



Employment Law Newsletter – Coronavirus Job Retention Scheme update

On Saturday 4th April 2020, the Government updated its guidance on how the scheme will work.

We have updated some answers in light of the new guidance, which are in the detail below. Some headlines are:

- To be eligible for the grant employers must now confirm in writing that an employee has been furloughed. A record of this communication must be kept for five years.
- Employees dismissed for any reason after 28th February can be rehired and furloughed (the dismissal does not have to be for redundancy).
- A furloughed employee can take a paid job elsewhere while doing no work for you.
- There is still no clarification about annual leave (whether that breaks furlough leave).
- Shielding employees can only be furloughed if you would otherwise have to make them redundant.

How long will the scheme last?

It will be open until at least 31st May 2020. You can use the scheme anytime until this date, but you may backdate your claim to 1st March 2020. The Government expects the scheme to be up and running by the end of April 2020.

Who can claim?

Any business, charity or recruitment agency in the UK that had created and started a PAYE payroll scheme on 28th February 2020 and has a UK bank account.

Public sector organisations may use the scheme, but the Government expects the majority of public sector employees to continue providing essential public services.

For which employees can you claim?

Provided that the furloughed employee was on your PAYE payroll on 28th February 2020, how you employ them doesn't matter so it includes full and part time employees, apprentices and those you engaged through an agency or on a flexible or zero hour contract.

What about those you hired after 28th February 2020?

The scheme doesn't permit you to claim for employees that you hired after 28th February 2020.

Can you furlough someone after hearing the announcement and then claim back to March 1st even though they have been working since that date?

No – the scheme is backdated to 1st March to cover those who have not been working.

Can you furlough Company Directors?

Yes, salaried company directors are eligible to be furloughed if you pay them via PAYE. Your board of directors would need to decide that individual salaried directors should be furloughed, formally adopt the action as a decision of the company, note it in the company records and communicate it in writing to the director(s) concerned.

How can you reconcile furloughed Company Directors' statutory duties with your instruction not to work?

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

This also applies to salaried directors of their own personal service company.

We don't yet know specifically what duties will be permitted by the scheme.

What about Agency Workers?

As the end client, you should speak to your agency about whether you require its workers. Where agency workers are paid through PAYE, they are eligible to be furloughed, including where they are employed by umbrella companies.

Furlough should be agreed between the agency and the worker. During furlough, agency workers should perform no work for, through or on behalf of the agency that has furloughed them, including for the agency's clients.

What if you've already made someone redundant?

If you made employees redundant, or they stopped working for you on or after 28th February 2020, you can re-employ them, put them on furlough and claim for their wages through the scheme.

However, you're not obliged to do so.

Can you ask a furloughed employee to do some work?

No. They can't work for you. That means they cannot provide services or generate revenue. You can allocate any critical business tasks to staff that are not furloughed. You also cannot ask them to work for associated or 'linked' companies.

What about volunteering?

Your furloughed employee can volunteer, if they do not provide services to or generate revenue for, or on behalf of your organisation, or a company linked to, or associated with your organisation.

Can a furloughed employee do paid work for another non linked organisation?

If the employment contract allows, furloughed employees may undertake other employment while on furlough, and this will not affect the grant that you can claim under the scheme. Make sure they tell you, as the furloughed employee must be able to return to work for you if you decide to end their furlough and they must be able to undertake any training that you require while on furlough.

Can you ask employees to engage in training?

Yes, provided that the training doesn't involve providing services to, or generating revenue for, or

on behalf of your organisation, or a company linked to or associated with your organisation. You must pay at least the appropriate national minimum wage even if this is more than the 80% of the employee's wage that will be subsidised. If that is the case, you will need to top it up. You should agree the training you require and record it in writing with the other requirements of furlough.

Will a furloughed employee have to pay tax?

Yes. The employee's wage will be subject to usual income tax and other deductions.

Can you use the scheme if you've just cut an employee's hours or reduced their pay?

No. You will have to continue paying the employee through your payroll and pay their salary, subject to what you have agreed with them. However, there is nothing to prevent you transferring an employee to furlough in the future.

Should I reduce employee's hours or furlough them?

You will need to decide what duties and employees are critical to your business. You may have some work for employees to do but not enough for a full time job attracting a full wage. You will need to decide whether the benefit of maintaining your revenue stream and continuing to engage with your customers outweighs the cost of continuing to pay employees without Government support.

Can you rotate furlough between your employees?

Yes, you can, subject to the requirement that you must furlough employees for a minimum of three weeks. Your employees may want to be furloughed, particularly if you are paying them full pay and working would require them to leave home. Moving employees on and off furlough leave may avoid resentment from those who you initially need to work.

How should you agree furlough?

Discuss and agree any proposed change to the contract of employment with your employee. Confirm in writing that you have furloughed this employee and keep records.

When deciding to whom to offer furlough, equality and discrimination laws will apply in the usual way. To be eligible for the grant you must write to your employee confirming that they have been furloughed and keep a record of this communication for five years.

What about those on unpaid leave?

You can only furlough an employee that you placed on unpaid leave after 28th February 2020.

Can you furlough an employee who is on Statutory Sick Pay?

Employees on sick leave or self-isolating should get Statutory Sick Pay (SSP). You cannot claim for employees while they're getting SSP, but you can furlough them and claim the grant for their wages once they are no longer receiving SSP.

The Government guidance to employees says that those on sick leave or self-isolating because of coronavirus (COVID-19), should speak to their employer about whether they can be furloughed after this.

Can you furlough shielding employees?

Yes, you can claim for furloughed employees who are shielding in line with public health guidance, or who need to stay home with someone who is shielding, if they are unable to work from home and you would otherwise make them redundant. The Government guidance to employees says that those who are shielding should speak to their employer about whether they plan to place staff on furlough.

Can you furlough employees who can't work because they are caring for others?

Yes, those looking after their children or others for whom they are responsible are eligible to be furloughed if they cannot work from home, in the same way as those staying with people who are

shielding.

What about an employee with more than one employer?

If your employee has more than one employer, they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually. Alternatively, they can be put on furlough by one employer and continue to work for, and receive their normal wage from, another employer.

Can you furlough an employee on a fixed term contract?

Yes, you can, along with renewing or extending it, if appropriate, during the furlough period without breaking the terms of the scheme.

Where an employee's fixed term contract ends because you do not extend or renew it you will no longer be able claim the grant for their wages. Remember that, currently, the scheme is due to run until 31st May 2020. We do not know if, or for how long it will be extended, so consider this when making any decision about renewing any fixed-term contracts.

For what period can you claim?

Grants will be pro-rated 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 you make the decision, or when you write to them to confirm their furloughed status.

For what payments can you claim?

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.

Are you still liable for Employer National Insurance and pension contributions?

Yes, you remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of your furloughed employees, but you can claim for these.

However, you will not be able to claim for additional National Insurance or pension contributions you make because you choose to top up your employee's salary or any pension contributions you make that are above the mandatory employer contribution.

How does the scheme treat 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 you provide 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.

Apprenticeship Levy and Student Loans

Both the Apprenticeship Levy and Student Loans should continue to be paid as usual. Grants from the Job Retention Scheme do not cover these.

National Minimum Wage

Individuals are only entitled to the National Living Wage (NLW), National Minimum Wage (NMW) or Apprentices Minimum Wage (AMW) for the hours they are working or treated as working under minimum wage rules.

This means you can pay furloughed workers the lower of 80% of their salary or £2,500 per month even if, based on their usual working hours, this would be below their appropriate minimum wage. However, time spent training is treated as working time for the purposes of the minimum wage calculations and must be paid at the appropriate minimum wage. Minimum wage rates increased from 1st April 2020.

What happens after you have submitted your claim?

Once HMRC has received your claim and determined you are eligible for the grant, it will pay it via BACS payment to a UK bank account.

You should make your claim in accordance with actual payroll amounts at the point at which you run your payroll or in advance of an imminent payroll.

You must pay the employee all the grant you receive for their gross pay, no fees can be charged from the money that is granted.

Can you make an employee redundant after you have furloughed them?

Yes. After furlough you can decide whether to allow the employee to return to work or make them redundant. You can make someone redundant while on furlough or afterwards. The position on whether they would be entitled to notice at full pay or furlough pay levels has not been addressed. You may want to take legal advice should this arise.

What if employees refuse to go on furlough?

The Employee Guidance, as opposed to the general guidance, starts 'If you and your employer both agree, your employer might be able to keep you on the payroll'. This suggests that if you put employees on furlough without their agreement, even if you have consulted, collectively or otherwise, you may not be eligible for the grant. The option would still remain to make them redundant.

It also says:

If your employer asks you to go on furlough and you refuse you may be at risk of redundancy or termination of employment, depending on the circumstances of your employer. However, this must be in line with normal redundancy rules and protections.

What about those on family leave?

If an employee is on maternity leave, adoption leave, paternity leave or shared parental leave, the normal rules for maternity and other forms of parental leave and pay apply. Pregnant employees must take at least two weeks' maternity leave (four weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement.

Most women will prefer to take at least six weeks' maternity leave given that the first six weeks of statutory maternity pay is paid at 90% of normal weekly earnings

Although there may be a short term financial benefit for a woman who is only entitled to statutory maternity pay in taking only six weeks' maternity and then being on furlough leave, the scheme is currently only due to run until 31st May 2020 - although it may be extended.

A woman who cuts her maternity leave short on this basis could be required to return to work earlier than she expected.

What if you pay enhanced maternity pay?

If you pay more than Statutory Maternity Pay (SMP), this enhanced contractual maternity pay is included within the wage costs that you can claim through the scheme. The same principles apply to contractual adoption pay, paternity pay or shared parental pay.

Although the guidance doesn't expressly state that an employee can simultaneously be on furlough and maternity leave, there would be no need to give guidance on how to reclaim enhanced maternity pay unless someone on maternity leave could be furloughed.

Maternity Leave will start as usual and SMP will apply as usual. If you pay more than SMP, this enhanced contractual maternity pay is included within the wage costs that you can claim through the scheme.

Can annual leave be taken during furlough?

The guidance does not answer this question and there is a risk that if you designate a furloughed employee to be on annual leave you may be liable for their full wages during that time. You may also be unable to return them to furlough leave or even claim the grant for the period they were on annual leave.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

watershedhr.com

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