



COVID-19 JOB RETENTION SCHEME

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In light of the rapidly developing situation and government response, this memorandum is current as of 5 January 2021.

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

Until 30 April 2021, HM Revenue & Customs ("**HMRC**") will reimburse eligible employers for up to 80% of the wage costs for the hours not worked by each eligible employee in the United Kingdom that would otherwise have been laid off or made redundant. The maximum amount reimbursed per employee is £2,500 per month.

Employers are still liable for National Insurance contributions and pension contributions for each furloughed employee, such amounts will not be reimbursed by HMRC.

Employers may no longer submit claims for the period ending on 31 October 2020. Claims for furlough days in December 2020 must be made by 14 January 2021.

Am I eligible to furlough employees?

The scheme is open to all UK employers (including businesses, charities, recruitment agencies and public authorities) with a UK PAYE system started on or before 30 October 2020. In addition, all employers accessing the scheme must be enrolled for PAYE online; enrolment can take up to 10 days.

Eligible employers include:

- an employer that becomes an employer of otherwise eligible employees on or after 1 September 2020 by way of a TUPE transfer or a transfer where PAYE business succession rules apply provided that the employee is employed by either their old or new employer on 30 October 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). However, the UK Government has confirmed that employers who are not fully funded by public grants may use the scheme.

The UK Government has retained the right to retrospectively audit employers and claw back fraudulent or erroneous claims pursuant to the scheme. 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 30 October 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 on or after 23 September 2020. However, new employees who have been hired since 30 October 2020 are not eligible to participate in the scheme.

Employees on fixed term contracts can be furloughed. Fixed term contracts may be renewed or extended during the scheme. If an employee's fixed term contract expired on or after 23 September 2020, such employee may be re-employed and furloughed.

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. Such employees may also be furloughed. In these circumstances, the relevant employee will be classified as furloughed and will no longer receive sick pay.

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 also 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. When deciding which employees to furlough, you must comply with all applicable equality and anti-discrimination laws; and
- continue to pay each furloughed employee, reduced to 80% of their salary (up to the £2,500 cap) where 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.

Employees can be employed for any amount of time and any work pattern. Employers may elect to (i) fully furlough employees; or (ii) flexibly furlough employees (provided that employees may not work for their employer during the hours that they are furloughed). There is no minimum furlough period but, unless otherwise specified, the minimum period to be claimed for is seven calendar days.

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, (v) the payroll/ works number for each furloughed employee (optional), (vi) your Self-Assessment Unique Taxpayer Reference or Corporation Tax Unique Tax Payer Reference, (vii) the claim period (start and end date), (viii) amount claimed, (ix) for each flexibly furloughed employee, the usual number of hours worked and the hour to be worked during the claim period, (x) your bank account number and sort code, (xi) a contact name, (xii) a contact phone number; and (xiii) your address.

Claims can be made in advance and must be submitted 14 calendar days after the month the employer is claiming for. HMRC will pay participating employers the amount claimed via a BACS payment to a UK bank account.

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?

HMRC has produced an online calculator¹ to assist with determining 80% of an employee's wage costs (including past overtime, fees and compulsory commission payments but in all cases excluding fees, discretionary bonuses, tips, other commission payments, non-cash payments, benefits in kind and benefits provided through salary sacrifice schemes).

You may elect, but are not required, to continue to pay furloughed employees all or some of their remaining salary. 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. Employees may end maternity leave in order to be furloughed provided that 8 weeks' notice is provided.

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. 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.

¹ <https://www.gov.uk/guidance/calculate-how-much-you-can-claim-using-the-coronavirus-job-retention-scheme>

Furlough and holiday accrual

Furloughed employees continue to accrue annual leave in accordance with their employment contract. Employers and employees may agree to vary an employee's holiday entitlement provided that each employee is always entitled to a minimum of 5.6 weeks of statutory paid annual leave.

Furloughed employees may take holiday; employers should not put employees on furlough just because they are on holiday. Employers must top up a furloughed employee's wages whilst they are on holiday as employees must be paid their usual holiday 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.

Furlough and training

Furloughed employees can (and should be encouraged to) engage in training while furloughed provided that the employee does not provide services to, or generate revenue for his or her employer (or a linked or associated organisation).

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. Payments to employees who are made redundant should be calculated on the basis of their normal wage, not their reduced furlough wage.

From 1 December 2020, employers may not make a claim under the scheme for days on which an employee is serving a contractual or statutory notice period.

Furlough and publicly available information

In order to deter fraud, from February 2021, HMRC will publish the following information about employers who make claims under the scheme on or after 1 December 2020: (i) employer name and company number (if applicable); and (ii) the range within which the value of the claim falls. Employees will also be provided with information on the claims made for them.

HMRC will not publish details of employers in limited circumstances where the employer can show there is a serious risk of violence or intimidation to certain relevant individuals.