



Guidance on Coronavirus Job Retention Scheme and Furlough Leave

The Coronavirus Job Retention Scheme (CJRS) has been set up by the Government to support UK employers who have been severely affected by coronavirus (COVID-19). It is a temporary wage support measure that is designed to support jobs and help employers facing difficulties in paying wages rather than laying off staff or making them redundant.

In order to be eligible for CJRS, employers must have created and started a PAYE payroll scheme on or before 19 March 2020 (N.B. the date was previously 28 February 2020) and have a UK bank account.

The Chancellor has confirmed that the CJRS will be extended until the end of October 2020. There will be no changes to the current format of the scheme until the end of July, when employers currently using the scheme will be able to bring back furloughed employees on a part-time basis. This is intended to allow employers more flexibility in their operations and support workers in getting back to work from furlough.

As of August 2020, the Government has said that workers on furlough leave will continue to receive 80 per cent of their usual salaries, subject to the £2,500 cap. However, employers will have to make a (currently unspecified) contribution to this cost. Details of these arrangements are due to be published by the end of May.

Please note that this information is subject to change and so it is important to keep checking for the most up-to-date information.

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

1. What does it mean if an employee is 'furloughed'?

- 1.1. When on furlough leave, employees do not work but continue to be employed and paid. Continuity of service is unaffected and the employee will continue to accrue annual leave whilst on furlough leave. Although employees cannot do any work for their employer whilst they are on furlough, they can do volunteer work or training.
- 1.2. Under the CJRS, the government will cover 80% of salaries, up to £2,500 a month (plus the associated Employer National Insurance contributions and minimum automatic enrolment employer contributions on that wage) of all workers who are placed on furlough leave. The payments are subject to tax and National Insurance in the usual way. Employers will have to claim for financial assistance by means of an HMRC portal and employees will be paid in the normal way.

1.3. Being 'furloughed' involves a change of employment status and so the employer must:

- Designate (i.e. select and tell) the employee that he or she has been placed on furlough leave
- Confirm the furlough leave in writing before the start of the furlough leave;
- Keep the employee on the payroll; and
- Ensure the furlough period lasts at least three weeks.

The employment contract will not change in any other way and the employee will remain bound by the terms and conditions of the contract and staff handbook.

Does the employer have to 'top up' the 80% payment to 100%? No, the government scheme only requires employers to pay staff 80% of their normal pay.

2. Do employees have a right to be on furlough leave?

No, employees do not have a right to be furloughed. It is for employers to decide whether or not to place an individual employee on furlough depending on the circumstances. Employers should base the decision on the needs of the business but should also take account of the personal circumstances of the employee, where relevant. Employers must ensure that their decisions are not discriminatory. They must also keep in mind the implied duty of mutual trust and confidence, so must make sure that their decisions are not unreasonable or unfair.

3. What can employees do while on furlough?

3.1. Can employees start a new job when on furlough?

Yes, provided that it is allowed by the employment contract or the employer agrees to waive the relevant clause. In these circumstances, an employee may end up earning 80% of the old salary and 100% of a new one. Employees cannot start work for another organisation linked to an employer whilst on furlough from the same employer.

3.2. Can employees undertake training while furloughed?

Yes. A furloughed employee can do training provided that this does not involve providing services to, or generating revenue for, the employer.

3.3. Can employees undertake volunteering whilst on furlough leave?

Yes, although employees cannot volunteer for their usual employer.

There is no provision for the equivalent of keeping-in-touch days for furloughed workers, and there is no guidance on what kind of contact the employer can have with the employee. An employer will need to keep in contact with furloughed employees to support their wellbeing and to inform them of developments such as the expected length of the furlough. However, it appears from the guidance that the employer should not ask employees to respond to emails or calls related to the operation of the business where this could involve "providing a service" or "generating income" for the employer.

HMRC states that it reserves the right to retrospectively audit claims made under the scheme. This could include checking that employees have not been required to continue working. However, it is

not known how extensive these audits may be, or the approach that HMRC would take to minimal work-related contact.

4. How long does furlough leave last and what happens at the end?

4.1. How long does furlough leave last?

Furlough leave lasts at least three weeks and an employee can be furloughed multiple times. The CJRS will be open for an initial period of five months (1 March to the end of July 2020). From August to October 2020 the Scheme will be changed so that furloughed employees can be brought back part-time and more details on this will be published by the end of May 2020. All furloughed staff should ensure they are in a position to pick up normal (or, in some cases, reduced) duties at any time.

4.2. What happens at the end of the furlough?

- The intention of CJRS is that employees will be able to go back to work at the end of furlough leave.
- At the end of each furlough period, the employer should review its furlough arrangements and decide if the furlough period should continue or the employee should return to work.

5. Can employees furlough themselves and what about casual and zero-hours contracts?

5.1. Can employees put themselves on furlough leave?

No, the employer needs to designate employees as furloughed.

5.2. How will employees know if they have been furloughed?

The employee will be issued with a letter saying that their working status has been changed to 'furloughed' and ask the employee to confirm their agreement. Records must be kept for 5 years.

5.3. Are casual workers and workers on zero-hours contracts eligible for furlough leave?

Yes, the scheme covers workers on the PAYE system, including any casual or zero-hours worker who is paid in that way. If a worker's pay varies, employers can claim for the higher of either:

- the same month's earning from the previous year;
- average monthly earnings from the 2019-20 year.

6. Can you rotate furlough leave, what about employees on sick leave and apprentices and the NMW?

6.1. Is it possible to rotate furlough leave so employees are furloughed at different times?

Yes. Employees can be furloughed multiple times, which means that they can be furloughed, brought back to work, then re-furloughed, provided each furlough period is of at least three weeks' duration.

6.2. Can an employee be furloughed if they are on sick leave?

No, employees on sick leave or self-isolating are eligible for Statutory Sick Pay (and, if applicable, contractual sick pay). When they are on sick leave or are self-isolating, employees should not be treated as furloughed under the scheme but they may then be furloughed afterwards. However, employees who are shielding in line with public health guidance (because they have a specific health condition which makes them very vulnerable to COVID-19) can be placed on furlough.

6.3. Can apprentices be furloughed?

Yes, and the apprentice can continue to train while furloughed.

6.4. Can employers pay furloughed employees 80% of their wages in this is below the rate of the National Minimum Wage (NMW)?

Under the CJRS, employees must be paid the lower of 80% of their monthly earnings or £2,500, even if this brings the employee's average hourly payment below the NMW rate. This is because the NMW only applies to hours worked and employees will not work any hours while on furlough leave.

7. **Holiday related questions.**

7.1. Does annual leave accrue during a period of lay-off or furlough?

Yes, statutory annual leave will continue to accrue as normal during a period of lay-off or furlough during the coronavirus (COVID-19) crisis. This is because the contract of employment will continue to be in existence during this period.

Contractual annual leave in excess of the statutory minimum will also continue to accrue, unless the contract specifically provides otherwise.

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

Yes. This was confirmed in Government guidance published on 13 May 2020. However, the guidance goes on to state that employers should consider whether the purpose of annual leave (rest, relaxation and enjoyment) would be met if the employee was under any restrictions e.g. lockdown. However, as lockdown begins to ease, the worker's argument that enforced annual leave would not serve its purpose is weaker.

It should be mentioned that the Working Time Regulations 1998 have recently been amended to allow for four weeks of leave to be carried over into the next two leave years where it was not reasonably practicable for the worker to take leave as a result of coronavirus.. This now means that all statutory minimum annual leave can be carried over, albeit carrying over the 1.6 weeks of additional leave is still subject to agreement by the employer and can only be carried over into the next leave year. Carry over of any

contractual leave in excess of the statutory minimum is subject to agreement between employer and employee.

This extension to the carry over rules means that it is less of a concern for employers that employees have a potentially large amount of backed up leave to take once the pandemic passes.

7.3. How should employers treat Bank Holidays falling in the furlough period?

If employees usually take Bank Holidays as leave, the employer must top up the employee's pay to their usual holiday pay rate (100%) or give them a day's holiday in lieu.

7.4. Can employees carry forward holiday into the next leave year?

The Government has advised that employees who have not taken all of their statutory annual leave entitlement (up to 20 days) will be able to carry it over into the next two leave years. This applies where, on account of coronavirus, it is not reasonably practicable for employees to take some or all of the holiday to which the employee is entitled.

7.5. Can employees have holiday paid whilst on furlough leave?

Yes, employees should have holiday paid as normal. Employers can claim back the cost of an annual leave furlough day (subject to the cap of 80% of salary or £2,500 per month) and the employer must make up the difference between that and the employee's normal pay.

8. How do employers access the CJRS scheme?

8.1. The CJRS is accessed through an online portal operated by HM Revenue & Customs (HMRC). The employer will have to provide HMRC with details of furloughed employees, specifying:

- the number of employees being furloughed;
- details of employees – the name and National Insurance Number of each furloughed employee;
- the start and end date of the claim period;
- the amount claimed;
- the employer's contact name and telephone number;
- the employer's PAYE scheme reference number;
- the employer's Corporation Tax Unique Taxpayer Reference, Self-Assessment Unique Taxpayer Reference or Company Registration Number as appropriate for the entity;
- the employer's UK bank account details;
- the organisation's registered name, and;
- the organisation's address.

8.2. For efficient use of the portal the employer should make sure that this information is ready before they access the system to make a claim.

8.3. The HMRC furlough payment portal is operational from 20 April with a view to payments being made on 30 April.

8.4. The Government has changed the eligibility date for furlough eligibility from 28 February to 19 March. This means that any employee who was on an employer's payroll on 19 March

can be furloughed, provided that the employer has filed an RTI (Real Time Information) submission to HMRC for the employee by that date i.e. 19 March.

9. Temporary changes to right to work checks

The Government has issued advice for employers carrying out right to work checks for new recruits during the coronavirus pandemic, which is intended to make the checks easier. The full details can be found here: <https://www.gov.uk/guidance/coronavirus-covid-19-right-to-work-checks>.

Essentially, checks still need to be carried out, but:

- checks can be carried out by video call; and
- job applicants or current workers can provide scanned documents or photos of documents instead of submitting originals.

These are temporary measures and employers who recruit workers using these measures will have to do retrospective checks within 8 weeks of coronavirus measures ending.

10. Coronavirus and Redundancy

Even with the unprecedented support of the Government's Coronavirus Job Retention Scheme (furlough scheme), it was always likely that many companies would be looking at making staff redundant, either during, or at the end of, the furlough period. After all, the purpose of the scheme is to help: "employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy" and the Guidance Notes explicitly acknowledge the possibility of redundancy: "Your employer can still make you redundant while you're on furlough or afterwards".

The CJRS has been extended to October 2020 with the scheme continuing in its current form until 31st July 2020. From August to October 2020 the scheme will be changed so that furloughed employees can be brought back part-time and more details on this will be published by the end of May 2020.

10.1. Redundancy and Furlough Leave

If, then, a Company finds itself in the position of implementing a redundancy programme during or after the furlough period, the usual requirement to demonstrate that there is a genuine redundancy situation and follow a fair and legal consultation process will still apply, but there are additional considerations for employers in this regard.

These include:

- The logistical difficulties of consulting with employees remotely. Redundancy consultations will still have to take place individually or collectively, but this will be by means of video or conference call, or in writing.

- It is good practice to give employees the right to be 'accompanied' to the redundancy meetings, even if this meeting is carried out remotely. Employers will have to consider how best to enable this.
- If an employer is making 20 or more employees redundant in a 90-day period and collective consultation is triggered, the Company must ensure that it consults collectively with Trade Union or staff representatives, and that it meets the 30-day (or 45-day for 100 or more redundancies) deadline for starting consultation.
- Employers will have to be particularly careful to ensure that redundancy selection pools and criteria are fair, objective and reasonable and that staff are consulted about them before they are confirmed. In particular, it is unlikely to be fair if employees are automatically selected for redundancy because they were selected to be furloughed.
- In terms of the reason for redundancy, employers will have to consider if selecting an employee for redundancy when he or she could remain on furlough leave may make the resulting redundancy dismissal unfair.

10.2. Alternatives to Redundancy

As part of any fair redundancy process, employers should consider steps that can be taken to avoid compulsory redundancies. These may include:

- seeking applicants for voluntary redundancy;
- encouraging existing staff to work flexibly on reduced hours by agreement;
- freezing or restricting recruitment;
- redeploying existing employees to other parts of the business;
- reduction in the use of freelancers and casual workers; and/or
- introducing a pay freeze or agreed salary reductions.

10.3. Redundancy Payments

As with other employment rights, an employee's redundancy rights are unaffected by being furloughed.

- Any employee who has been employed by the Company for a continuous period of more than two years is entitled to receive a statutory redundancy payment (or a contractual redundancy payment if applicable). A statutory redundancy payment is calculated by reference to the period during which the employee has been continuously employed, his or her age and gross weekly pay.
- Statutory redundancy payments to an employee on furlough leave are calculated on an employee's pre-furlough salary. Companies cannot reclaim the cost of statutory or contractual redundancy payments under the furlough scheme.
- Employees who are made redundant whilst on furlough leave are entitled to be given notice of termination in accordance with their contracts of employment.
- Notice pay during the notice period is payable at the rate of the employee's pre-furlough salary. Companies are likely to be able to reclaim the cost of an employee's notice pay (up to 80% of salary and subject to the £2500 per month cap) for any notice period whilst on furlough. However, employers cannot reclaim any payment in lieu of notice under the furlough scheme.

- Employees who are made redundant whilst on furlough leave are entitled to be paid in lieu of any accrued but untaken annual leave. This payment is payable at the rate of the employee's pre-furlough salary. Employers will not be able to reclaim the cost of any payment made in lieu of annual leave under the furlough scheme.

11. *Can furloughed staff take part in disciplinary and grievance procedures?*

New guidance from Acas, released on 6 May 2020, details that furloughed staff can take part in such procedures, provided rules on social distancing and public health are followed. It will be up to the organisation if these procedures can still proceed fairly. For more information on this guidance.

12. What obligations does an employer have to an employee who lives with someone who is at very high risk of serious illness from coronavirus?

People who are at very high risk of severe illness from coronavirus (COVID-19) because of an underlying health condition are advised to "shield" themselves by staying at home for at least 12 weeks and avoiding any face-to-face contact. Government guidance on shielding for extremely vulnerable people, includes a list of those included in this category. These people will be notified by the NHS that they are at very high risk and should shield themselves.

According to the guidance, people who live with someone who is in the very high risk group should stringently follow guidance on social distancing and reduce their contact outside the home. However, they are not required to take the shielding measures themselves.

Employers should therefore support employees who live with someone at very high risk to work from home if at all possible. They should travel to work only if it is possible to follow the guidance on social distancing stringently and remain at least two metres away from others while at work, and on the way to and from work. If neither working from home nor strict social distancing is possible, employers should consider alternative arrangements, such as a period of furlough.

Government guidance on the Coronavirus Job Retention Scheme confirms that employers can furlough an employee, and make a claim for their wage costs under the scheme, if they need to stay at home with someone who is shielding.

13. Can an employer place an employee on furlough if they need to stay at home to look after their children?

Yes. Guidance published by HMRC on the Coronavirus Job Retention Scheme confirms that: "Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed." An employee may be unable to work because they have no alternative childcare while the schools are closed during the coronavirus crisis. An employee in this situation would not have the right to paid time off (unless provided for in their contract of employment), so a period of furlough may be a potential solution for both employer and employee.

There is no requirement under the Coronavirus Job Retention Scheme for an employer to show adverse economic effects on the organisation. Provided that the employee is not working because of circumstances arising as a result of coronavirus, the circumstances can be personal to the employee, such as caring responsibilities.

14. Does furlough affect pay during the statutory notice period?

Yes. The same rules that apply during the statutory notice period in a lay off situation will apply during furlough. That means that if an employee is serving their notice period when on furlough, the starting point is that their statutory notice pay is protected meaning that they will be due full pay. As usual, we then need to look at the length of the notice periods. If the notice period for dismissal is at least a week more than the statutory notice for dismissal, then the pay protection no longer applies and the position reverts to contractual pay, which will be furlough pay.

15. Which employees are allowed to travel to work during the period of "lockdown" to control the coronavirus outbreak?

The UK Government's COVID-19 recovery strategy, published on 11 May 2020, states that, from 13 May 2020 in England: "All workers who cannot work from home should travel to work if their workplace is open. Sectors of the economy that are allowed to be open should be open, for example this includes:

food production;
construction;
manufacturing;
logistics;
distribution; and
scientific research in laboratories."

Some workplaces, such as hospitality and non-essential retail are required to remain closed.

The Governments of Scotland, Wales and Northern Ireland have not currently adopted the same message of encouraging employees to go to work if they cannot work from home.

The guidance across the UK remains that employers should allow employees to work from home wherever possible, to prevent the spread of coronavirus (COVID-19). Employees who have coronavirus symptoms, or who live with someone with symptoms, should not attend work and should follow the rules on self-isolation.

Employers have a duty to do everything reasonably practicable to ensure the health, safety and welfare of their employees at work. Therefore, employers should not ask employees to return to the workplace until they have put in place effective measures to prevent coronavirus infection.

The UK Government has published eight Working safely during coronavirus guides, setting out measures to keep the risk of infection as low as possible in different types of workplace. Employers in Northern Ireland, Scotland and Wales should consult the UK Government's guidance alongside guidance on public health and safety requirements applicable to their location.

16. At what stage can you start a redundancy process when someone is on furlough leave? Do you have to end their furlough first?

Employers can start a redundancy process at any stage, including the period when employees are on furlough. Furlough does not have to be ended before starting the redundancy process.

The coronavirus job retention scheme is designed to minimise redundancies, but employers can still make staff redundant during or after furlough. The redundancy process can be commenced at any time provided the correct procedures and consultations are followed. The HMRC furlough guidance does warn employees that they can still be made redundant while on furlough or following furlough. It also reminds employers that furlough grants cannot be used for redundancy payments. HMRC will be closely monitoring this once the scheme has closed.

If you are thinking of redundancies within your business, HR advice should be taken.

(Disclaimer: While everything has been done to ensure the accuracy of the contents of this at the time of publication, it is a general guide only. It is not comprehensive and does not constitute specific HR advice. Specific HR advice should be sought in relation to the particular facts of a given situation and please refer to Government website for the most up to date information).

