



## Thomas More Chambers

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### **The Coronavirus Job Retention Scheme – FAQs by Employers**

*The Government's Coronavirus Job Retention Scheme was announced on 20 March 2020. This document is intended to provide practical assistance to employers and those who advise them as to how to interpret and apply the Scheme.*

The initial information provided on the Government's COVID19: Support for businesses website states:

The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at least 3 months starting from 1 March 2020. It is designed to support employers whose operations have been severely affected by coronavirus (COVID-19).

Employers can claim for 80% of furloughed employees' (employees on a leave of absence) usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers can use this scheme anytime during this period.

The scheme is open to all UK employers that had created and started a [PAYE](#) payroll scheme on 28 February 2020.

More detailed Government guidance on the Scheme was published on 26 March 2020 (last updated 9 April 2020) and is available at [Claim for wage costs through the Coronavirus Job Retention Scheme](#).

The Government's guidance on the Job Retention Scheme is constantly being updated. The information provided below is based upon the Government's guidance as at 14 April 2020.



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## **1. Do normal employment law rules apply to the Scheme?**

The Government has made it clear in the guidance that it does not plan to make any changes to any employment law rules in dealing with the Covid19 crisis. Normal rules in relation to, for example, statutory sick pay, maternity and parental leave, unfair dismissal, contract law, unlawful deduction of wages and discrimination continue to apply and apply to any employer who makes use of the Job Retention Scheme.

## **2. What is the aim of Scheme?**

In order to assist businesses during the coronavirus pandemic and reduce the numbers of employees whose employment would otherwise be terminated, employers will be able to ask employees and workers to stop working while keeping them on their payroll. Employees and workers who agree to this course of action will be “furloughed”.

The Government will pay employers 80% of the wages of furloughed employees and workers, up to a cap of £2,500 a month, for as long as the furloughed employee or worker remains employed by the employer during the furlough period.

## **3. Which employers are eligible?**

All UK employers are eligible for the Scheme. This includes businesses, charities, recruitment agencies and public authorities. It also includes individuals who employ others.

Such employers, however, **MUST** (1) have created and started a PAYE payroll scheme on or before 28 February 2020, (2) enrolled for PAYE online and (3) have a UK bank account.

If any employer satisfies criteria (1) and (3) but not (2) they can enroll now for PAYE online. This can take up to 10 days. The relevant link is [PAYE online](#).



The guidance does not identify any other criteria that has to be satisfied in order to be eligible for the Scheme. It does not appear that employers have to show that they have been detrimentally affected by the coronavirus. The guidance states that “all employers are eligible to claim under the scheme and the government recognises that different businesses will face different impacts from coronavirus”.

#### **4. Who can be furloughed?**

Employers can make a claim for employees and workers that were on their PAYE payroll on or before 28 February 2020.

Employees and workers that were hired after 28 February 2020 cannot be furloughed and claimed for under the Scheme.

The guidance makes it clear that qualifying employees and workers can be on any type of employment contract including: full-time; part-time; agency; flexible; or zero-hour contracts.

Foreign nationals are eligible to be furloughed. Grants under the Scheme are not counted as ‘access to public funds’. Employers can, therefore, furlough employees on all categories of visa.

It is important to note that employees and workers who were made redundant or have stopped working for the employer on or after the 28 February 2020 can be re-employed by the employer who can then place them on furlough and claim their wages under the Scheme.

Employers can only claim for employees or workers who started unpaid leave after 28 February 2020.

Employees and workers who are, pursuant to Government guidance, shielding for (currently) 12 weeks at home because they are in the very high-risk category (or



need to stay home with someone who is shielding) may be furloughed if they are unable to work from home.

Similarly, employees and workers who are unable to work because they have caring responsibilities resulting from the pandemic can be furloughed. Employees/workers who have to stay at home to look after children are identified in the guidance as an express example.

Employees on fixed term contract are eligible to be furloughed. Employers can renew or extend fixed term contracts during the furlough without breaking the terms of the Scheme. Where the fixed term contract ends because the contract is not extended or renewed, the employer will no longer be able to claim the grant for that employee.

New employers are eligible to claim under the Scheme in respect of employees of a previous business transferred after 28 February 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.

The guidance makes it clear that the grant can be claimed for certain groups who are not, as a matter of law, employees. These groups are:

- a. office holders (including company directors);
- b. salaried members of Limited Liability Partnerships (LLPs);
- c. agency workers (including those employed by umbrella companies);
- d. limb (b) workers.

The guidance identifies specific considerations in relation to individuals who fall within any of these four groups and who are paid via PAYE. Unless that specific guidance in relation to those groups explicitly varies from the general guidance, the general guidance is applicable.



## **5. What is the position in relation to employees or workers who are on sick leave or self isolating?**

The most recent Government guidance has substantially amended the approach on this issue.

Employees who are on sick leave or self isolating as a result of Coronavirus will be able to get [Statutory Sick Pay](#) subject to other eligibility conditions being met.

The guidance states that the Coronavirus Job Retention Scheme is not intended for short term absences from work due to sickness. The guidance also states that short term illness and/or self isolation should not be a consideration in deciding whether to furlough an employee.

The guidance, however, now makes it clear that employers can furlough employees who are currently off sick.

If a currently sick employee is furloughed, they must not continue to receive sick pay.

Employers are also entitled to furlough employees who are being shielded or are off on long term sick leave. The decision as to whether to furlough such employees lies with the employer.

Employers can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate scheme<sup>1</sup> for the same employee but not for the same period of time. When an employee is on furlough, the employer can only reclaim expenditure through the Coronavirus Job Retention Scheme and not the SSP rebate scheme.

If a non furloughed employee becomes ill, needs to self isolate or be shielded, the guidance refers to the fact that they might qualify for the SSP rebate scheme

<sup>1</sup> Please see the Employment Law Group's article on Statutory Sick Pay (SSP) Changes in Response to Covid19.



(available to employer with 250 or less employees) enabling the employer to claim up to 14 days of SSP per employee.

## **6. What happens when a furloughed employee becomes sick?**

Furloughed employees retain their statutory rights, including the right to SSP when sick. Furloughed employees must, therefore, be paid at least SSP.

The guidance makes it clear that it is for the employer to decide whether to move furloughed employees onto SSP or to keep them on furlough, at their furloughed rate.

If an employer moves a sick furloughed employee onto SSP, it can no longer claim for their furloughed salary. If employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for the furlough costs from the Coronavirus Job Retention Scheme.

## **7. Do employers have to give furloughed employees holiday leave?**

The guidance does not currently address the issue of furloughed employees and workers holiday leave rights.

## **8. What is the position in relation to employees or workers who have more than one job?**

The guidance states that if the employer's employee has more than one employer he or she can be furloughed for each job. Further each job is separate and the cap applies to each employer individually.

The guidance goes on to state that employees can be furloughed in one job and receive furloughed payment but continue working for another employer and receive their normal wages. This is a significant exception to the general rule that



furloughed employees or workers cannot continue to work whilst furloughed (see question 9 below).

The guidance also states that, if contractually allowed, employees are permitted to work for another employer whilst on furlough. The guidance states that for any employer that takes on a new employee, the new employer should ensure that they complete the [starter checklist](#) form correctly. If the employee is furloughed from another employment, they should complete Statement C.

It is arguable that Government guidance on this issue could lead unscrupulous employers and employees to abuse the Scheme.

### **9. Can a furloughed employee or worker continue to work for an employer whilst furloughed?**

The short answer to that question is no.

The guidance clearly states that a furloughed employee cannot undertake work for or on behalf of the employer's organisation. The employer cannot ask a furloughed employee to do any work that:

- a. makes money for the employer's organisation or any organisation linked or associated with the employer's organisation; and/or
- b. provides services for the employer's organisation or any organisation linked or associated with the employer's organisation.

The guidance does not provide a definition of a 'linked' or 'associated' organisation.

Further, the guidance also makes it clear that an employee or worker who is working but on reduced hours and/or on reduced pay will not be eligible for the Scheme.



Employers are advised that they are free to consider allocating any critical business tasks to staff who are not furloughed.

It is highly likely that employers who furlough employees but continue to get them to work, even at a reduced level, will face civil claims for recovery of grants paid as well as, potentially, other penalties at HMRC's disposal. It is possible that serious abuses of the Scheme will lead to criminal prosecutions.

There are two limited exceptions to the no work prohibition, where the employee or worker undertakes training or does voluntary work.

Training. The guidance states that employers should encourage furloughed employees to undertake training. Furloughed employees can engage in training so long as in undertaking the training the furloughed employee does not provide services to, or generate revenue for or on behalf of the employer's organisation.

This last provision is clearly intended to ensure that employers do not circumvent the prohibition on furloughed employees or workers working for the employer by disguising such work as training.

Where training is undertaken by a furloughed employee at the request of the employer, he or she is entitled to be paid at least their appropriate national minimum wage for the time involved in training. In most cases, the furlough payment of 80% of an employee's regular wage up to the £2,500 monthly cap will provide sufficient monies to cover the training hours involved. Where, however, the time spent training attracts a minimum wage entitlement in excess of the furlough payment, the employer will need to pay the additional wages. See further questions 16 on national minimum wage considerations.

Voluntary work. Furloughed employees can take part in volunteer work so long as it does not provide services to or generate revenue for or on behalf of the employer's organisation.



The employer can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance.

## **10. What is the position in relation to employees on maternity leave and other forms of parental leave?**

The normal [rules for maternity and other forms of parental leave and pay](#) apply.

Employers can claim through the Scheme for enhanced (earnings related) contractual pay for employees who qualify for either:

- a. maternity pay;
- b. adoption pay;
- c. paternity pay;
- d. shared parental pay.

Therefore employers who, for example, offer enhanced contractual maternity pay can furlough employees on maternity leave so that they can receive support with the cost of the enhanced payment.

Guidance has been provided in relation to employees returning from statutory after 28 February 2020. For the purposes of calculating their furlough grant, employers should use the employee's salary before tax, not the pay he or she received whilst on statutory leave. Claims for those on variable pay should be calculated using either:

- a. the same month's earnings from the previous year; or
- b. the average monthly earnings for the 2019-2020 tax year.

## **11. Can an employer impose a furlough on an employee?**

The guidance states that employers should discuss with their staff and make any changes to the employment contract by agreement.



In the vast majority of cases, UK employment contracts will not give employers the contractual right to unilaterally place employees on a leave of absence and/or reduce their pay. In the absence of such a contractual right, unilaterally imposing a leave of absence and/or a reduction in pay will amount to a breach of contract giving rise to potential breach of contract and (where pay is unilaterally reduced) unlawful deduction of wages claims. Such unilateral action may give rise to a successful constructive unfair dismissal claim.

It is, therefore, strongly advisable that employers seek the agreement (preferably written, although there are practical difficulties in achieving this in a lockdown situation) of employees and workers to be furloughed.

Employers should give consideration to preparing a furlough agreement for furloughed employees and workers to agree to. The TMC Employment Law Team can assist if required.

The guidance states that to be eligible for a grant under the Scheme employers “must confirm in writing to their employee confirming that they have been furloughed”. A record of this communication must be kept for five years.

## **12. How should an employer select employees for furlough?**

The guidance states that when employers are making decisions in relation to the process, including making decisions as to whom to offer furlough to, equality and discrimination laws will apply in the usual way.

Different businesses are going to have different work requirements during the crisis. In some cases, the entire business will be closed (possibly with a small skeleton team remaining active). In other cases there will be businesses that are having to operate at full capacity (and beyond). There will, however, be many instances where businesses have to furlough some employees but not all. In such cases, employers



will need to apply fair and reasonable selection criteria, analogous to the process involved in a redundancy exercise.

Employers should consult with employees in relation to a furlough selection exercise to the extent (at the present time) that it is practicable to do so.

Where 20 or more employees at one establishment are being considered for furlough, collective consultation rules may apply.

### **13. Do employers have to pay the balance of a furloughed employee's remuneration?**

The Scheme does not require employers to pay the balance of a furloughed employee's remuneration.

As stated above, however, normal employment law rules apply. The vast majority of UK employment contracts do not provide the employer with the unilateral right to reduce an employee's pay. In the absence of such a contractual right, unilateral action by an employer to reduce an employee's pay will give rise to strong breach of contract and unauthorised deduction of wages claims. It will also lay the foundations for a constructive unfair dismissal claim.

It is, therefore, strongly advisable that employers reach agreement with any employees that they propose to furlough if they intend to pay those employees less than their normal pay. Employers should seek to consult with employees that they propose to furlough and pay less than their normal wages to the extent that is reasonably practicable in the current circumstances. Where 20 or more employees at one establishment are involved, collective consultation rules may apply requiring employers to inform and consult with recognised trade unions or employee representatives.

Employers should also keep in mind that even if they do obtain consent from their employees to a pay cut whilst on furlough it is likely that such consent will be given under duress (ie. employee faced with alternative of furlough with pay cut or



dismissal). In such circumstances it may be possible for the employee to subsequently bring a successful claim for breach of contract and/or unlawful deduction of wages for the balance of his or her salary.

#### **14. How much can an employer claim under the Scheme?**

Employers can claim for:

- a. 80% of the employee's wages, even if the employee is on the National Minimum Wage, up to a maximum of £2,500;
- b. employer National Insurance contributions that are paid on the subsidised furlough pay

In relation to (a), the guidance goes on to state: Do not claim for the worker's previous salary.

Employers can also claim in relation to pension contributions that are paid on the subsidised furlough pay, up to the level of the minimum automatic enrolment employer contribution. The maximum that can be claimed is set in line with the minimum automatic enrolment employer contribution of 3% on qualifying earnings. Employers must pay the whole amount claimed in relation to pension contributions into a pension scheme for the employee as an employer contribution.

For the avoidance of doubt, the amount that will be paid is the lower of 80% of wages or £2,500 per month.

The guidance states that an employer can choose to top up an employee's salary, above the relevant cap, but that it is not obliged to do so under the Scheme.

It is important to note, however, that this does not relieve employers from their legal obligations under their contracts of employment. Please see further the answer to question 13 on this issue.



The guidance states that the way an employer works out its employees' wages is different depending on what type of contract they are on and when they started work.

Full and part-time employees on a salary. Employers should claim for 80% of the employee's salary, as of 28 February 2020, before tax.

Employers can claim for any regular payments that they are obliged to pay their employees. This includes wages, past overtime, fees and compulsory commission payments.

Discretionary payments, such as bonuses, tips, commission payments and non-cash payments must be excluded.

The reference salary must not include the cost of non-monetary benefits provided to employees, including taxable Benefits in Kind. Benefits provided through salary sacrifice schemes, including pension contributions, that reduce an employee's taxable pay should also be omitted from the reference salary.

Normally an employee cannot switch freely out of a salary sacrifice scheme unless there is a life event. HMRC agrees that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly.

### **15. What is the position in relation to employer National Insurance and pension contributions?**

Employees and workers will continue to pay income tax and National Insurance contributions in the normal way on any payments received from the Scheme (ie. via PAYE deductions made by the employer).

Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have opted out.



Employers are still required to pay employer National Insurance and pension contributions on behalf of their furloughed employees. Employers, however, can claim for these too.

Employers cannot claim for:

- a. additional National Insurance or pension contributions that they make because they chose to top up their employer's salary; or
- b. any pension contributions that they make that are above the mandatory employer contribution.

#### **16. How do you calculate the level of remuneration of an employee whose pay varies?**

Where an employee or worker has been employed for 12 months or more, the employer can claim the highest of either:

- a. same month's earnings from the previous year (not defined); or
- b. average monthly earnings for the 2019/20 tax year.

If the employee or worker has been employed for less than 12 months, the employer should claim for 80% of their average monthly earnings over the period since they started work.

If the employee or worker only started work in February 2020, the employer should work out a pro-rata for their earnings so far and claim 80% of that figure.

#### **17. How are payments made under the Scheme to be treated for tax purposes?**

The guidance states that payments received by a business under the Scheme are made to offset these deductible revenue costs. These payments must, therefore, be



included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes. The normal principles apply.

Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes, again in accordance with normal principles.

### **18. What is the position if the amount an employee gets on furlough is less than the National Minimum Wage?**

Individuals are only entitled to the National Living Wage, the National Minimum Wage and the Apprentices Minimum Wage for the hours that they are actually working or treated as working under national minimum wage rules.

This means that furloughed employees and workers who are not working can be paid the lower of 80% of their salary or £2,500 even if, based on their usual working hours, this would be below the applicable minimum wage.

Time spent training, however, is treated as working time for the purposes of the minimum wage calculations and must be paid at the appropriate minimum wage. Remember – the minimum wage rates increased from 1 April 2020.

Employers must therefore ensure that furlough payments provide sufficient monies to cover these training hours. Where the furlough payment is less than the appropriate minimum wage entitlement for the training hours, the employer will need to pay the additional wages to ensure at least the appropriate minimum wage is paid for 100% of the training time.

The guidance advises that, were a furloughed worker is paid close to the minimum wage levels and will complete training courses for a substantial majority of their usual working time whilst on furlough, employers should seek independent legal advice or contact ACAS.



## **19. Over what period will the Scheme apply?**

The guidance states that this is a temporary Scheme in place for three months starting from 1 March 2020. The Scheme may, if necessary, be extended.

With the exception of employees terminated on or after 28 February 2020 and reinstated, it is difficult to see how employers will be able to make eligible claims in relation to employees and workers from 1 March 2020 up to the date when the Scheme was announced (20 March) and guidance provided (26 March). During that period, the vast majority of employers would not have effectively furloughed employees and workers within the meaning of this Scheme as the concept of furloughing such individuals within the meaning and criteria of the Scheme simply did not exist.

Employers may use the Scheme at any time during the three month period.

## **20. Over what period can an employer furlough an employee?**

Employees and workers placed on furlough must be furloughed for a minimum period of three consecutive weeks. When they return to work they must be taken off furlough.

Employees can be furloughed multiple times but each separate instance must be for a minimum period of three consecutive weeks.

These provisions allow an employer to have alternating/rotating periods of furlough, allowing for some employees (subject to agreement) to be furloughed for three weeks whilst others are working and then switching employees from active to furlough status and vice versa. Such an approach may be regarded as fairer by employees and reduce the risk of a challenge in relation to selection criteria at a later date. Conversely, however, such an approach could create practical and logistical problems for employers.



The guidance states that grants will be prorated if the employee or worker is only furloughed for part of a pay period

It is important to note that claims should be started from the date that the employee or worker finishes work and starts furlough, not the date on which the decision to furlough is made and not the date when the employer writes to the employee or worker confirming their furloughed status.

## **21. What will employers need to make a claim?**

To make a claim, employers will need to provide the following information:

- a. their ePAYE reference number;
- b. the number of employees being furloughed;
- c. National Insurance numbers for the employees the employer wants to furlough;
- d. The names of the employees the employer wants to furlough;
- e. The employer's Self Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number;
- f. the claim period (start and end date);
- g. the amount being claimed (per the minimum length of furloughing of three consecutive weeks);
- h. their bank account number and sort code;
- i. their contact name;
- j. their phone number.

Employers must calculate the amount that they are claiming.

Claims should be made using the amounts in the employer's payroll – either shortly before or during running payroll.



Employers who use an agent who is authorised to act for the employer for PAYE purposes will be able to use the agent to make a claim on their behalf.

File only agents (who file an employer's RTI return but do not act for the employer on any other matters), however, are not authorised to make a claim for the employer and the employer will need to make the claim itself. File only agents can assist the employer in obtaining the information that is required to make a claim.

Claims can be backdated until 1 March 2020 where employees or workers have already been furloughed.

In circumstances where the furloughed employee or worker's wages are to be reduced whilst on furlough (either because of the 80% and/or £2,500 per month caps) this exercise must be undertaken by the employer within its payroll before the furloughed employee or worker is paid. This adjustment will not be made by HMRC.

The guidance expressly warns that HMRC will retain the right to retrospectively audit all aspects of an employer's claim.

## **22. What happens after a claim is made?**

HMRC will check the claim and, if it is eligible, will pay it in to the employer by BACS to a UK bank account.

The guidance makes it clear that the employer must pay **all** of the grant to the furloughed employee or worker that the employer receives for their gross pay in the form of money. Employers are prohibited from entering into any transaction with the worker which reduces the wages below their gross pay. Employers cannot charge any administration charge, fees or other costs in connection with the employment.

The guidance states that HMRC will process all claims before the Scheme ends.



### **23. What happens after the Scheme ends?**

The guidance states:

“When the government ends the scheme, you must make a decision, depending on your circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider termination of employment (redundancy).”

The guidance also states that grants under the Scheme cannot be used to substitute redundancy payments

### **24. Can employers make a claim now?**

No. The current guidance states that the online service that employers will use to make a claim is not available yet. Currently, the Government expects that online service to be available by the end of April 2020.

No guidance is given as to likely length of time that it will take for HMRC to process, approve and pay grants.

**14 APRIL 2020**

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*The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues, including those arising from the Covid-19 pandemic. We are*



*well used to working remotely and can arrange for confidential telephone or video conferences and meetings on a variety of platforms with you and our mutual clients. In addition, we all are well used to paperless working and to dealing with remote hearings and are always happy to assist in setting them up.*

*Equally important during these times is an appreciation of the practical reality of the court system and what it can currently offer and the priority being given to urgent business in relation to children and domestic violence. We can provide urgent advice in relation to whether an application is likely to come within the criteria to enable an urgent hearing to be obtained.*

If you or your clients need any assistance in relation to the Coronavirus Job Retention Scheme, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at [cbrown@thomasmore.co.uk](mailto:cbrown@thomasmore.co.uk).

The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues arising from the coronavirus crisis. If you need such assistance, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at [cbrown@thomasmore.co.uk](mailto:cbrown@thomasmore.co.uk).

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