

Taylor Walton Guidance – 20 April 2020

The Coronavirus Job Retention Scheme (“the Scheme”)

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 and updated on 4 April, 9 April¹⁵ and 20 April 2020. The full guidance can be viewed here: <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>.

On 15 April 2020, the Treasury gave a direction to HMRC setting out the legal framework of the Scheme. This direction must be followed by HMRC when it makes payments to employers under the Scheme. Although amendments to the direction are possible, it is likely to be the definitive guidance on how the Scheme works. Where there are inconsistencies between the previously issued Government guidance and the Treasury direction, employers should follow the details set out in the Treasury Direction. Please note that the guidance below is subject to any further information published by the Government in relation to the Scheme.

Between 18 and 20 April, other guidance on aspects of the Scheme has been issued including:

- a step by step guide for employers relating to making claims. HMRC states that every employer who makes a claim must read this guide prior to submitting their claim (link below)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880099/Coronavirus_Job_Retention_Scheme_step_by_step_guide_for_employers.pdf

- a guide to calculating what can be claimed under the scheme. This includes a link to an online calculator to assist employers to calculate the amounts that can be claimed under the Scheme (link below)

<https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme>

Under the Scheme, eligible employers 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 Scheme will be backdated to 1 March 2020, and will now be open for at least four months from 1 March 2020 until 30 June 2020. HMRC opened an online claims portal on 20 April 2020 and it is expected that payments will be received by employers within 6 days of submitting their claim.

The key points relating to the Scheme are:

1. Are all businesses covered by the Scheme?

The Treasury direction states that any organisation with employees can apply, including charities, recruitment agencies and public authorities provided that they had a pay as you earn ("PAYE") scheme registered on HMRC's real time information system for PAYE on **19 March 2020**. This is referred to in the Treasury direction as a qualifying PAYE scheme. Government guidance states that it is also necessary for the employer to have a UK bank account.

Where an employer has more than one qualifying PAYE scheme, they will need to submit separate claims for each scheme.

The Government stated in its guidance that it does not expect public sector employers to use the Scheme as long as central Government continues funding wage costs in the normal way.

2. What employees are covered?

The Treasury direction confirms that the Scheme applies to all employees on PAYE who were employed on 19 March 2020 (previously 28 February 2020) provided the employer had submitted real time information payroll data by that date. This means that workers as well as employees are covered by the Scheme, including those engaged on zero hours contracts.

In order for the employer to claim payments under the Scheme in respect of a particular employee, the Treasury direction states that an employee must also fall within the definition of a "furloughed employee".

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. Please see question 5 below in relation to how to designate an individual as a “furloughed employee”.

Employees that were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on a real time information submission on or before 28 February) and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the Scheme if the employer re-employs them and puts them on Furlough Leave. This suggests that the Scheme only covers those individuals dismissed between 28 February and 19 March 2020 who are subsequently re-employed although this is not clear. Specific advice should be sought if you are considering re-employing a former employee in order to place them on Furlough Leave.

Prior to the Treasury direction being issued, it was not entirely clear whether the Scheme was intended to apply only to those employees who would otherwise be made redundant. The direction clarifies that the Scheme is not limited to those employees who would otherwise be made redundant. It applies to any who are furloughed "by reason of circumstances as a result of coronavirus or coronavirus disease".

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

3. Does the Scheme cover Apprentices?

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed.

However, apprentices must be paid at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) including the new rate from 1 April 2020 for all the time they spend training. This means that the employer must cover any shortfall between the amount that can be claimed for their wages through the Scheme and their appropriate minimum wage.

The Government has issued further guidance on Apprentices and their training arrangements at:

<https://www.gov.uk/Government/publications/coronavirus-covid-19-apprenticeship-programme-response/coronavirus-covid-19-guidance-for-apprentices-employers-training-providers-end-point-assessment-organisations-and-external-quality-assurance-pro>

4. Does the Scheme cover any other individuals?

Yes, office holders (including directors), salaried members of Limited Liability Partnerships (LLPs), agency workers (including those employed by umbrella companies) and workers can be furloughed under the Scheme. The Treasury direction clarifies the extent to which directors can undertake their duties to a company during a period of Furlough Leave and sets out further details in relation to payments to LLP members.

Directors - the board of the company can decide that one or more directors should be furloughed. This should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned. The Treasury direction states that a director who is furloughed can only undertake work to fulfil a duty or other obligation arising from an Act of Parliament relating to the filing of the Company's accounts or provision of other information relating to the administration of the director's company. This is a very narrow interpretation of directors' duties.

These rules will also apply to salaried individuals who are directors of their own personal service company.

LLP members - those who have been designated as employees for tax purposes ('salaried members') under the Income Tax (Trading and Other Income) Act 2005 are eligible to be furloughed. The terms of the LLP agreement may need to be varied by a formal decision of the LLP. The reference salary for the Scheme is the LLP member's profit allocation, excluding any amounts which are determined by the LLP member's performance, or the overall performance of the LLP.

Agency Workers - Furlough Leave should be agreed between the agency, as the deemed employer, and the worker, though it would be advisable 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.

5. Can an employer insist on putting someone on Furlough Leave?

The Treasury direction states that in order for an employer to make a claim under the Scheme in respect of an employee, the employee must have been instructed by the employer to cease

all work in relation to their employment (see question 2 above). The Treasury direction also states that such an instruction will only have been given if the employer and employee have agreed in writing that the employee will cease all work in relation to their employment. Agreements can be recorded by electronic means including an exchange of emails.

This means that in order to make claims under the Scheme, according to the Treasury direction it will be necessary for employers to reach agreement with employees to be placed on Furlough Leave and the agreement must be recorded in writing. Essentially, this will require the employer to write to the employee seeking consent to place them on Furlough Leave and the employee should confirm their agreement in writing. However, if an employee refuses to consent to be sent home on Furlough Leave, then they risk being made redundant. The evidence to date is that most employees will agree.

This part of the Treasury direction is different to information previously given in Government guidance. The guidance originally stated that whilst employers should write to their employee confirming that they have been furloughed and keep a record of this communication for 5 years, employers only had to reach agreement with employees in relation to any changes to the employment contract which were needed to place an employee on Furlough Leave. The guidance also states that the Scheme is subject to normal employment law.

The guidance on this point led most employment practitioners to take the view that where the employment contract includes the right to lay off staff, it was not necessary to seek an employee's consent to place them on Furlough Leave. Many employers have already written to their staff confirming that they are being placed on Furlough Leave in accordance with a contractual right to lay off. Given the requirements of the Treasury direction in relation to seeking agreement, many employers who have relied on a contractual right to lay off have written to affected employees to ask them to confirm that they agreed to go on Furlough Leave and have not worked for the employer since the date they went on Furlough Leave.

In response to criticism about confusion caused to employers by the inconsistencies between the guidance and the Treasury direction, the guidance was updated on 20 April 2020 to state the following:

“To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response. A record of this communication must be kept for five years.”

Given the wording of the Treasury direction and the vague nature of the updated guidance, our view is that the safest approach is to agree any Furlough Leave arrangements with staff

in writing, regardless of whether or not the employment contract includes a layoff clause. The written agreement should be kept for 5 years. The danger for the employer of failing to demonstrate that an agreement has been reached with an employee may mean that the employee does not meet the definition of a “furloughed employee” set out in the Treasury direction and that the employer cannot therefore make claims under the Scheme for that employee’s wage costs.

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.

6. 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. 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 Scheme as preferable to business closure and making redundancies. If the employee makes a request, the employee should be asked to make the request in writing. The employer should then respond in writing setting out the terms of the agreement which the employee should be asked to sign. The signed agreement should be retained for 5 years.

7. 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. Once a selection exercise has been carried out, employers should contact the relevant employees to seek agreement to place the employee on Furlough Leave.

8. 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, per employee, plus the associated employer National Insurance Contributions and minimum auto enrolment pension contributions on that wage or salary.

HMRC states that employers should carefully review the new guidance relating to making claims under the Scheme issued between 18 and 20 April 2020. Links are on page 1 of this document.

Claims for reimbursement should be started from the date that the employee finishes work and starts Furlough Leave, not when the decision is made, or when they have written to confirm their furloughed status.

For full time and part time salaried employees (i.e. those who earn an annual salary in respect of a particular number of hours per year and are paid in regular, equal instalments), the

employee's actual salary before tax, as of 19 March 2020, should be used to calculate the 80%.

The Treasury direction states that the amount of salary for the employee must disregard anything which is not "regular salary or wages". This means that any performance related bonus or discretionary payments (including tips), any conditional payments and any non-financial benefits will be excluded.

In addition, the Treasury direction states that the employer:

- cannot claim for any salary which is "conditional on any matter"; and
- can claim for earnings which it "reasonably expects to be paid" to the employee. This seems to include earnings which the employee has agreed to defer (see question 25 below) until the employer receives reimbursement under the Scheme (provided they are not conditional on the Scheme paying out). The Government guidance also suggests that payments in respect of past or guaranteed overtime will be covered.

The additional guidance on making a claim issued on 20 April 2020 states that the amount you should use when calculating 80% of your employees' wages is regular payments you are obliged to make. This is stated to include non-discretionary overtime, non-discretionary fees, non-discretionary commission payments and piece rate payments. Further, according to the guidance it is not possible to claim for non-cash payments or non-monetary benefits such as a company car and salary sacrifice schemes (including pension contributions) that reduce an employees' taxable pay.

The new guidance also clearly states that the entirety of the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme.

The Treasury direction states that employers cannot claim additional National Insurance or pension contributions which are made because the employer chooses to top up an employee's salary or any pension contributions made above the mandatory employer contribution. This is repeated in the new guidance notes issued on 20 April 2020.

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

For these workers the employer can claim for the higher of (i) the same month's earnings from the previous year (e.g. 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.

10. 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.

Individuals are only entitled to the national 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 and employers will be obliged to top up payments in such circumstances.

11. How do we treat benefits and salary sacrifice schemes?

The reference salary used to calculate 80% should not include the cost of non-monetary benefits provided to employees (for example, insurances and company vehicles). 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 the employer provides benefits to furloughed employees, these should be continued in addition to the wages that must be paid under the terms of the Scheme unless an alternative agreement can be reached with employees. The new guidance on making a claim issued on 20 April 2020 states that the entirety of the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money and that no part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme.

Some employees may wish to cease salary sacrifice arrangements at the current time in order that their reference salary for the purposes of the Scheme is higher. HMRC has acknowledged that the current Covid 19 crisis justifies such a change although this matter is not specifically covered in the Treasury direction. This means that it may be possible for the employer and the employee to agree a change to the contract of employment to cease the salary sacrifice arrangement and increase normal salary payments and that the new higher salary can then be used for the purposes of working out the 80% figure to be claimed under

the Scheme. Employee pension contributions would then be deducted from their salary in the usual way.

12. What about employees who are on sick leave?

Employees cannot be on sick leave and Furlough Leave at the same time.

However, updates to the Government guidance state that short term illness and self-isolation should not be a consideration in deciding whether to furlough an employee. Employers can decide to furlough employees who are on sickness absence. However, the Treasury direction states that where an employer decides to furlough an employee on sickness absence, the period of Furlough Leave will not commence until the period of sickness absence during which statutory sick pay is being claimed has expired.

Where an employee who has been placed on Furlough Leave becomes unwell, the Treasury direction states that there is no requirement to take the employee off Furlough Leave and place the employee on sick leave. It may be preferable for both the employee and the employer for an unwell employee to remain on Furlough Leave.

13. Can we furlough employees who are shielding in accordance with public health guidance?

Employees who are unable to work because they are shielding in line with public health guidance (or need to stay at home with someone who is shielding) can be placed on Furlough Leave.

14. What about employees who cannot work due to caring responsibilities?

Employees who are unable to work because they have caring responsibilities resulting from coronavirus can be furloughed. For example, employees that need to look after children can be furloughed.

15. Employees on fixed term contracts

Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the Scheme. Where a fixed term employee's contract ends because it is not extended or renewed, the employer will no longer be able to claim under the Scheme for them.

16. Employees on Unpaid Leave or Sabbaticals

Employees who are on unpaid leave or sabbatical cannot be placed on Furlough Leave during the period that the unpaid leave was intended to continue.

17. Employees who have been transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

A new employer is eligible to claim under the Scheme in respect of the employees of a previous business transferred after 19 March 2020 where TUPE applies to the change in ownership. Normal eligibility rules regarding the employees who are covered by the Scheme will apply (see question 2 above).

18. Can holiday be taken during Furlough Leave?

This is not explicitly covered in the Treasury direction. However taking account of guidance issued by ACAS and the Government, the position seems to be that the normal rules relating to holiday entitlement and pay will apply and a period of holiday leave will not break the Furlough Leave.

This means that employees (and workers) will continue to accrue annual leave as normal in accordance with their employment contract during Furlough Leave. Employees will still be entitled to a minimum of 5.6 weeks (28 days for a full time worker) of paid annual leave in this holiday year, regardless of whether or not they have been furloughed. If employees usually receive more than 5.6 weeks annual leave, the employer and employee can agree to vary the employee's holiday entitlement as part of the employee's agreement to be placed on Furlough Leave (as long as the total amount does not fall below the 5.6 weeks minimum).

Employees can request and take holiday as normal during Furlough Leave (subject to employer agreement) including bank holidays. However, employees must be paid at their normal rate of pay and employers will be obliged to top up the amount they are reimbursed from HMRC to the employee's normal pay.

An employer can require an employee to take holiday on particular dates but must give the employee notice twice the period of holiday to be taken. For example, if the employer requires the employee to take 1 week holiday, they must give at least 2 weeks' notice of this. If employees are being directed to cancel holiday, a period of notice equal to the period of holiday due to be taken must be given. This is subject to any provisions in the employment contract allowing for different notice requirements.

HMRC has confirmed that the holiday policy with regards to Furlough Leave will be kept under review.

19. 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 and the Treasury direction do 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.

20. If an employee refuses Furlough Leave can we make them redundant?

Yes, subject to normal employment law considerations including consultation.

21. 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 consecutive weeks (21 days) to be eligible for funding. Employees can be taken on and off Furlough Leave and businesses could consider rotating staff on Furlough Leave on a three week basis subject to agreeing the arrangements with the relevant employees (see question 5 above).

22. Can employees work for our business whilst on Furlough Leave?

The employee must not be working at all for the employer who has put them on Furlough Leave or any linked or associated organisation. This includes providing services and generating revenue. 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.

23. Can an employee take a new job with another employer during Furlough Leave?

Subject to any conditions in their contract of employment relating to other employment, an employee who has been put on Furlough Leave can take up new employment with another employer whilst on a period of Furlough Leave.

24. What will be the process for getting the money back?

HMRC has set up a claims portal which opened on 20 April 2020. To make a claim you will need the following details:

- your ePAYE reference number
- the number of employees being furloughed
- National Insurance numbers for the employees you want to furlough
- Names of employees you want to furlough
- Payroll/works number for the employees you want to furlough
- Your Self-Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number
- 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.

If you have fewer than 100 furloughed staff you will be asked to enter details of each employee you 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 you have 100 or more furloughed staff you 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. The file should include the following information for each furloughed employee: name, National Insurance number, claim period and claim amount, payroll/employee number (optional).

You should retain all records and calculations in respect of your claims.

HMRC aims to pay employers within 6 working days after the submission of their claim. Employers will then be able to claim 14 days before payments are due to employees.

25. Who pays the employee during Furlough Leave?

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

Unless an employee agrees to defer their salary or wages payment until such time as the employer receive payment under the Scheme, the employer should continue to pay employees at the normal time. Whilst this may cause cash flow issues for some businesses, failing to pay employees at the normal time may lead to claims for breach of contract and/or unlawful deductions from wages.

26. Tax Treatment for employees and employers

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. These sums are reimbursed under the 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.