

COVID-19 and Job Retention Scheme

This document provides information on the latest Government guidance on the Coronavirus Job Retention Scheme.

Coronavirus Job Retention Scheme

This is a new Government scheme which forms part of a range of business support measures that have been made available to UK businesses to provide financial support during the COVID-19 outbreak. The scheme has been updated several times since its release.

Headlines

- On 12 May, the Chancellor announced the extension of the Furlough Scheme until the end of October.
- Furloughed workers will continue to receive 80% of their salary up to £2,500.
- From August:
 - new flexibility will be introduced to allow furloughed workers to return to work part-time and boost the economy.
 - employers will be asked to pay a percentage towards the salaries of their furloughed staff. The details of this are yet to be released.

How does the scheme work?

- Employers can claim for 80% of furloughed employees' usual monthly wage costs, up to £2,500 a month.
- While on furlough, the employee's wage will be subject to usual income tax and other deductions.
- To be eligible for the subsidy, when on furlough, an employee can not undertake work for or on behalf of the organisation, including providing services or generating revenue.
- A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for or on behalf of your organisation.
- Any UK organisation with employees can apply, including:
 - Businesses
 - Charities
 - Recruitment agencies (agency workers paid through PAYE)
 - Public authorities

- Employees, who are shielding in line with public health guidance, can be placed on furlough.
- Employees with more than one employer can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.
- HMRC have clarified that employees on visas can be furloughed if they meet the requirements; the receipt of grants under the scheme are not counted as “access to public funds”.
- The scheme portal opened on 20th April for employers to process their claims.

Who is eligible for furlough?

- Furloughed employees must have been on the PAYE payroll on **19 March 2020**, and can be on any type of contract, including:
 - Full-time employees
 - Part-time employees
 - Employees on agency contracts
 - Employees on flexible or zero-hour contracts
- The scheme also covers employees who were made redundant since **28 February 2020** and up to **19 March 2020**, if they are rehired by their employer.
- The employer must have made an RTI submission notifying payment in respect of an employee to HMRC on or before **19 March 2020**.

Who isn't eligible for furlough?

- Employees hired after **19 March 2020** cannot be furloughed or claimed for in accordance with this scheme.
- Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after **19 March 2020**.
- Employees on sick leave or self-isolating should get Statutory Sick Pay, but can be furloughed after this.
- If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme.

Is this a loan?

- No. This is a grant, which will reimburse 80% of furloughed workers' wage costs up to a cap of £2,500 per month (per furloughed worker) plus applicable employers' NICs and minimum statutory pension contribution in respect of that wage.
- You will need to pay the worker and process PAYE, NICs and employer's costs as normal and then there will be a reimbursement. You may choose to pay your furloughed employees more, but you won't get reimbursement - £2,500 is a cap, it is not 80% of £2,500.
- You won't receive any reimbursement for employees that aren't put on furlough and reported to HMRC as such. Clearly there is scope for abuse with this scheme and we are assuming there will be some checks and balances. HMRC will retain the right to retrospectively audit all aspects of your claims.

Fees, commission & bonuses should not be included in the wage costs calculation

- An employer can also choose to top up an employee's salary beyond this but is not obliged to do so under this scheme.
- For full-time and part-time salaried employees, the employee's actual salary before tax should be used to calculate the 80%. Fees, commission and bonuses should not be included.

For employees whose pay varies

- If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, the employer can claim for the higher of either:
 - the same month's earning from the previous year
 - average monthly earnings from the 2019-20 tax year
- If the employee has been employed for less than a year, the employer can claim for an average of their monthly earnings since they started work.
- If the employee only started in February 2020, the employer can use a pro-rata for their earnings so far to claim.

Rules for the employer

- Employers can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the **1 March** if applicable.
- When the government ends the scheme, the employer must make a decision, depending on the circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider termination of employment (redundancy).

What payments are included in the wage cost calculation?

- Employers will be reimbursed for 80% of a furloughed employee's wage, up to the £2,500 cap, as in the last pay period prior to **19 March 2020**, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage.
- The Government have now clarified that employers can claim for any regular payments, this includes wages, past overtime, fees and "compulsory" commission payments. However, discretionary bonus (including tips), commission payments and non-cash payments are excluded.

How long is the furlough scheme?

- The furlough scheme started on **1 March 2020** and will remain open until the end of October 2020.
- Changes to the scheme will be brought from August to allow furloughed workers to return to work part-time. The details are yet to be published.
- The minimum furlough period is three weeks at a time, but there is no maximum within the time limits that the scheme will run.
- When the scheme ends, employers will need to decide whether there is enough work for the

employees to return to their duties. If not, it may be necessary to consider a reorganisation of work, which is likely to involve going through a redundancy process and could result in termination of their employment.

- For agency workers on a contract for service, this may result in termination of their contracts.
- The updated guidance has clarified that employees can be furloughed multiple times, but each separate instance must be for a period of three weeks.

Will employees and temporary workers continue to accrue annual leave whilst on furlough?

- The guidance states that employees on furlough will continue to accrue annual leave as per their employment contract.
- For a temporary worker, this will depend on the type of contract they have with the agency. If it is a contract for services, the temporary worker only accrues leave whilst working on an assignment because there is no contract between assignments.

My employee has two jobs, which one should be furloughed?

- If your employee works for more than one employer, they can be furloughed by either or both employers for each job. Each employer will be able to furlough the employee, and claim the grant of 80% of salary plus NI and pension costs, up to the £2,500 cap.
- Employees can be furloughed in one job and receive a furlough payment via the retention scheme but continue working for another employer and receive normal wages.

Can employees work for us or someone else whilst on furlough?

- The guidance is very clear that employees must not work for you whilst on furlough. This includes providing any service or generating any revenue for your business, or any **linked** or **associated** organisations. 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 performing such work through or on behalf of the agency for the agency's clients.
- Employees can undertake volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of your organisation. When undertaking training courses, you will need to pay them at least NLW/NMW for the time spent training which means topping up the wage if 80% is below NLW/NMW.

Does this right to furlough need to be in our contract of employment?

- Employment law has not been suspended. This is a change of employment. If there is not a contractual right to furlough or lay-off, then it needs to be done with the employee's consent. It is likely you will have a right to vary your contract of employment and notify employees but generally employee agreement is required to make a change to the employee's disadvantage (they are likely to receive reduced pay).
- HMRC say you must write to affected employees confirming they have been furloughed and keep a record of this communication for five years. Provided that this is done in a way that is consistent with employment law, it is valid for the purposes of claiming through the scheme.

Collective agreement reached between an employer and a trade union is also acceptable – there needs to be a written record but the employee does not have to give a written response.

Can my employees be on furlough and annual leave at the same time?

- The Government guidance has since confirmed that employees can take holiday whilst on furlough.
- The employer can continue to claim 80% to cover the majority of the holiday pay, but must pay the difference to top up holiday pay to the normal remuneration.

How to treat Bank holiday whilst on furlough?

- If an employee usually works bank holiday, then their furlough will be unaffected by the bank holiday. The employer can agree that this is included in the grant payment as a normal working day.
- If the employee usually takes the bank holiday as leave, then the employer would either 1) treat the bank holiday as annual leave and top up to their usual holiday pay or 2) defer the bank holiday and give the employee a day in lieu.

Can I require my employees to take their annual leave during furlough?

- The Government guidance has since confirmed that employers have the flexibility to restrict when leave can be taken if there is a business need, this applies for both the furlough period and the recovery period.
- The Government have said that they are keeping the policy on holiday pay during furlough under review.
- Under regulation 15 of The Working Time Regulations, an employer can require a worker to take leave or not take leave provided that you give twice as much notice as the required leave period. So for example, if you want to impose 1 week of annual leave, you need to give 2 weeks' notice.

Is holiday pay when on furlough based on 80% or 100% of salary?

- The Government guidance has since confirmed that under the Working Time Regulations, employers are required to pay holiday pay at the normal rate of pay, or for variable pay - this is calculated on the average pay received during the 52-week reference period. Therefore, furloughed employees should be paid their usual holiday pay in accordance with the Working Time Regulations, so you will need to top up to 100% of normal remuneration.

Does the scheme apply to temporary workers engaged via an agency?

- Yes, the scheme is for full or part-time employees, agency workers, and workers on flexible or zero-hour contracts.
- To be eligible, furloughed temporary workers must meet the following requirements:
 - Must have been on the agency PAYE payroll on or before **19 March 2020**
 - The agency must have made an RTI submission notifying payment in respect of you to HMRC on or before **19 March 2020**

- Must have been on an assignment with the agency on or before **19 March 2020, which has ended due to COVID-19**

Does the scheme apply to temporary workers engaged via an Umbrella company?

- Temporary workers who work through an umbrella company and are employed by the umbrella company may be eligible for the scheme if the umbrella company chooses to use the Scheme for those temporary workers.

Does the scheme apply to contractors engaged via a PSC (Personnel Service Company)?

- Companies may engage contractors either directly or via an agency
- Both the company and the agency will not be able to furlough a contractor with a PSC. This is regardless of whether they are Inside or Outside IR35.
- The PSC could choose to furlough its own director/employee.
- Contractors operating via a PSC should seek independent advice on other Government initiatives they may be eligible for depending on how they have been operating their own business.

What help is there for self-employed contractors?

There is a separate support scheme for the self-employed. They may be eligible for a grant through the Self-employment Income Support Scheme.

Further information can be found here <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>

Please find some additional useful links below:

<https://www.cipd.co.uk/knowledge/fundamentals/emp-law/health-safety/coronavirus-employer-responseguide>

<https://www.acas.org.uk/coronavirus>

<https://archive.acas.org.uk/index.aspx?articleid=1639>

<https://www.acas.org.uk/manage-staff-redundancies>

<https://www.gov.uk/lay-offs-short-timeworking>

<https://www.gov.uk/staff-redundant>

Charlotte Fisher
Managing Director
Advantage Group UK