



Job Retention Scheme updated 20 July 2020

These FAQs deal with the mechanics of furloughing workers under the scheme in place from 1 March 2020, which closed to new entrants from 30 June 2020.

How is the scheme going to work from July onwards?

On 29 May 2020, the Chancellor announced changes to the Scheme.

Existing scheme closure and 'flexible furlough'

- The old Scheme will close to new entrants on 30 June.
- From this point onwards, employers will only be able to furlough employees that they have furloughed for a full three week period prior to 30 June.
- Employers who want to place new employees on furlough must do so by 10 June so the minimum 3 week period required can be achieved.
- From 1 July, flexible furlough can be used.
- For example, an employee who works 5 days a week can be brought back to work for 2 days a week. The employer will pay wages for those 2 days as normal. The Scheme will "continue to cover" the employee for the other 3 working days.

Financial assistance and final closure

- There will be no change to the level of financial assistance provided by the scheme during June and July.
- From the start of August, employers will begin to contribute to furloughed employees' wage costs on a phased basis - more details are outlined below.
- The scheme will close at the end of October.

What is a 'furloughed' employee?

The word furlough generally means temporary leave of absence from work.

A furloughed employee is someone who, rather than being dismissed for redundancy by their employer or being put on lay off, is kept on the payroll during a period where the employer does not have any work for them. From 1 July 2020, furloughed staff can return to work on a part-time basis.

Do I need to get employees to agree to the furlough?

Unless there is a term allowing furlough in employees' contracts, you will need to obtain agreement from employees to designate them as furloughed and reduce their pay (if that is what you want to do — you may decide to furlough and keep on 100% pay by topping up the Government grant).

You will need to agree the pay reduction with employees as part of the agreement to furlough, because normal employment law principles apply.

On 15 April 2020, the Government released a Treasury Direction on the Scheme. It stated that employers must have agreement in writing that the employee will cease to do all work for the duration of furlough.

Employers should confirm the employees' new status and obtain their consent in writing, including confirmation that the employee will cease all work in relation to their employment. Records should be kept for five years.

The second Treasury direction clarified that agreement to cease all work can be done by either obtaining the employee's consent in writing or by the employer confirming the agreement in writing. This measure is intended to cover those employers who did not obtain written agreement from employees before placing them on furlough provided that the employer complies with all other requirements of the second direction. The second direction requires that written agreement or confirmation:

- specifies the main terms and conditions on which the employee will cease work
- is incorporated (expressly or impliedly) into the employee's contract
- is made in writing or confirmed in writing by the employer (including by electronic means such as email)
- is retained by the employer until at least 30 June 2025.

A separate agreement will be necessary for staff who are to be placed on flexible furlough. If the hours they are to work change, a further agreement to this development will also be necessary.

When the new rules are implemented, for any flexible furlough which takes place during the period commencing on or after 1 July, will employers need to get fresh agreement with furloughed employees if their furlough is to continue?

As employees must cease all work for their employer while on furlough under the current rules, it is likely that furlough agreements include a requirement that the employee does not carry out any work for the employer during their furlough period. The change to terms and conditions is that furlough means no work and 80 per cent pay (unless topped up). A fresh furlough agreement will be needed, which permits the employee to work during furlough and sets out the circumstances in which the employer can require the employee to work.

A new Treasury Direction has been released on 26 June 2020 to cover the post-July period because the one currently in place only sets out the terms of the current version of the Scheme.

Who does the Scheme apply to?

The scheme is open to all UK employers that had a PAYE scheme in place on or before 19 March 2020, have enrolled for PAYE online and have a UK bank account. Any organisation with employees can apply, including charities, not for profit organisations and recruitment agencies.

From 1 July 2020, the scheme is only available to those who have been furloughed by 10 June 2020, save for eligible employees returning from certain types of family leave including maternity leave. In order to qualify, employees must have been on furlough for the minimum period at any time in the period from 1 March to 30 June 2020.

What happens to employees who have been transferred under TUPE?

Government guidance published on 30 April 2020 confirms that employees who were subject to a TUPE transfer after 28 February 2020 can be furloughed and the new employer can claim for their wages, to the prescribed amount, via the Scheme. This reverts the position back to that which had been in place before 15 April 2020, which is when the Government amended their guidance to state that employees who had been transferred after 19 March could be claimed for under the Scheme. For now the position is this: employees transferred after 28 February 2020 can be claimed for provided they are on the 'new' employer's payroll, and a RTI submission made, on or before 19 March 2020.

From 1 July, TUPE'd staff can be placed on furlough by the new employer, provided they have previously been furloughed by their old employer.

What do we use as the starting point for employee pay?

Salaried employees' pay is that which they earned in the last pay period prior to 19 March 2020. You can reclaim up to 80 per cent of wage costs up to a cap of £2500 per month, plus the associated employer National Insurance contributions and minimum auto-enrolment pension contributions on that reduced wage. This is going to be in place until the end of July, from which point changes are to be made to how much the government contributes to the scheme - see below for details.

Guidance published on 15 April 2020 clarifies that, if, based on previous guidance, you had calculated your claim based on the employee's salary as at 28 February 2020 (and that differed from their salary in their last pay period prior to 19 March 2020) you can choose to still use this calculation for your first claim.

The situation for those with variable/irregular pay is different. If the employee has been employed (or engaged by an employment business) for a full 12 months prior to the claim, you 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, you can claim for an average of their monthly earnings since they started work.

If you have previously calculated employee pay as at 28 February 2020, you can still use this calculation. Please refer to your accountant or payroll for specific advice on this.

What exactly is covered in terms of elements of pay?

The Government guidance is that commission, bonuses and discretionary payments are not included when calculating pay. All elements that you are obliged to pay your employees including wages, past overtime, fees and compulsory commission payments can be included.

From the start of the scheme until the end of July, the government pays 80 per cent of wages up to a cap of £2,500 as well as employer NICs and pension contributions for the hours the employee doesn't work.

In August, the government will pay 80 per cent of wages up to a cap of £2,500 and employers will pay employer NICs and pension contributions for the hours the employee does not work.

In September, the government will pay 70 per cent of wages up to a cap of £2,187.50 for the hours the employee does not work. Employers will also pay employer NICs and pension contributions and 10 per cent of wages to make up 80% total up to a cap of £2,500.

In October, the government will pay 60 per cent of wages up to a cap of £1,875 for the hours the employee does not work. Employers will also pay employer NICs and pension contributions and 20% of wages to make up 80% total up to a cap of £2,500.

Will the payment be taxable?

Yes, payments you make to furloughed employees will be subject to PAYE and National Insurance contributions.

Will I be able to recover Employer's NI contributions and pension contributions under the Job Retention Scheme?

You remain liable for Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees. However, you can claim a grant from HMRC to cover:

- wages for a furloughed employee (equal to the lower of 80% of an employee's regular salary or £2,500 per month), plus
- the Employer National Insurance contributions associated with that (capped) payment, plus
- minimum automatic enrolment employer pension contributions in respect of that (capped) payment.

From August, employers will pay employer NICs and pension contributions for the hours the employee does not work.

Do I have to pay 100% of the wages in order to claim?

No. You can choose to top up to 100% but do not have to. Those who choose to top up can still only claim the 80 per cent from the government (70 and 60 per cent from September and October respectively).

Do I have to meet minimum wage with the 80 per cent?

Minimum wage applies to hours worked. So if employees are furloughed and do not work and 80 per cent of their normal earnings would take them below the NMW, this is fine.

Can I make an employee redundant when they are on furlough?

Although the scheme is in place to prevent redundancies, it is inevitable that some businesses will assess that redundancies are required. The Government guidance confirms that employees can be made redundant while they are on furlough. Redundancy processes are still subject to the normal rules when carried out on furlough and, to prevent an unfair dismissal claim, reasonableness of the decision will be a key factor. This includes the financial position of the employer. As part of the process, employers should consider why furlough, with its ability to claim capped wages from the Scheme, was not suitable in the circumstances. We have recently completed some redundancies and would be happy to help you if you are thinking about this for your business.

Is statutory redundancy pay calculated on furlough pay or normal pay, when a redundancy takes place following furlough?

If there was no agreement as part of the furlough agreement that redundancy pay would be based on the reduced furlough pay, then it should be calculated using the employee's pre-furlough pay. Although there has been an agreement to reduce wages, this is arguably only for the purpose of being able to join the furlough scheme

How long does furlough last?

Prior to 1 July, furlough had to be taken in minimum blocks of three weeks in order to be eligible for the funding. It was able to last for the entirety of the scheme's life time but the final date by which an employer could furlough an employee for the first time was 10 June, save for employees who are returning from maternity, paternity, adoption, shared parental and parental bereavement leave, or reservists returning from active service in the coming months where they are returning to work for an employer who has previously furloughed employees. Reservists must have been on active service before 10 June 2020 and also need to have returned after this date.

From 1 July, employees can be placed on furlough for any amount of time.

Can I rotate employees on furlough?

Yes, it appears so. Employees can be put on furlough more than once so you can, for example, place Employee Set A on furlough while Employee Set B continue to work. Then Set B can be put on furlough while Set A come back to work. Set A can then be furloughed again etc.

Rotating employees between work and furlough can continue into July and onwards, however, any employee put on furlough from 1 July must have already been furloughed for a minimum of three weeks prior to 1 July 2020. Employers must also remember the limit on the number of employees that can be furloughed on any one claim period from July.

Can the employee undertake any work during furlough?

Prior to 1 July, employees were not able to conduct any work for the company, or any linked or associated organisation. If they worked for even an hour (during their minimum three week furlough period) the employer was unable to claim the grant for this period.

From 1 July, furloughed employees can return to work on a part-time basis. However, for the time in which they are considered furloughed, they should still undertake no work for the company.

Can my employee get another job whilst on furlough with me?

Your normal rules on employees getting second jobs will still apply as per your contract of employment, however you may wish to be flexible in the circumstances however it will be in your best interests to continue any restrictions on other employment which may create a conflict of interest e.g. work with a competitor or client. If you do allow your employees to take on other work during their normal working hours, you should ensure that they understand that they must be available for duty when work is available again.

How do I select employees for furlough leave?

You must be careful not to discriminate when deciding who to furlough. In some cases it will be all employees, in others it will be certain departments. Where selection does need to take place, it may be appropriate to implement a similar selection period as would be used in a redundancy situation so that the most effective employees remain in work.

What about employees on sickness or self-isolating?

Government guidance released on 9 April 2020 clarified that while an employee receiving SSP cannot be on furlough at the same time, an employer can decide whether to place a sick employee on furlough or on sick leave. The second direction clarifies that employers can place an employee who is on sick leave or self-isolating onto furlough at any stage; it had previously been understood that furlough could only commence once an original SSP period had ended. Where the employer places a sick employee on furlough, SSP is longer payable and the employee should receive furlough pay. Both the SSP Rebate Scheme, introduced as part of coronavirus emergency legislation, and the Job Retention Scheme can be used for the same employee but not at the same time. The guidance made clear that an employer should not use the Scheme as a way to “top up” sick pay for short term sickness. In any case, the minimum furlough period eligible to claim the grant is three weeks. Employers who decide to place sick employees on SSP cannot claim for wages under the Scheme.

What about employees who are ‘shielding’?

Guidance published on 9 April 2020 appears to show a change in stance where those who are shielding are concerned. Guidance now states that employees who are shielding can be furloughed if they are unable to work. Previous guidance had stated that employers could only furlough those shielding where the employee would otherwise have been made redundant. This no longer appears to be the case.

On 16 April 2020, new legislation permitted employees who are 'shielding' to be entitled to statutory sick pay (SSP). As outlined above SSP cannot be claimed under the scheme. You will therefore need to decide if you want to furlough staff in this position or keep providing SSP to them. The government may refund up to two weeks of SSP for coronavirus related absences as part of the Coronavirus SSP Rebate Scheme, subject to eligibility.

What's the position with apprentices?

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed. However, apprentices must get at least the appropriate minimum wage rate for all the time they spend training which is not covered by the reimbursement.

Where apprentices are furloughed or placed on unpaid leave, or where the nature of their employment changes and no longer supports their apprenticeship, the apprentice, employer and training provider should consider whether a break in learning would be appropriate.

Apprentices can be made redundant, however, specific advice should be taken on this as different rules may apply in different parts of the UK.

Employers who are subject to the apprenticeship levy payment must continue to pay this as normal; it is not recoverable under the scheme.

What's the position with agency workers?

Where agency workers are paid through PAYE, they are eligible to be furloughed and receive support through this scheme, including where they are employed by umbrella companies.

Furlough should be agreed between the agency, as the deemed employer, and the worker, though it would be advised to discuss the need to furlough with any end clients involved. As with employees, agency workers should perform no work for, through or on behalf of the agency that has furloughed them while they are furloughed, including for the agency's clients.

Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.

How does furlough interact with fixed term contracts?

Fixed term contracts which ended, without extension or renewal, on or before 19 March 2020 did not qualify for the grant once they have ended. Fixed term contracts could, however be renewed or extended before their natural conclusion during the furlough period without breaking the terms of the scheme. There was no minimum period which must be left to run on a fixed-term contract to enable it to be renewed or extended, but it was not able to have ended. The furlough period had to be for a minimum period of three consecutive weeks.

Where a fixed term employee's contract ended because it was not extended or renewed before its natural conclusion you will no longer be able claim a grant for them once the contract ends. However, an employee on a fixed term contract can be re-employed, furloughed and claimed for if either:

- their contract expired after 28 February 2020 and an RTI payment submission for the employee was notified to HMRC on or before 28 February 2020 or
- their contract expired after 19 March 2020 and an RTI payment submission for the employee was notified to HMRC on or before 19 March 2020.

Employees that started and ended the same contract between 28 February 2020 and 19 March 2020 will not qualify for this scheme. This is not specific to employees on fixed-term contracts, the same would apply to employees on all other contracts.

Remember that, from 1 July 2020, only staff who have previously been furloughed can be placed on furlough, subject to exceptions.

Does annual leave accrue during furlough?

Yes it does continue to accrue because the contract of employment is still in existence.

Can annual leave be taken at the same time as furlough?

Yes. On 17 April 2020, the Government confirmed this point. It was also clarified that employers must pay the employee's normal pay for any annual leave but will still only be able to claim 80% of pay through the scheme. The rest must be topped up by the employer. Normal rules will apply to annual leave requests from employees during furlough which means that employers can refuse the request. Some employers may choose to do this in light of the requirement to 'top up' pay to 100% during annual leave.

Guidance published on 13 May 2020 clarified the position with Bank Holidays which fall during a period of furlough. Workers who would normally have worked on the Bank Holiday will simply still be on furlough.

Where the worker would usually have taken annual leave on the Bank Holiday, the employer has two options.

The first option is to confirm that the worker will be on annual leave, and ensure they are paid accordingly i.e. normal pay which may include the employer topping up pay from 80% if that is the agreed rate of pay during furlough.

The second would be to agree with the worker that annual leave will not be taken on that day and it will be a 'normal' day of furlough. Where this happens, the day's leave will be deferred and the worker must be permitted to take it later on in the year, or carry it over (see next question for new rules on annual leave carry over)

If employees are flexibly furloughed then any hours taken as holiday during the claim period should be counted as furloughed hours rather than working hours. This means that the employer will be able to include them in the hours claimed for.

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. If you wish your staff to take holiday, you must provide them with double the notice of the length of the holiday period you are asking them to take.

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.

How does furlough interact with maternity leave?

Those about to go on maternity leave will go on leave as normal.

Employees can be furloughed if they are on maternity leave, or other family related leave.

It appears that an employee can be furloughed if they are on maternity leave, or other family related leave, although this has not been expressly confirmed by the Government.

Guidance states that, where employers pay enhanced maternity pay, they can claim for this under the scheme and it does not appear that this would be the case if employees could not be on maternity leave and furlough at the same time. The same applies to pay during paternity, adoption and shared parental leave.

The position on assessing the level of payment to be made during leave was confirmed by the Government on 24 April 2020. Eligibility for Statutory Maternity Pay (SMP) is calculated with reference to earnings during a prescribed 8 week period. New legislation provides that, where statutory maternity leave begins on or after 25 April 2020, entitlement to SMP will be calculated on the employee's normal, full earnings rather than their furlough pay.

The same applies to paternity leave, adoption leave, shared parental leave and parental bereavement leave.

The cut off date of 10 June does not apply to employees returning from statutory maternity, paternity, adoption, shared parental and parental bereavement leave. You can furlough an employee returning from these types of statutory parental leave after 10 June even if you are furloughing them for the first time. You may do this provided that:

- you have previously submitted a claim for any other employee in your organisation in relation to a furlough period of at least 3 consecutive weeks taking place any time between 1 March 2020 and 30 June
- the employee you wish to furlough for the first time started maternity, shared parental, adoption, paternity and parental bereavement leave before 10 June and has returned from that leave after 10 June
- the employee was on your 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 19 March 2020

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. In our experience, so far it we have been able to conduct these meetings virtually.

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.

17 July 2020

Guidance released on 17 July confirms that you can continue to claim for a furloughed employee who is serving a statutory or contractual notice period, however grants cannot be used to substitute redundancy payments.

How should I ask staff to come back to work?

It is advisable to provide as much written notice as is reasonably possible. Whilst government guidance does not outline what should be considered reasonable, employers should consider providing at least one week's notice. This gives staff time to get their personal situation in order; for example, they may need this time to make arrangements for child care.

Employers can ask staff to volunteer to come back in off furlough, something that may prove popular if staff have been receiving 80 per cent of their wages. This can be a useful way of managing a situation where employers do not want their staff to all return at once. If too many volunteer, employers should then consider different processes, such as a rota system or asking staff to return part-time. Alternatively, they may also need to implement a selection criteria. Any procedure put in place should be non-discriminatory.

What should I do if furlough has paused procedures such as a disciplinary process?

Generally, procedures such as a disciplinary can take place during a period of furlough but it may have been decided to postpone them during lockdown. As workplaces reopen, employers may now wish to recommence them. In doing so, they should consider if all parties required, such as managers and witnesses, are available. Although it is understood that furloughed staff can provide witness statements, it may make the process easier to wait for them to be taken back off furlough. If there are any further delays, these should be clearly communicated, in writing, to all parties.

What steps have been taken to prevent abuse of the Scheme?

HMRC's Chief Executive, Jim Harra, confirmed measures had been put in place to minimise fraud, which were:

- the requirement for an employer to have already been authenticated by HMRC
- a four- to six-day payment processing period to allow background checks
- checks on employers after a payout has been made to verify a claim was real

Payments may be withheld or need to be repaid if claims were based on dishonest or inaccurate information or found to be fraudulent. A hotline has also been set up on which employees can report employers' abuse of the system.

The HMRC is expected to be given more powers to investigate instances of furlough fraud.

A reminder of key milestones and activity is detailed below for you:

Month	Potential furlough grant amount	Mandatory amount payable by employer	Employer NICs and pension contributions	Government calculation of average gross employment costs to employer	Percentage salary received by employees who are furloughed 100% of the time
June	80% up to £2,500	Can top up furlough pay voluntarily but must pay employees for any hours worked	Claimable under the grant (up to the minimum automatic enrolment employer pension contribution, calculated on 80% of wages up to £2,500 a month)	None	At least 80% of salary up to £2,500 per month
July	80% up to £2,500	Can top up furlough pay voluntarily but must pay employees for any hours worked	Claimable under the grant (up to the minimum automatic enrolment employer pension contribution, calculated on 80% of wages up to £2,500 a month)	None unless employee works	At least 80% of salary up to £2,500 per month
August	80% up to £2,500	Can top up furlough pay voluntarily but must pay employees for any hours worked	Payable by employer - not claimable	Employer minimum payment averages 5% of pre furlough costs	At least 80% of salary up to £2,500 per month
September	70% up to £2,187.50	Must top up furlough pay by at least 10%	Payable by employer - not claimable	Employer minimum payment averages 14% of pre furlough costs	At least 80% of salary up to £2,500 per month
October	60% up to £1,875	Must top up furlough pay by at least 20%	Payable by employer - not claimable	Employer minimum payment averages 23% of pre furlough costs	At least 80% of salary up to £2,500 per month

* (CIPD update)

If you are considering making redundancies, the legal requirement and process to vary will follow depending on the number of proposed redundancies, so HR advice must be taken as early on as possible from us, so we can support you with this,

(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).