



COVID-19 JOB RETENTION SCHEME

FRIED FRANK

In light of the rapidly developing situation and government response, this memorandum is current as of 1 June 2020.

This memorandum will inform you whether you can furlough employees or workers; will detail the practicalities of furloughing; and will inform you as to whether furloughed employees can still volunteer for your organisation.

Job Retention Scheme

For the period between 1 March 2020 and 31 July 2020, HM Revenue & Customs (“**HMRC**”) will reimburse eligible employers for:

- 80% of the wage costs for each employee in the United Kingdom that would otherwise have been laid off or made redundant, up to a cap of £2,500 per month per employee; and
- the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions of 3% on qualifying earnings.

For all claims relating to any period from 1 August 2020 onwards, HMRC will cease to reimburse employers for the relevant Employer National insurance contributions and pension contributions.

For claims relating to September 2020, HMRC will reimburse 70% of an employee's wage costs up to £2,187.50 per employee (with employers required to contribute at least 10% of the relevant wage costs). For claims relating to October 2020, HMRC will reimburse 60% of wage costs up to £1,875 per month (with employers required to contribute at least 20% of the relevant wage costs). The scheme is expected to terminate on 31 October 2020.

The following will not be reimbursed:

- additional National Insurance or pension contributions where an employer elects to top up a furloughed employee's salary;
- voluntary automatic enrolment contributions above the minimum mandatory employer contribution will not be reimbursed; and
- the Apprenticeship Levy and Student Loans, each of which should continue to be paid as usual.

Am I eligible to furlough employees?

The scheme is open to all UK employers registered on HMRC's real time information system for PAYE as of 19 March 2020 and a UK bank account. In addition, all employers accessing the scheme must be enrolled for PAYE online; enrolment can take up to 10 days. A new PAYE scheme registered after this date will also be permitted where the new scheme (i) replaces at least two of the employer's qualifying PAYE schemes as a consequence of the employer's payroll consolidation, and (ii) only has effect in relation to employees who are former members of one of the transferred schemes.

Eligible employers include:

- an employer that becomes an employer of otherwise eligible employees after 19 March 2020 by way of a TUPE transfer or a transfer where PAYE business succession rules apply (even where such new employer did not have a qualifying PAYE scheme on or before 19 March 2020);
- individual employers; individuals may furlough employees provided that such employees are paid through PAYE; and
- administrators, where an eligible employer is under the management of an administrator. However, such access is limited to where the administrator considers that there is a reasonable likelihood of the furloughed employees not being made redundant at the expiry of the scheme.

Any employers receiving public funding for staff costs (or the provision of necessary services to respond to COVID-19) are not expected to furlough employees (subject to limited exceptions where such employers are not primarily funded by the UK Government and cannot redeploy staff to essential services).

The scheme is intended to assist employers who would otherwise have difficulty in paying their employees due to COVID-19. However, the UK Government has confirmed that all employers are eligible to claim under the scheme. Although it has not been expressly stated, it would appear that HMRC will not dispute the granting of a rebate where a company has sufficient cash flow to pay its employees.

The UK Government has retained the right to retrospectively audit employers and claw back fraudulent or erroneous claims pursuant to the scheme. The UK Government has also put in place an online portal for employees and the public to report suspected fraud and is actively encouraging employees to do so. HMRC has confirmed that fraud will be subject to criminal prosecution.

Who can be furloughed?

The scheme applies to:

- employee (and apprentice) wage costs. This includes employees on fixed term contracts; the contracts with such employees may be renewed or extended during the furlough period. However, where a fixed term contract terminates because it has not been renewed or extended, an employer may no longer claim the wage costs for such employee;

- the wage costs of agency workers, zero-contract or casual workers (i.e. workers who provide services to a business other than pursuant to a contract of employment);
- the wage costs of employees that are foreign nationals. The UK Government has confirmed that the scheme will not be considered to be 'access to public funds', for the purposes of an employee on any category of visa;
- the wage costs of office holders (including company directors) and salaried members of limited liability partnerships where the company or LLP (as applicable) has formally adopted a decision to furlough such individual and vary the terms of the LLP agreement (if applicable); and
- the wage costs of agency workers and limb (b) workers,

in each case, provided that such individuals were employed on or before 19 March 2020 and are paid through the employer's PAYE system. For the purposes of this memorandum, all eligible employees and workers will be collectively referred to as "**employees**".

You may rehire and furlough ex-employees that were made redundant after 28 February 2020. However, new employees who have been hired since 19 March 2020 are not eligible to participate in the scheme. Employees on unpaid leave cannot be furloughed unless such unpaid leave commenced after 28 February 2020 or until the period of unpaid leave expires on the date contemplated on its commencement or, where the duration was tied to an event or circumstance, such event or circumstance has occurred.

Employees on fixed term contracts can be furloughed. Fixed term contracts may be renewed or extended during the scheme but once a contract ends you will not be reimbursed for such employee's ongoing wage costs (if any).

As is required of all furloughed employees, the UK Government guidance confirms that furloughed directors should not complete any work to generate commercial revenue or provide services to or on behalf of their company. However, a furloughed director may continue to carry out duties required to fulfil his or her statutory obligations provided that such director does not undertake more work than would reasonably be judged necessary for that purpose.

The Job Retention Scheme and SSP

An employee is eligible for SSP where the employee: (i) is self-isolating (in accordance with the relevant UK Government guidance), or (ii) contracts COVID-19. The UK Government has now confirmed that such employee may be furloughed. In these circumstances, the relevant employee will be classified as furloughed and will no longer receive sick pay. However, there is some continued uncertainty in this regard as the UK Treasury Direction published on 15 April 2020 ("**Treasury Direction**") states that furlough designation in respect of an employee cannot occur until any period of SSP has expired.

However, the UK Government guidance also confirms that a furloughed employee retains his or her statutory right to SSP. This means that furloughed employees who

become ill must be paid at least SSP. An employer may elect to move a sick employee onto SSP (and make a claim under the SSP rebate scheme) or to keep them on furlough. An employer may make a claim from both the Job Retention Scheme and the SSP rebate scheme for the same employee but not for the same period of time.

Employees who are shielding in line with the relevant UK Government guidance or are unable to work as they have COVID-19 related caring responsibilities can be placed on furlough.

How do I furlough employees?

You must:

- designate each relevant employee as 'furloughed' and notify them in writing of the change. You must retain a record of this communication for five years. An employee must agree to be furloughed. The Treasury Direction states that an employee must agree in writing to be furloughed but the latest guidance from the UK Government provides that while there must be a written record of the agreement, the employee is not required to provide a written response. Alternatively, an employer may reach collective agreement with a trade union. When deciding which employees to furlough, you must comply with all applicable equality and anti-discrimination laws;
- continue to pay each furloughed employee their salary, reduced as appropriate. You must pay each furloughed employee the gross amount received by you in respect of such employee, no fees can be charged. In addition, no part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme. Employees will continue to pay Income Tax, National Insurance and make pension contributions as usual; and
- apply for any claims relating to the period on and before 30 June 2020 before 31 July 2020. From July 2020, claims must relate to a single month (to reduce complexity as the available support will vary from month to month).

HMRC has set up an online portal. You should apply through this portal, submitting the following information: (i) the amount claimed, (ii) your ePAYE reference number, (iii) the number of employees being furloughed, (iv) the National Insurance Number for each furloughed employee (employers should contact HMRC where an eligible employee does not have a National Insurance Number), (v) the name of each furloughed employee, (vi) the payroll/ works number for each furloughed employee, (vii) their Self-Assessment Unique Taxpayer Reference or Corporation Tax, (viii) the claim period (start and end date), (ix) amount claimed (per the minimum length of furloughing of three weeks), (x) their bank account number and sort code, (xi) their registered name and address, (xii) a contact name, and (xiii) a contact phone number. Each claim must be made within one session on the portal. The portal will time out after half an hour and progress cannot be saved so employers should have all relevant information ready prior to applying through the portal.

Where an employer furloughs fewer than 100 employees, the details of each employee must be entered directly into HMRC's system; employers with 100 or more

furloughed staff must upload a file containing each employee's full name, National Insurance number, payroll number (optional), furlough start date, furlough end date (if known) and the full amount claimed.

A step by step guide setting out how to make a claim (including links to HMRC's pre-recorded webinars on YouTube) can be found here. The UK Government is also expected to publish detailed guidance on how to calculate the amounts that will be reimbursed post July 2020 on 12 June 2020.

Employers have been instructed to make claims for relief in accordance with actual payroll amounts at the point at which employers run payroll or in advance of an imminent payroll. HMRC will pay participating employers the amount claimed via a BACS payment to a UK bank account.

The minimum period of time an employee may be furloughed is three weeks. After this minimum period, an employee will be able to move between furloughed status (each time subject to the minimum three week period) and normal status as and when work becomes available (for example, to replace an employee who becomes sick).

The UK Government has confirmed that employees have the same rights as they did previously which we understand to include rights tied to continuity of service (for example, maternity and paternal leave rights and rights to redundancy payments and Statutory Sick Pay entitlement) as well as rights against unfair dismissal. The UK Government has also clarified that furloughed workers planning to take paid parental or adoption leave are entitled to pay based on their usual earnings, not their furloughed pay rate. To the extent you seek to make any changes impacting such rights, you will need to discuss the issue with your employees and will need to amend employment contracts by agreement, which may require entering into a collective consultation process in order to achieve any such changes.

In accordance with normal principles when calculating taxable profits for Income Tax and Corporation Tax purposes, you (i) must record any payments received from HMRC pursuant to this scheme as income, and (ii) may deduct employment costs as normal.

How much do I pay furloughed employees?

For the purposes of determining an employee's wage costs (including past overtime, non-discretionary fees and compulsory commission payments but in all cases excluding discretionary fees, discretionary bonuses, tips, other commission payments, non-cash payments, benefits in kind and benefits provided through salary sacrifice schemes):

- **full time or part time salaried employees (including employees returning from statutory leave after 19 March 2020):** the wage costs should be determined by reference to the employee's actual salary before tax as of 19 March 2020 *provided that*, where an employee is on unpaid leave, the wage costs should be calculated on the basis of what would have been paid to the employee during the unpaid period if the leave had been granted on the same terms as the employee's paid leave entitlement. The UK Government has confirmed that where an employer has calculated wage costs using an

employee's salary as at 28 February 2020 in line with previous guidance, such calculation may be used for the employer's first claim under the scheme;

- **variable pay employees:** if the employee (i) has been employed for 12 months prior to the claim or returns from statutory leave after 19 March 2020, employers should use the higher of (A) the same month's earning from the previous year, and (B) the employee's average monthly earnings from the 2019-20 tax year, or (ii) has been employed for less than 12 months, employers should use such employee's average monthly salary since they started work; or
- **new employees:** where an employee only commenced work in March 2020, an employer should calculate a pro-rata for their earnings to date.

A detailed guide and calculator setting out how to calculate wage costs (including worked examples) can be accessed [here](#).

You may elect, but are not required, to continue to pay furloughed employees all or some of the remaining 20% of their salary. However, although the UK Government has specifically reserved the right to change its guidance on this particular point, the current guidance states that where an employee takes holiday while furloughed, an employer must pay the employee their usual rate of pay for the days on which the employee is on holiday. In addition, HMRC has confirmed that COVID-19 is classified as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly. If you do not elect to make additional payments to furloughed employees, such employees would be paid the lower of 80% of their salary and £2,500 (on a monthly basis), even where this amount would be below the National Minimum Wage / National Living Wage (as applicable).

If you offer enhanced (earnings related) contractual pay to employees on maternity leave, these are wage costs that can be claimed through the scheme. The same principles apply in respect of employees qualifying for contractual adoption, paternity or shared parental pay.

Can a furloughed employee still volunteer for our organisation and if so, in what capacity?

The Minister for Civil Society has confirmed that furloughed employees in the charity sector cannot volunteer for their own organisation in any capacity, in order to prevent fraud. Furloughed employees may undertake volunteer work for other organisations or training provided that such activities do not provide services or generate revenue for or on behalf of your organisation.

Prior to 30 June 2020, furloughed employees may not continue to work for or on behalf of you while furloughed as the scheme does not cover employees working reduced hours. From July 2020, a furloughed employee may work part-time (for any period of time and any shift pattern), provided that HMRC will only reimburse you for wage costs corresponding to time that the employee did not (but usually would) work. You must pay part-time furloughed employees for the hours they work in the ordinary course.

Where employees are required to complete online training courses, they must be paid at least the Apprenticeship Minimum Wage, National Minimum Wage or National Living Wage (as applicable) for the time spent in training, even if this is more than the subsidised 80% of their salary.

Furlough and redundancy

If an employee does not agree to be furloughed, such employee can be made redundant provided that the applicable redundancy process is followed. Collective consultation will be required where 20 or more employees/workers will be terminated and re-engaged (if they do not agree to be designated as furloughed).

You should consider how this scheme will affect any existing redundancy programs or other reduced hours policies put in place as a consequence of COVID-19. Subject to following the applicable redundancy processes, a furloughed employee can still be made redundant. Where you expect your activities will be impacted in the long term as a result of COVID-19 and redundancies may be required, you should use the same objective redundancy criteria when selecting the employees to be designated as furloughed. Grants received under the scheme cannot be used to substitute redundancy payments.

If no redundancy process is initiated, when the scheme ends employees will return to work.