

Covid-19: Job Retention Scheme – FAQs for employers

As a result of the Coronavirus outbreak many employers are faced with the reality that they cannot cover staff costs and/or will not be able to in the foreseeable future.

In response, the Government has announced a new initiative, the Coronavirus Job Retention Scheme (Scheme) to assist employers during these uncertain and unprecedented times.

Note: FAQs as at 1 May 2020 – changes since the last edition are highlighted in blue.

These FAQs outline details of the Scheme as known to date. Given the fast-paced situation, always check the latest UK government guidance (currently: <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>)

The HMRC online portal for applying under the Coronavirus Job Retention Scheme went live as of 20 April 2020. Employers can now submit applications under the Scheme.

A key change is that the Direction issued on 15 April under the Coronavirus Act 2020 requires **written agreement between** employee and employer that work will cease during furlough for a valid grant claim to be made. **This is inconsistent with the associated guidance republished on 20 April 2020.** The guidance requires only that furlough is agreed and employers confirm in writing that employees have been furloughed – further detail below. Evidence of written agreement to cease all work will not be necessary to claim under the Scheme.

Employees who were on payroll as at 19 March are now eligible to be furloughed. Further detail below.

These FAQs are intended for general guidance only. Please contact us for advice on specific situations.

1. Coronavirus Job Retention Scheme

1.1 What is the Coronavirus Job Retention Scheme?

The Scheme is a temporary measure introduced by the UK Government to assist employers adversely affected by the Coronavirus outbreak. The Scheme will allow employers to apply to HMRC for a grant of 80% of furloughed employees' monthly wages (up to a cap of £2,500 per month). It will also allow employers to claim associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised furlough pay.

1.2 What are furloughed employees?

'Furlough' is not a term ordinarily used in UK employment law. Under the Scheme, furlough is being used to describe a period of absence that is agreed between the employer and employee, as an alternative to the employee being laid off or made redundant.

1.3 What happens to an employee who has been furloughed?

The employee will essentially be laid off work, i.e. they will be asked not to attend the workplace and will not be given any work for a minimum period of 3 weeks. However,

they will remain on the payroll and in employment. They will be paid up to 80% of their wages during furlough. Employers can top up to 100% but are not obliged to do so.

1.4 Can furloughed employees carry out the occasional piece of work for me while they are on furlough?

The Government has been quite clear that employees on furlough should not undertake **any** work for or on behalf of their employer **or any linked or associated organisation**. This will include working for another organisation that is controlled by their employer, or an organisation controlled by a person related to their employer.

If an employee does carry out work for you or any linked or associated organisation on furlough, grant funding for their wages will be unavailable under the Scheme.

To be eligible for the grant funding you **must** instruct the employee to cease all work in relation to their employment with you and the employee **must** agree to this in writing. Such agreement can take the form of email or other electronic communication. This requirement stems from the formal HMRC Direction and is inconsistent with subsequent guidance which requires only that furlough is agreed and employers confirm in writing that employees have been furloughed. If you do not have consent in writing contact us to discuss.

The latest version of HMRC guidance on the Scheme confirms that agreement to be furloughed can be by collective agreement with a trade union.

The employee can however take part in voluntary work or voluntary training, provided that they are not providing services to you or for your benefit or generating revenue on your behalf or any linked or associated organisation. However, where a furloughed employee undertakes training at your request, they should receive at least the National Minimum Wage for this time. This may mean that you have to top up wages for time spent training.

[HMRC guidance dated 30 April confirmed that furloughed employees who are union or non-union representatives can undertake duties and activities for the purposes of individual or collective consultation of employees or other workers – provided they do not thereby provide services or generate income for their employer or an associated or linked organisation.](#)

1.5 Can a furloughed employee work for another employer during a period of furlough?

Yes, provided that (1) under the employee's contract of employment they are permitted to work for another employer, and (2) the work is not for a linked or associated organisation (see 1.4 above), they can do so whilst on furlough leave.

Where an employer takes on a new employee who is furloughed from other employment, they will have to refer to the fact the employee is on furlough leave when completing the HMRC 'Starter Checklist for PAYE'.

1.6 Will the employee be taxed during furlough leave?

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

1.7 Can employees take holiday (or be required to take it) during furlough?

Updates to the Government Guidance for employees provides that employees can take holiday during furlough and should be paid 100% of pay. This will require employers to top up the furlough grant.

Government guidance is currently silent on whether an employer can compel an employee to take holiday during furlough. Contact us to discuss if you are considering directing employees to take holiday.

The government's policy on holiday during furlough is being kept under review and may change.

1.8 What employment rights do furloughed employees have?

Furloughed employees continue to have the same employment rights as they would have, had they not been furloughed and were continuing to work. These rights include;

- the right to Statutory Sick Pay
- Maternity and Other Parental Rights
- the right not to be unfairly dismissed
- the right to a redundancy payment

Their holiday entitlement will continue to accrue during furlough leave.

1.9 What is the benefit of this Scheme?

In the present circumstances, many employers will already have considered measures such as lay-off, short-time working, unpaid leave and redundancies. This scheme provides employees with generous Government funded wage protection and job security. It may also prevent employees triggering redundancies, potentially avoiding substantial redundancy pay-outs.

2. Eligibility under the Scheme

2.1 Who can apply to the Scheme?

The Scheme is open to all UK employers. Therefore, any UK business, regardless of its size, including recruitment agencies, charities and non-profit organisations will be able to apply. However, the business must have had a PAYE payroll system in place on or before

19 March 2020 be enrolled for PAYE online and have a UK bank account. HMRC guidance at 15 April 2020 sets out in more detail what information employers will need to make a claim. See 3.6 below.

If your business has gone into administration, the administrator will be able to apply to Scheme on its behalf.

Where employees of a previous business have transferred over to you after 19 March 2020, you may be able to claim under the Scheme, where either the TUPE or PAYE business succession rules apply in relation to the change in ownership.

Where employers are receiving public funding for staff costs, employers should in general use these funds to continue to pay staff and not furlough them.

2.2 Will I still be able to apply, even although my business was not forced to shut down by the Government at the time staff were furloughed?

The purpose of the Scheme is to assist businesses who cannot maintain their current workforce because operations have been severely affected by the Coronavirus outbreak. If you elected to close your offices and place your employees on lay-off, as you experienced financial hardship or there was no work coming in, this is likely to be sufficient for you to apply to the Scheme.

2.3 Which employees can I claim for?

You may make a claim under the Scheme for the following employees;

- full-time employees,
- part-time employees,
- employees on agency contracts,
- employees on flexible or zero-hour contracts

However, the employee must have been on your PAYE payroll

- on or before 28 February and this must have been notified to HMRC on an RTI submission on or before 19 March 2020; or
- on or before **19 March 2020** and this must have been notified to HMRC on an RTI submission on or before **19 March 2020**.

Office holders, salaried members of LLPs, agency workers and workers are also eligible to be furloughed provided they were paid via PAYE.

Foreign nationals on all categories of visa are eligible to be furloughed and grants under the scheme are not counted as 'access to public funds'.

2.4 Can an employee on a fixed term contract be furloughed?

Yes, and their contracts can be renewed/extended during the period of furlough.

An employee on a fixed term contract can be re-employed, furloughed and a claim made under the Scheme, if their contract expired after 28 February or 19 March and an RTI payment submission for the employee was notified to HMRC on or before 28 February or 19 March respectively.

Unexpired fixed term contracts can be renewed and employees furloughed if an RTI payment submission for the employee was notified to HMRC on or before 19 March 2020.

2.5 Can an apprentice be placed on furlough?

Yes, an apprentice can be placed on furlough. They can also continue to train whilst on furlough leave. However, where you require an apprentice to continue training, you must pay them at least the applicable Minimum Wage for the time that they spend training. This may mean that you have to top up the amount you can claim in respect of the apprentice's wages under the Scheme.

2.6 Can company directors be placed on furlough?

The Government confirmed on 4 April 2020, that salaried company directors can be placed on furlough. The difficulty in applying to the Scheme in respect of directors, is that they have statutory duties and obligations which they owe to their company. This would on the face of it render directors' ineligible under the Scheme, as one of the eligibility criteria is that a person placed on furlough leave cannot work for their employer.

However, the Government has confirmed that furloughed directors can perform their statutory duties (provided they do no more than would reasonably be judged necessary for that purpose) on furlough leave. The work a director is able to do while on furlough has been narrowly defined as that required to fulfil a statutory duty or statutory obligation relating to the filing of company accounts or provision of other information relating to the administration of the company.

Caution should be exercised to ensure that furloughed directors do not perform work which they do not have a statutory duty/obligation to carry out during this time.

Where the board of a company decides that a director 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 concerned.

For the avoidance of doubt, a director's dividends are not considered to be part of their salary and therefore cannot be claimed for under the Scheme. [Company directors who are paid annually are eligible to claim, provided they meet other conditions.](#)

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

2.7 I have already made several of my employees redundant, does this stop me from applying to the Scheme?

No, provided that the employees who were made redundant meet the conditions set out in 2.3 above and were on payroll at 28 February 2020, you can still make a claim under the Scheme. However, you would need to rehire those employees and then place them on furlough.

2.8 What if an employee resigned can I re-hire them and place them on furlough?

Yes, the Government guidance provides that where an employee was on your payroll as of 28 February 2020, had been notified via an RTI submission before that date and stopped working for you after that date and prior to 19 March 2020, you can rehire them, then place them on furlough and claim their furloughed wages through the scheme. This will apply even if you re-employ the employee after 19 March 2020. However, it should be noted that this is discretionary, and you are not obliged to do so.

There are a number of considerations before rehiring an employee who has previously resigned or stopped working for you, including that employees will continue to accrue continuous service and potentially employment rights (e.g. right to claim unfair dismissal or a redundancy payment) and will accrue holiday during furlough.

In the event that a former employee has been subsequently employed and placed on furlough by their current employer, you should not seek to re-employ them and put them on furlough.

2.9 Can I apply to the Scheme to top up pay for employees on short-time working arrangements?

Unfortunately, you cannot apply to the Scheme in respect of employees who have agreed to reduced hours and reduced pay. Furloughed employees cannot carry out any work for their employer during the period of furlough. This means employees working reduced hours are ineligible under the Scheme.

2.10 I have an employee that is due to start their maternity leave, are they eligible under the Scheme?

The normal rules apply where employees are eligible and due to take maternity leave (or paternity leave, adoption leave or shared parental leave). Employers are liable to pay SMP (and other statutory pay for the leave referred to above) and cannot claim for it via the Scheme.

However, where you offer your employees enhanced contractual pay during these periods of leave, you can include this as a wage cost and claim through the Scheme.

2.11 I have an employee who is currently on unpaid leave, are they eligible under this Scheme?

If an employee went on unpaid leave on or before 28 February, they cannot be placed on furlough until the date that you previously agreed with your employee that they would return to work from this period of leave.

The Direction provides that employees who start a period of unpaid leave/sabbatical before or after 19 March 2020 may not be furloughed. This is inconsistent with associated guidance and we await an update.

2.12 I have an employee with childcare responsibilities, are they eligible under the Scheme?

Yes, the Government guidance provides that where an employee cannot work because they have caring responsibilities resulting from coronavirus (including having to take care of a child) they can be furloughed.

2.13 One of my employees has two jobs, can I place them on furlough if they are going to continue to work for their other employer?

The Government has made it clear that where an employee has multiple jobs with multiple employers, these jobs should be treated separately. Therefore, you can place the employee on furlough while they continue to work for their other employer and receive their normal wages in respect of that job. As the jobs are dealt with separately the ability to claim up to 80% of the employee's monthly wages (up to a cap of £2,500 per month) will apply to each employer.

2.14 I have an employee who is currently self-isolating, are they eligible under this Scheme?

The scheme is not intended to cover short term absences due to self-isolating or sickness and is for a minimum of 3 weeks. Therefore, generally, if an employee is self-isolating or absent short term due to sickness, they should receive Statutory Sick Pay or contractual sick pay as applicable - and while receiving this will not be eligible to be placed on furlough.

The guidance provides that if while the employee is on sick leave you decide for business reasons that you will need to place them on furlough, you can proceed to furlough the employee on sick leave (along with other employees). However, you would need to ensure that the employee stopped receiving statutory sick pay as they would be deemed a furloughed employee and entitled to furloughed wages at this stage. The furloughed wage must be at least the rate of SSP.

Caution is needed here as **the Direction** is contradictory and states that where an employee is entitled to SSP they are not eligible to be furloughed. Contact us to discuss.

Vulnerable employees who are 'shielding' in accordance with public health guidance and unable to work may be furloughed. The Government has also announced that you can furlough individuals who need to stay at home with someone who is shielding and are

therefore unable to work.

2.15 If I place an employee on furlough leave and they subsequently become sick, are they still furloughed, or should they receive statutory sick pay and contractual sick pay where applicable?

Updated guidance on 9 April clarifies that furloughed employees who become sick must receive at least SSP, but it is up to their employer to decide whether to move them on to SSP or keep them on furlough at the furlough pay rate.

In the event that a furloughed employee becomes sick and is moved onto SSP, employers will no longer be able to claim for the furloughed wages. It should be borne in mind that employers are required to pay SSP themselves, although smaller employers may qualify for a rebate of SSP for 14 days. If employers keep the employee on furlough, they remain eligible to claim for the furloughed wages through the scheme.

3 Applying to the Scheme

3.1 What steps should I take to apply to the Scheme?

- First, discuss with affected employees the proposal to place them on furlough leave. This will involve considering your workforce and identifying whether you are unable to maintain your workforce because your operations have been severely affected by coronavirus.
- If contracts of employment contain a lay-off clause, placing the employee on furlough should be relatively straightforward as the alternative to agreeing to furlough is likely to be unpaid lay-off.
- Even where there is no contractual lay-off clause, the alternative to agreeing to furlough is likely to be redundancy and furlough a better option.
- Discuss the background to the proposal, observing social distancing requirements. Explain that, as an alternative to redundancy or lay-off, and because of the impact of coronavirus on your operations, you propose to apply for grant funding for up to 80% wages under the Scheme, and to progress this employees will need to agree to being furloughed/to cease all work for you.
- Write to employees seeking consent to relevant changes to their contractual terms and conditions. Record the date furlough started. Keep a record of their written consent for 5 years.
- **The Direction published on 15 April 2020 provides that you should also write to your employees instructing them that they must cease working for you during furlough leave and request that they agree to this in writing. This is inconsistent with later associated guidance. It is thought that HMRC will accept claims without requiring evidence of the employee's written agreement to cease all work. In all circumstances an auditable written record of agreement (however reached) should be kept for 5 years.**
- Where more than 20 employees are involved, you **may** need to engage in a collective consultation processes in order to seek consent to this change to terms and conditions. Contact us to discuss.

- Submit pay details via the HMRC online portal which is now open for applications. It is expected that you will receive payment within six working days of your application.

3.2 I still require some of my staff to continue working, how do I decide which staff will be furloughed?

When deciding who to place on furlough leave, equality and discrimination laws will apply in the usual way. Options may include the following:

- Identify business-critical staff – who do you need to remain at work to ensure the business is best able to survive? That may mean furloughing junior staff before more senior colleagues but could also mean retaining a more junior member of the team if they have unique core skills. Document your reasoning.
- Consider rotating furlough so that staff are on furlough leave for at least 3 weeks then at work for a number of weeks. The benefit of this is that it would give all staff the opportunity to receive 100% pay for a period and then 80% of furlough pay.
- Ask staff if they wish to volunteer to be placed on furlough and receive 80% of their pay.
- Produce objective selection criteria and score employees in a similar way to a redundancy exercise. Contact us to discuss if this approach is required.

3.3 What if I ask to furloughed staff to return to work, can I place them back on furlough at a later date?

The Government has confirmed that you can place an employee on furlough multiple times – provided that each period of furlough is for a minimum period of 3 consecutive weeks. [The latest guidance confirms that each period of furlough can be extended by any amount of time while the employee is on furlough until the scheme ends.](#)

3.4 What if an employee refuses to agree to being furloughed?

We do not think many employees will refuse to being furloughed given the alternative may be redundancy. Clear and open communication with employees about the reasons for the proposed furlough leave and the alternatives will minimise issues. If any staff do refuse, contact us to discuss options, including redundancy.

3.5 What period of notice am I required to give employees before they are furloughed?

There is no minimum required period of notice. For some, placing staff on furlough will be time critical and must be done as soon as possible. For others there may be more time to explain the reasons and alternatives to staff. Being as open and transparent as possible will minimise the risk of problems. Communications to employees designating them as furloughed should set out the date it will take effect.

If you are planning to furlough more than 20 employees contact us to discuss as collective consultation requirements **may** apply.

It may help to designate an initial furlough period and set review dates, which may result in the furlough period being shortened or lengthened.

3.6 What information will I need to make a claim under the Scheme?

When making your application to the Scheme, you will need the following information:

- your ePAYE reference number
- the number of employees you have furloughed
- National Insurance numbers for the employees you want to furlough
- Names of employees you want to furlough
- Payroll/employee number for the employees you want to furlough (optional)
- your Self Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number
- the claim period (start and end date of furlough)
- the amount claimed for (minimum length 3 consecutive weeks)
- your bank account number and sort code
- your contact name
- your phone number

You should have all this information to hand when applying via the HMRC online portal. The Government step by step guidance for employers applying to the Scheme provides that once started the application must be completed and cannot be returned to at a later date. There is no return facility, therefore once information has been entered into the portal, you cannot go back and amend this. The application will time out after 30 minutes of inactivity.

You will be required to calculate the amount you are claiming for under the Scheme.

If you have placed fewer than 100 staff on furlough, you will be required to manually enter the above information in respect of each individual employee.

If you have placed more than 100 staff on furlough you will not be required to manually enter details for each employee, however you will need to upload a file containing this information onto the online portal.

You should retain all records and calculations you have carried out in respect of each claim you make under the Scheme.

4. Funding under the Scheme

4.1 What can I claim under the Scheme?

You are be able to apply using the HMRC portal for funding for certain wage costs in relation to your furloughed employees. These comprise:

- for full time and part-time salaried employees, the lower of 80% of their salary before tax or £2,500 per month

- where an employee's hours vary and they have been employed for 12 months, the higher of (a) the same month's earnings from the previous year, or (b) average monthly earnings in the 2019-2020 tax year
- where an employee's hours vary, and they have been employed for under a year, average monthly earnings since they started work
- for employees who started in February 2020, pro-rated earnings to date
- Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on the furlough pay.

In calculating reference pay, you can claim for any regular payments you are obliged to pay employees, including wages, past overtime, fees and compulsory commission payments. *Discretionary* bonus (including tips) and commission payments and non-cash payments are excluded.

Employers must pay all the grant they receive under the scheme to furloughed employees in the form of money – and not use it to subsidise benefits or otherwise reduce the subsidised wage.

The funds that you will receive from HMRC in respect of a furloughed employee will be prorated if the employee was furloughed for only part of the pay period.

4.2 How do I claim for employees placed on furlough after a period of statutory leave?

Statutory leave is a broad term encompassing statutory maternity and paternity leave, shared parental leave, adoption leave, sick leave and the recently introduced parental bereavement leave.

To calculate what you can claim for in respect of furloughed employees who have recently returned from such leave, you should refer to point 4.1, bearing in mind that the employee's reference salary (for salaried employees) should be actual salary not sums received during statutory leave.

Caution is needed if employees return from statutory leave when they were not reasonably expected to do so – the Direction suggests that such employees will not be eligible to be furloughed. A good paper trail to show a planned return will be important.

4.3 How long will I need to wait before receiving this funding?

The HMRC online portal for applying to the Coronavirus Job Retention Scheme went live on 20 April 2020. According to the Government's Step by Step Guide for employers applying under the Scheme (accessed here: 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) employers will receive payment six working days after making their application.

As you will be required to pay furloughed employees 80% of their wages in the interim, this may present some cash-flow issues. If this is the case you should consider other Government initiatives, including government loans.

4.4 Can I defer payment to furloughed employees until such times as I receive funding under the Scheme?

The Government guidance and Direction do not specifically address this point and the following remains subject to further guidance/clarity.

The furlough scheme is a reimbursement model, premised on employers paying employees and then claiming grants under the Scheme. Some employers, due to cash-flow concerns are seeking to agree with employees to defer payment of their furloughed wages until the Scheme pays out. If this course is adopted, you would need to make it clear that payment is simply deferred until receipt of the grant and is **not conditional** on the Scheme paying out.

4.5 How long will the Scheme provide this funding?

The Government has confirmed that where the Scheme applies, they will provide this funding for at least **four** months from March 2020 to **30 June 2020**. Grants will only be payable from the point employees are designated as furloughed.

4.6 Do I need to pay employees the difference between the 80% that I can claim under the Scheme and their normal wage?

Provided that your employees agree to being paid 80% of their wages or the statutory cap of £2,500 (i.e. the sum you can claim under the Scheme) you are not required to top up so that they are receiving normal income, but you can do so.

4.7 How will I receive the funding?

After you have made your claim using the HMRC portal and provided you are eligible for the grant, HMRC will pay you via BACS payment to the UK bank account provided in the application form.

The above advice is based on Government information provided so far, and is subject to change as more details become available. It is provided for general guidance only and we recommend you seek advice on specific issue.

For further guidance and support, you can contact:

Ben Doherty, Partner and Head of Employment law
bendoherty@lindsays.co.uk
0141 302 8460



Kate Wyatt, Partner in Employment law
katewyatt@lindsays.co.uk
01382 317182