

The Coronavirus Job Retention Scheme and furloughing employees

Introduction

The UK Government announced the Coronavirus Job Retention Scheme (the 'Scheme') on 20th March 2020 as part of its response to assist businesses, business owners and individuals through the financial difficulties arising from the coronavirus outbreak. They first produced Guidance on the Scheme on 26th March 2020 but have updated that Guidance 7 times. This article is based on the latest Guidance, at the time of writing, which was issued on 23rd April 2020. The UK Government has also announced a comparable scheme to protect the self-employed.

This article is intended to provide an overview of the Coronavirus Job Retention Scheme and answer a range of questions relating to the Scheme. It aims to assist business owners, directors, managers and employees to understand what the Scheme covers, how it is intended to work and when they may be able to use it.

Overview of the Scheme

What is the Coronavirus Job Retention Scheme?

In short, the Scheme seeks to provide income protection for those employees, who would otherwise be laid off or made redundant during the coronavirus outbreak. It does so by making payments to employers, who apply under the Scheme in relation to qualifying employees. Eligible employers will be able to reclaim up to 80% of the wage costs of furloughed employees up to a cap of £2,500 per month together with associated Employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on that subsidised furlough pay.

To which employers is the Scheme available?

The Scheme is available to all UK employers (including businesses under the management of an administrator) that are able to satisfy the following criteria. The employer must:

- (a) **UK place of business** – have a place of business in the UK;
- (b) **Payroll scheme** – have created and started a PAYE payroll scheme by 19th March 2020;
- (c) **Enrol for PAYE online** – have enrolled for PAYE online;
- (d) **UK bank account** – have a bank account in the UK; and
- (e) **Furloughed employees** – have placed at least 1 employee on furlough.

To which employers is the Scheme NOT available?

The UK Government does not expect the Scheme to apply to the following categories of UK employers in whole or in part:

- (a) **Public sector organisations** – This is because the majority of public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.
- (b) **Organisations receiving public funding for staff costs** – This is because employers are expected to use that money to continue to pay staff in the usual fashion and, therefore, not furlough them. There may be some exceptions where they are partly public funded.

What is a furloughed employee?

Neither the term 'furlough' nor the term 'furloughed employee' are commonly used in the UK. In the Government Guidance, a 'furloughed employee' is referred to as an employee "on a leave of absence". Employees on furlough

cease working for their employers and do not earn a salary. However, technically, they still retain their jobs for the purposes of continuity of employment. The Scheme is aimed at providing a safety net to reduce the number of employees, who would be made redundant or laid off, and to provide them with a reduced replacement income paid by the state. Employers, whose operations have been affected by the current crisis, can therefore choose to keep employees on their payroll and apply for a grant to recover a proportion of their employees' wages.

To which furloughed employees does the Scheme apply?

In order to qualify under the Scheme, an employee must satisfy the following criteria:

- (a) **Contract of employment** – The employee may be employed under any type of contract (full-time, part-time, agency contract, flexible contract or zero-hour contract). There is no requirement for that contract to be in writing in order for it to qualify.
- (b) **Commenced employment** - The employee must have been employed on 19th March 2020. It should be noted that the Scheme will also cover employees who have been made redundant since 28th February 2020, if they are rehired by their employer and then placed on furlough. The rules in relation to rehiring, furloughing and qualifying under the Scheme are referred to below.
- (c) **On PAYE payroll** - The employee must have been on the relevant employer's PAYE payroll on or before 19th March 2020.
- (d) **Not working** - The employee must not carry out any work for or on behalf of the employer (or any linked or associated employer). This includes providing any services or generating revenue. In relation to employees on agency contracts, it only applies to those who are not working.

Employees made redundant since 28th February 2020

An employer can re-employ employees, put them on furlough and claim for their wages from the date on which you furloughed them on the following bases:

- (a) **Employees who stopped working for you after 28th February 2020** – This applies as long as the employee was on the employer's PAYE payroll on 28th February 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 28 February 2020.
- (b) **Employees who stopped working for you after 19th March 2020** – This applies as long as the employee was employed on 19th March 2020 and was on the employer's PAYE payroll on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19th March 2020.

These rules apply similarly to fixed term contracts, which expired after each of the above dates and where RTI submissions notifying payment in respect of the relevant employees had been made to HMRC. The fixed term contracts (including those which have not expired) can be extended or renewed. However, this does not apply to fixed term contracts which began and ended between 28th February 2020 and 19th March 2020.

To which furloughed employees does the Scheme NOT apply?

The Scheme will not apply to the following categories of UK employees, in whole or in part:

- (a) **Hired after the qualifying date** - Employees hired after 19th March 2020.
- (b) **RTI submission date** – Employees for whom no RTI submission has been made on or before 19th March 2020.
- (c) **Unpaid leave**- Employees placed on unpaid leave, unless they were placed on unpaid leave after 28th February 2020. They may be furloughed once their unpaid leave finishes.
- (d) **Sick leave** - Employees on short-term sick leave or self-isolating should receive Statutory Sick Pay and should not be furloughed unless it is for business reasons. However, they may be furloughed once their sick leave or self-isolation finishes. Employees on long-term sick leave or who are being shielded may be furloughed. Statutory Sick Pay cannot be claimed for the same period of time as an employee is on furlough.

- (e) **Maternity leave** - Individuals who are on or plan to take Maternity Leave must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth. The normal rules will apply to employees eligible for Statutory Maternity Pay (SMP) or Maternity Allowance. It should be noted that any enhanced (earnings related) contractual pay to women on Maternity Leave is included as wage costs and can be claimed through the Scheme.
- (f) **Contractual adoption** - The same principles apply as maternity leave.
- (g) **Paternity leave** - The same principles apply as maternity leave.
- (h) **Shared parental pay** - The same principles apply as maternity leave.

What sums can be included in a claim?

The Scheme covers the following wage costs:

- (a) **Salary** - The relevant employee's gross salary as at 28th February 2020 (up to the lower of 80% of their regular wage or £2,500 per month);
- (b) **National Insurance** - Employer's National Insurance Contributions on (a); and
- (c) **Pension** - Minimum automatic enrolment employer pension contributions on (a). This is 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

What sums cannot be included in a claim?

The initial Government Guidance specifically excluded fees, commission and bonuses from any claim. This was altered to exclude them to the extent that they are discretionary. However, it appears that no other sums can be included in a claim, including the value of benefits in kind, except salary, employer's National Insurance Contributions and minimum automatic enrolment employer pension contributions up to the relevant caps.

How to calculate your claim under the Scheme

The calculation is simple for full time and part time salaried employees. Where an employee's pay varies then the claim should be calculated as follows:

- (a) **Employed over 12 months** – the higher of either (i) the same month's earning from the previous year, or (ii) average monthly earnings from the 2019-20 tax year.
- (b) **Employed before 1st February 2020 but less than 12 months** – the average of their monthly earnings since they started work.
- (c) **Employed after 1st February 2020** - a pro-rata amount for their earnings so far.

Once the amount of salary for which a claim can be made has been determined, the relevant amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions, for which a claim can be made, should be calculated.

When can support be claimed?

HMRC launched an online service for Scheme claims on 20th April 2020.

You will only be able to submit one claim every 3 weeks. That is the minimum period for which an employee can be furloughed. However, claims may be backdated to 1st March 2020, where appropriate.

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.

What information you will need to make a claim

In order to make a claim, you will need to calculate the amount you are claiming and then be able to provide the following information:

- (a) your ePAYE reference number;
- (b) the number of employees being furloughed;
- (c) the National Insurance numbers of the employees being furloughed;
- (d) the names of the employees being furloughed;
- (e) the payroll/works number for the employees being furloughed;
- (f) your Self Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number – we suggest that you ensure that you have all information available;
- (g) the claim period (start and end date);
- (h) amount claimed (per the minimum length of furloughing of 3 weeks);
- (i) your bank account number and sort code;
- (j) your contact name; and
- (k) your phone number.

HMRC will retain the right to retrospectively audit all aspects of your claim.

How will support be paid?

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

Once the Scheme has been closed by the government, HMRC will continue to process the remaining claims before terminating the Scheme.

When will payments be made under the Scheme?

HMRC has stated that payments should be received within 6 working days of the application being made but has requested employers not to contact it unless more than 10 working days have passed since the claim was made and the payment has not been received in that time.

Frequently asked questions in relation to the Scheme

Section 1 – Who can be furloughed?

Q: What is the different between being furloughed and being laid off?

A: The Scheme only applies where an employer would otherwise be making the employee redundant or laying them off.

A lay off occurs when an employer requests an employee to stay at home or take unpaid leave. Where a contract of employment (or a national agreement for the industry or a collective agreement with a recognised trade union) permits, an employer can lay off an employee when it is temporarily unable to give them paid work. The legislation relating to temporary lay-offs is complex and little-used in practice. In essence, it provides employees who have been laid off for four or more consecutive weeks or six weeks in any 13-week period with a right to claim a redundancy payment in certain circumstances. There is a statutory wage protection scheme for employees who are laid off without pay but the amounts are very low.

Employees who are on furlough under the Scheme or on temporary lay-off retain continuity of employment. However, whilst an employee on temporary lay-off may not be entitled to any payment (other than under the very limited statutory wage protection scheme), under the Scheme an employee will still receive salary up to the Scheme cap.

Whilst it is not yet clear, it does not appear that an employee on furlough under the Scheme will have the right to claim a redundancy payment on a similar basis to an employee on temporary lay-off.

Q: Will furloughed employees be entitled to redundancy pay?

A: Whilst it is not yet clear, it seems unlikely that an employee on furlough under the Scheme will have the right to claim a redundancy payment. However, an employees' continuity of employment will continue whilst on furlough. Accordingly, if an employee who has been on furlough is dismissed by reason of redundancy, that employee will be eligible to make a claim for statutory redundancy pay where he qualifies.

Q: Can employees taken on after 28th February 2020 be furloughed?

A: The Scheme will not apply to employees taken on after 28th February 2020 unless the employee was on the employer's PAYE payroll on or before 19 March 2020. The Scheme will not apply to employees taken on after 19th March 2020. It may be that employers decide to terminate the contracts of such employees by notice as they will not have statutory protection.

Q: Can employees who have already been made redundant be furloughed?

A: The Government Guidance now makes it clear that this will be possible where they were made redundant after 28th February 2020. However, such employees would need to be rehired by the employer first. That may give rise to some complex issues relating to their original redundancy including the status of any statutory redundancy payment that has been made.

Q: Can employees who have already been dismissed (other than by reason of redundancy) be rehired and furloughed?

A: This seems to be unlikely. However, it is not yet clear.

Q: Can employees who have already been placed on reduced days/hours/pay be furloughed?

A: In short, yes. However, it may be that their salary for the purposes of calculating their claim will be reduced accordingly. The position is not yet clear. It is also unclear as to whether an employer (probably in agreement with the employee) may reverse the arrangements with regards to reduced days, hours or pay before placing the employee on furlough (in much the same way as rehiring a redundant employee and placing him on furlough appears to be permitted). Logically, the position should not be different.

Q: Can employees who are on maternity leave be furloughed and, if so, how does that impact what they get paid?

A: It seems likely that an employer will be able to furlough staff on maternity leave (or about to go on maternity leave) with their consent. Employers will have to pay the statutory 6 weeks' pay at 90% without reduction. Thereafter, subject to any enhanced maternity pay rights, they will only receive pay in accordance with the Scheme. It should be noted that any enhanced (earnings related) contractual pay to women on Maternity Leave is included as wage costs and can be claimed through the Scheme.

Q: Can an employee on sick leave or family leave return to work early so that they can be furloughed?

A: The position is not yet clear. The Government Guidance provides that employees who are on sick leave (or who are self-isolating) should receive statutory sick pay where they qualify. Once the period of sick leave (or self-isolation) ends, they will be entitled to return to work and, therefore, provided they qualify may be furloughed. However, the Government Guidance makes it clear that vulnerable employees who are shielding in line with public health guidance can be placed on furlough.

Section 2 – How do you furlough?

Q: Does an employer require consent to furlough an employee?

A: Any change to a contract of employment usually requires the agreement of the parties. Placing an employee on furlough is a significant change to the contract. Sometimes a contract of employment provides an employer with the right to lay-off an employee. As the concept of 'furlough' is not generally used in the UK, it is unlikely that it will be included in a contract of employment. Therefore, unless an employer intends to top up the relevant employee's pay to 100% of their usual pay, it is likely that consent will be required (either individually or collectively via a trade union (or employee representatives) provided they have the authority to agree contractual changes on behalf of other employees). In any event, that would be the safest course for employers to do so. The Government Guidance states "Employers should discuss with their staff and make any changes to the employment contract by agreement."

Q: Does an employee need to document furloughing an employee?

A: In short, yes. At the very least, to be eligible for the subsidy, employers will need to write to the relevant employees confirming that they have been furloughed (assuming the employees have agreed to this change – see above) and keep a record of this communication for 5 years. The employee does not have to provide a written response to the employer. However, confirmation is a useful record of the communication.

However, as furloughing any employee will involve a change in the terms of the relevant contract of employment, the safest course for employers would be to enter into a formal contract varying the existing contract of employment.

Q: What should a furloughing agreement include?

A: The contents of furloughing agreements will vary depending on the terms of the employee's contract of employment. However, they may include the following:

- (a) **Parties** - Names and addresses of the parties;
- (b) **Contract** - Cross-reference to the existing contract of employment;
- (c) **Grounds** - Reason for furloughing (that is, as a result of the Coronavirus crisis and an alternative to redundancy);
- (d) **Commencement** – The date on which furlough starts;
- (e) **Furlough period** - This may be fixed or variable (permitting the period to be extended or shortened), although the minimum period of furlough under the Scheme is three weeks;
- (f) **Reviews and contact** – Any proposed review and/or contact dates during furlough;
- (g) **Pay** – The new payment terms during the Scheme;
- (h) **Pensions and other benefits** – The new terms during the Scheme;
- (i) **Other variations** – Any other variations during the Scheme;
- (j) **Subject to the Scheme** - It should be subject to the terms and conditions of the Scheme and, potentially, any future changes to the Scheme.

It is not yet clear what must be included in the communication from the employer to the employee confirming that the employee has been furloughed nor how that communication may take place but it appears that any communication which is consistent with employment law will be sufficient. Equally, it is unclear what evidence HMRC may require at a later date to verify the grant application.

Q: What happens if an employee refuses to consent to be furloughed?

A: The Government Guidance makes it clear that employers should speak to their employees, make changes to contract by agreement and comply with equality and discrimination laws when making decisions in relation to the furloughing process. However, where an employee refuses a reasonable request to be placed on furlough with the necessary changes to their employment, it may be that the employer is able to dismiss the employee fairly after

following a proper process based on that refusal. In that scenario, the employer would not be dismissing for redundancy. As the circumstances may vary significantly, the employer should take legal advice and follow a proper process.

Section 3 – How do you decide who to furlough?

Q: Does an employer have to furlough all employees?

A: No. An employer does not have to furlough all employees, it can decide to furlough some but keep some working. However, an employer must follow a proper process, which is likely to be akin to a redundancy selection procedure.

Q: How does an employer decide who to furlough?

A: An employer should follow a fair and proper process, which is likely to be akin to a redundancy selection procedure. Employers should prepare fair selection criteria and implement a fair procedure in deciding to whom furlough leave should be offered. The criteria and procedure will need to be objectively justifiable and must not be discriminatory or unequal. Whilst cases will vary significantly, relevant criteria may include matters such as the requisite experience to carry out continuing work, the level of pay and length of service, the ability of an employee to work effectively from home. Prioritising vulnerable workers (by which we mean those with underlying conditions or those over 70 years of age) is unlikely to be considered discriminatory. It is advisable to record all discussions, decisions and the reasons for those decisions in writing.

Q: Can an employer choose which staff to retain where some staff are required during the period of the Scheme?

A: The critical issue is to have a selection process which is fair and non-discriminatory. As stated above, in general terms, the process which an employer must follow is likely to be akin to a redundancy selection procedure. The nature of the business is likely to dictate which categories of work need to continue during the whole or part of the period of the Scheme. However, where an employer needs to temporarily reduce the number of staff undertaking the same or a sufficiently similar role then it is advisable to request volunteers initially. Where that does not resolve the problem, then the employer will need to carry out a fair selection process in order to determine who will be furloughed.

Q: Can an employer take employees on and off furlough or is it a one-off decision?

A: It appears from the Government Guidance that, during the period of the Scheme, an employee can be brought back to work after being furloughed either permanently or for a short period before being furloughed again. An employee must be furloughed for a minimum of three weeks at any time in order for an employer to be able to make a claim under the Scheme.

Q: If I am approaching more than 20 staff to ask them to agree to be furloughed does that trigger collective consultation requirements?

A: The Government Guidance provides that "if sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment". The requirement to consult with the trade union may vary.

It is not clear as to whether furloughing itself will require a collective consultation process under the Scheme but it seems unlikely. It seems more likely that it will depend on additional factors.

- (a) **Dismissals and redundancies** - Where an employer is not considering dismissing or making redundant 20 or more staff in one establishment within a period of 90 days or less then the collective consultation rules should

not apply for this purpose. Conversely, where employers propose to make employees redundant if they do not agree to accept furlough then the collective consultation requirements are likely to apply.

- (b) **Contract changes** - Similarly, collective consultation obligations may apply where (i) it's written in the employee's contract that the trade union can agree changes, or (ii) it's not written in the employee's contract but the employer normally agrees contract changes with the trade union. Accordingly, if an employer intends to vary 20 or more contracts in one establishment within a period of 90 days or less (in this case, by reducing employees' pay to 80%) then collective consultation obligations are likely to apply.

Section 4 – Working whilst on furlough

Q: Can an employee work for the employer whilst receiving Scheme support?

A: No. Under the Scheme the relevant employee must not carry out any work for or on behalf of the employer which has furloughed him (whether at the workplace, at home or elsewhere).

Q: Can an employee carry out paid work for another employer whilst receiving Scheme support?

A: Yes. The Government Guidance makes it clear that each job is to be treated separately and that the cap on furlough payments applies to each job individually. Accordingly, whilst it remains to be clarified, it would appear to be possible for an employee to:

- (a) be on furlough and receive a payment under the Scheme whilst continuing to work and be paid in respect of another job;
- (b) receive a payment under the Scheme from more than one employer; or
- (c) be on furlough and take on a temporary job elsewhere provided this is not in breach of their contract with their original employer.

Q: Can an employee carry out voluntary work whilst receiving Scheme support?

A: Yes. However, the relevant employee must not carry out any work for or on behalf of the employer which has furloughed him.

Q: Can an employer rotate furloughed employees?

A: The Government Guidance does not make it clear whether this is permitted. However, the minimum period of furlough leave to be taken at any one time to qualify for payments under the Scheme is three weeks and employers may place employees on furlough at any time during the Scheme. This indicates that an employer may be able to rotate employees on furlough. If this is the case then it may assist business owners in spreading any continuing workload whilst making sure relevant tasks are carried out. However, clarification is required.

Section 5 – Other contractual entitlements whilst on furlough

Q: Do employers have to pay the difference between the furlough payment and normal salary?

A: Employers are not obliged to make up the balance of 20% of wage costs, but some may choose to do so. If they do so, any employer's National Insurance Contributions and pension contributions on that additional salary will not be funded through the Scheme.

Q: What happens if by paying an employee 80% of their salary, the sum falls below the National Minimum Wage?

A: The National Minimum Wage only applies to hours that are actually worked. Accordingly, it does not apply to payments under the Scheme.

Q: Will employees be entitled to receive pension contributions whilst on furlough?

A: The amount employers can claim under the Scheme will include minimum automatic enrolment contributions based on the furloughed employee's wage. Employers should check the contracts of employment and the pension scheme rules for any restrictions on the way in which employee pension contributions are calculated and in order to determine the level of flexibility (for example, whether they can temporarily reduce or suspend employee pension contributions during the period of furlough, or even opt out of the scheme altogether and opt back in at a later date).

Q: Will employees be entitled to receive benefits in kind whilst on furlough?

A: It seems likely that they will be entitled to receive these in the normal way (unless employee consent has been obtained to vary these in some way) as their contracts of employment will remain in place. However, it will depend upon the terms of the contract of employment and may be affected by the relevant rules applicable to such benefits (for example, car policies may require cars to be used for work only, facilities such as gyms may be closed).

Q: Will holiday entitlement continue to accrue during furlough?

A: Yes.

Q: Can employees take holiday whilst on furlough?

A: The Government has stated that it will be keeping the policy on holiday pay during furlough under review. The Guidance says that employees need to be paid their usual holiday pay rate for statutory minimum holiday taken whilst on furlough. Employers will not be able to claim any additional top-up to full holiday pay through the furlough grant.

Whilst the position may vary depending on the terms of the relevant contract of employment, it seems likely that an employee may be able to request holiday during the period which the Scheme operates (including whilst on furlough) and the employer may be able to justifiably refuse it on business grounds. Some employees may, however, consider it to be practical so that employees are available once the coronavirus outbreak has subsided and business becomes more stable.

A: Can an employer ask employees to use up their annual leave?

Q: Yes. Usually an employer can request employees to take statutory annual leave on specified days, provided they are given the required level of notice, unless they are on sick leave or self-isolating. Employers must give notice which is at least twice the length of the period of leave that the employee is being ordered to take (so, by way of example a requirement to take 1 week's holiday will require at least 2 weeks' notice from the employer).

Section 6 – Taxation

Q: Will the payments under the Scheme be taxable?

A: Yes. HMRC have confirmed that 'while on furlough, the employee's wage will be subject to usual income tax and other deductions.' The payment which the employee receives under the Scheme is still paid under an employment contract even though the employee is not doing any work. In the circumstances, it seems likely that other deductions (including automatic enrolment employee pension contributions), will need to continue to be made.

If you would like more information about the Coronavirus Job Retention Scheme, please visit www.orrlichfield.com or email enquiries@orrlichfield.com.



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