require my employees to take annual leave during furlough?

This has still not been covered in Government guidance. In any case, you may view this as unfavourable due to the requirement to pay 100% wages.