

The New Coronavirus Job Retention Scheme – Updated guidance published (this guidance replaces our previous guidance dated 23 March 2020)

The introduction of a new Coronavirus Job Retention Scheme (also referred to as Furlough leave) was announced by the Government on 20 March 2020. Further guidance was published on 27 March 2020.

The full guidance can be viewed here: <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

Under the scheme, all UK employers, regardless of size or sector, can claim a grant from HMRC to cover 80% of the basic salary of employees who are not working but kept on the payroll ("furloughed"), of up to £2,500 a calendar month for each employee. Employers can choose to top up the remaining 20% if they wish.

An additional sum will be paid in respect of employer National Insurance contributions and pension contributions. The Government will issue more guidance on how employers should calculate their claims for employer National Insurance Contributions and minimum automatic enrolment employer pension contributions before the scheme becomes live.

The scheme will be backdated to 1 March 2020, be open for at least three months from 1 March 2020 and will be extended if necessary. HMRC are urgently working to set up the new system of reimbursement, but the government hopes that the first grants should be available by the end of April.

The key points relating to the scheme are:

Are all businesses covered by the Scheme?

Any organisation with employees can apply, including charities, recruitment agencies and public authorities. The government does not expect public sector employers to use it as long as central government continues funding wage costs in the normal way. With agency employees, the scheme is only available for agency employees who are not working.

What employees are covered?

The scheme applies to all employees on PAYE who were employed on 28 February 2020. Individuals engaged after this date are not covered by the scheme. This means that it covers workers as well as employees, including those engaged on zero hours contracts.

Anybody who was on the payroll on 28 February and has since been made redundant can be rehired and put on the scheme.

Employees that have been furloughed have the same rights as they did previously. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments.

Can an employer insist on putting someone on Furlough leave?

If the employer has a clause in the contract which allows for the employer to either introduce lay off, or short time working, then the answer is Yes. No consent is required.

If the employer has no lay off clause in the contract, consent to send the employee home and reduce pay by 20% or more will be needed. However, if an employee refuses to consent to be sent home on Furlough leave, then they risk being made redundant. It is therefore anticipated that most employees will agree.

If the employer is proposing to top up the wages of employees of Furlough leave to normal levels, arguably consent will not be needed as most employment contracts do not include a right to attend work or carry out work if employees are being paid as normal.

Where the employer is not placing the whole workforce on Furlough Leave, a fair and objective selection process should be conducted to avoid discrimination claims.

The new guidance states that to be eligible for the grant, employers should write to their employee confirming that they have been furloughed and keep a record of this communication.

Can an employee request their employer puts them onto Furlough leave?

Yes, an employee can request this, but the employer does not have to agree. It is the employer's decision which employees to place on Furlough leave, if any.

It seems that it is also the employer's decision whether to place employees on Furlough leave, or make them redundant. Potentially redundant employees do not have a right to require their employer to place them on Furlough leave as an alternative to redundancy. However, it is hoped that many employers will see the new scheme as preferable to business closure and making redundancies.

How do you select for Furlough leave?

The employer needs to determine which employees they require and those which can be sent home. This will require fair and objective criteria, similar to a redundancy situation.

What does the reimbursement cover?

Employers can reclaim up to 80% of wage or salary costs up to a cap of £2,500 per month, plus the associated employer National Insurance contributions and minimum auto enrolment pension contributions on that wage or salary. Fees, commissions and bonuses are not included.

For full time and part time salaried employees, the employee's actual salary before tax, as of 28 February should be used to calculate the 80%.

How do we work out what to pay to zero hours workers?

The scheme will apply to those workers who were engaged by their employer as at 28 February 2020. For these workers the employer can claim for the higher of (i) the same month's earning from the previous year (eg earnings from March 2019); or (ii) average monthly earnings in the 2019-20 tax year.

If the worker has been engaged for less than a year, the employer can claim for an average of their monthly earnings since they started work. If the worker only started in February 2020, the employer should use a pro-rata for their earnings so far to claim.

When the employer has worked out how much of a worker's wages the employer can claim for, the employer must then work out the amount of Employer National Insurance Contributions and minimum automatic enrolment pension contributions that can be claimed.

Are employers obliged to top up the remaining 20%? What about if the employee is only paid National Minimum Wage?

There is no obligation to top up wages. However, withholding 20% of an employee's salary, will however, amount to breach of contract and unlawful deduction of wages unless the employment contract include a right to lay off/impose short time working or consent is given by the employee. It is expected that the majority of employees will consent as the alternative will be redundancy.

Individuals are only entitled to the minimum wage for the hours they work. So if they are furloughed and do not work and 80% of their normal earnings would take them below the minimum wage based on their normal working hours, they still only receive 80% as they are not working. However, they are entitled to be paid national minimum wage for any time spent training during Furlough Leave.

What about employees who are already on sick leave?

Employees on sick pay or self-isolating cannot be put on Furlough Leave, but can be furloughed afterwards. They will be entitled to sick pay in accordance with their employment contract.

Employees who are not attending work to prevent being contaminated with Coronavirus (such as vulnerable individuals) can be placed on Furlough Leave.

Can holiday be taken during Furlough Leave?

This is not explicitly covered in the guidance. However, if an employee wishes to designate a period of Furlough Leave as holiday, the employer would be obliged to pay normal salary/wages for this period. Employers may therefore prefer to refuse requests for holiday during Furlough Leave.

How do we treat employees on family leave (such as maternity or paternity leave)?

If an employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance (or similar), the normal rules apply.

Employees who qualify for SMP (or similar), 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 an employer offers enhanced contractual pay to employees on Maternity Leave (or similar), this is included as wage costs that the employer can claim through the scheme. The same

principles apply where the employee qualifies for contractual adoption, paternity or shared parental pay.

The guidance does not prohibit women on maternity leave agreeing to return to work early and then being furloughed, or electing to change to shared parental leave and then being furloughed. Any requests should be dealt with fairly and employers can require employees to comply with the normal notice requirements to change their return to work date. Usually employees are required to give 8 weeks' notice of the change in date.

If an employee refuses Furlough leave can we make them redundant?

Yes, subject to normal employment law considerations including consultation.

If we put an employee or worker on Furlough Leave, can we get them to come back to work and then put them on Furlough Leave again if we need to?

Furlough Leave must be taken in minimum blocks of three weeks to be eligible for funding. Businesses could consider rotating staff of Furlough Leave on a three week basis. There is nothing in the Government guidance which prohibits rotating furlough leave amongst employees, provided each employee is off for a period of at least three weeks.

Can employees work for our business whilst on Furlough Leave?

The employee must not be working at all. If they work for even an hour during Furlough Leave they are not eligible. However, they are able to undertake training and do volunteer work, provided they do not provide services to the employer or make any money for their employer.

If an 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.

Whether an employee can take a second job after being placed on Furlough Leave is not explicitly covered in the guidance. However, as the scheme applies to individual employers, it suggests that this is not prohibited although employees will still be subject to any conditions in their contract of employment relating to other employment

What will be the process for getting the money back?

The government are setting up a portal. It is not up and running yet. To make a claim you will need the following details:

- your ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- your bank account number and sort code
- your contact name
- your phone number

You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim.

Who pays the employee during Furlough leave?

The employer continues to pay the employee and claims reimbursement from HMRC.

Tax Treatment

Wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

Employers will be liable to pay Employer National Insurance contributions on wages paid, as well as automatic enrolment contributions on qualifying earnings unless an employee has opted out or has ceased saving into a workplace pension scheme.

Payment made to employers under the scheme must be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles. Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

Members of the Taylor Walton Employment Team are available to assist you with any employment law queries or concerns arising out of the Coronavirus Pandemic.

In the first instance please contact: Alec Colson on alec.colson@taylorwalton.co.uk or on 07711 589574.