

Furlough and the
Coronavirus Job Retention Scheme

Briefing Note

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Furlough and The Coronavirus Job Retention Scheme – the latest

The Government published some much-awaited further information about the Coronavirus Job Retention Scheme (CJRS) late on 26 March 2020. A copy of this is available at

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme?fbclid=IwAR01rSs4rCE4YS-aLNhIjLHYOFTCyfFai2dDeniRYcWWyaROVwuDDBO1QKo>

This has provided some more 'meat on the bones' of the concepts the Chancellor had previously outlined regarding help for employers whose business has been severely affected by the coronavirus (we wrote about the original announcement in our article [here](#)). However, it is important to note that the guidance does not amount to law, so the position will of course depend on any subsequent law or regulations that are published.

In this briefing note we will look at the key information for employers from the newly published details. Please note that although the contents of this note are up to date as at 27 March 2020, the situation is rapidly evolving and we suggest that you always check that you are acting upon the latest information.

(The Government has also announced its new scheme to help those who are self-employed, information about which is available [here](#), but please note that as we are employment lawyers we are focusing on the employee issues!)

Timing

As had previously been announced, the scheme will start from 1 March 2020, so employers are able to backdate to then. It is initially intended to last for 3 months from 1 March 2020 and the employer can apply to use it any time during the 3 month period.

Which organisations can claim?

The scheme can be used by [any employer](#) that had an existing PAYE scheme in place on 28 February 2020 and has a UK bank account. The new guidance specifically states that the scheme could potentially apply to public bodies, but also says that the scheme is not expected to apply where roles are paid for by public funding.

HMRC will have the power to audit any applications under the scheme.

How do you apply?

The idea of the scheme is that the employer will be able to reclaim 80% of the employee's pay (or £2,500, whichever is the lower). The employer will need to make the payment to the employee in the first instance, and will then be repaid via the scheme. The repayment will be made by the Government as a grant, which will come via HMRC.

Employers will need to apply for this money via an online portal. The Government says that they hope that the portal will be up and running by the end of April, although it is still not clear at this stage how quickly HMRC will make the payments, which will be key to the employer's cashflow. We understand that the Government is keen for employers to apply for the [Coronavirus Business Interruption Loan Scheme](#) if they are in financial difficulty, but that will not be appropriate or possible for every organisation.

How much can you get?

Through the portal the employer will be able to submit a claim for 80% of the monthly wage costs (up to £2,500 per month) for any employees who are on furlough. 'Wage costs' does not include any fees, commissions or bonuses, nor does it apply to dividends.

Crucially, the employer will also be able to claim for the associated employer's National Insurance contributions in addition to the minimum auto enrolment pension contributions the employer would have to pay (unless the employee has opted out of the pension scheme). Further guidance will be issued by HMRC in due course before the portal opens regarding how these should be calculated.

The scheme will not repay any employer pension contributions that the employer chooses to make over and above the auto-enrolment minimum (which is currently 3% of income above the lower limit earnings limit (which is £512 per month until 5th April 2020 and will be £520 per month from 6th April 2020)).

Employers are obliged to pass all of the grant on to the furloughed employees. The amount that the employee receives (i.e. 80% of their wages, or £2,500) will be subject to deductions for tax and National Insurance.

One thing employers will need to think about is how their payroll will cope with the scheme, as it is not something that it will have been designed to do!

The Government have also said that employers could also choose to top up the employee's salary so that they receive more than 80%, but there is no obligation whatsoever to do so and if you do, you would not be able to reclaim the top up amount through the CJRS.

How is the 80% calculated?

For employees who receive a salary, the calculation is simply based on their salary at 28 February 2020.

For employees whose pay varies, if they have worked for you for 12 months or more then you would use either their average monthly earnings for the 2019/20 tax year OR the same month's earning from the previous tax year, whichever is the higher.

If someone has variable pay and has not been with you for 12 months, then you would use an average of their monthly earnings.

This is in line with what we expected when the scheme was first announced.

Who can you furlough?

Previously it had been indicated that the scheme would apply to workers, but the latest information refers only to employees. It basically applies to anyone who is on PAYE (which will include some workers, but many are self-employed).

An employer will potentially be able to furlough any employee, whether part-time or full-time, flexible or zero hours, so long as they were on your payroll at 28 February 2020. There are also provisions for agency employees, who would normally be the responsibility of the agency.

The scheme does also allow employers to furlough staff who have been made redundant since 28 February 2020 if they are rehired by the employer. However, there is no obligation on the employer to rehire them.

Can the employee do some work for us during furlough?

In order to qualify for repayment under the CJRS scheme, it is important that the employee must not carry out any work for the employer during the furlough period. This is as per our [previous article on the scheme](#). Therefore if you still need the employee, but on reduced hours, this scheme will not apply (other options may be available, as we have explained in our recent Dealing with Difficult Times article [here](#)).

However, the scheme does allow for an employee to be furloughed from more than one job (or equally, to be furloughed from one and not the other). Each job, and the cap on the amount, will be looked at separately. In our view this does leave the scheme open to exploitation, because it appears to suggest that an employee on furlough with one employer could then go and get a new job elsewhere while they are still receiving 80% of their pay. This might however be a breach of contract with the employer who had furloughed them, depending on the terms that are in place (and the Government's [guidance to employees about the CJRS](#) does make reference to this).

How do you choose who to offer furlough to?

We have been receiving a lot of queries from employers about how they should decide which employees to furlough. Our advice has been that as usual, it will be a question of 'reasonableness' and you need to act fairly. The guidance does not give any particular method, so we would suggest something similar to a redundancy selection process may be a good starting point, depending on the situation. You could of course ask for volunteers if you wish, but there can be disadvantages to doing that.

Also, as with any decision an employer makes, you need to be mindful of your duty of trust and confidence to your employees, as well as the Equality Act and the need to avoid unlawful discrimination.

There may be some situations where an employer could justify offering furlough to specific employees, such as those who qualify as vulnerable due to their age or a health condition, or those who have childcare responsibilities now that schools are closed. However, we suggest that if you are thinking of doing this it is best to [take advice](#) in the first instance.

We have already come across a number of situations where employees have been unhappy that they haven't been furloughed when they wanted to be, and others where people have complained they have been furloughed when they didn't want to be. This is something that will require careful handling by employers.

What is the process for putting an employee on furlough leave?

The Government's guidance is very clear (and ACAS's advice is also consistent with this) that communication with employees about furlough will be key. In most cases, furlough will amount to a change to an employee's terms and conditions of employment and therefore is something that the employee will need to agree to. The Government recommends that employers seek legal advice about this ([contact us](#) if you have a situation you would like to talk through). For example, if 20 or more employees are being asked to agree to be furloughed, then collective consultation with employee representatives may be required.

The new information makes clear that in order to be able to claim the subsidy under the CJRS, they will need to have written to their employee confirming that they have been furloughed and keep a record of this communication. It may be that evidence of this may need to be submitted in due course via the portal.

Employers should discuss with their staff and make any changes to the employment contract by agreement. Employers may need to seek legal advice on the process. If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment.

How long does furlough last?

The scheme as a whole is initially envisaged to last for three months (starting from 1 March 2020) but it may be extended by the Government depending on how things go.

The latest guidance makes clear that the minimum period an employee can be furloughed for is 3 weeks.

A period of furlough would normally either end when you decide to bring it to an end because you have work for the employee, or when the Government ends the CJRS scheme. Again we suggest that you cover this in your letter to employees.

When the CJRS scheme ends, you must make a decision regarding whether your employee can return to their duties. If they cannot, then you would need to consider other options such as potential redundancy (we can advise further on this if required – please [contact us](#)).

Employee rights during the furlough period

As we expected, the Government has confirmed that employees continue to have all of their employment rights and obligations during furlough (other than the right to receive 100% of their pay) and this would of course include their entitlement to benefits such as private medical cover.

When you write to your employees regarding furlough we recommend that the position regarding their contractual rights and obligations is made clear to them.

Accrual of holiday

Based on the Government's guidance, employees will continue to accrue holiday during their furlough period. The amount they accrue will of course depend on their contract and the length of

furlough, but if the period is several months, the employee could return to work after a lengthy absence with a build up of annual leave to take.

However, in our view it is possible that the employer could ask the employee to agree that any holiday accrued during furlough will be taken during furlough. If the employee agrees, this would need to be properly documented, so please [let us know](#) if you would like us to assist you with this.

Can you rotate employees in and out of furlough?

This is a popular question amongst our clients and it hasn't been definitively answered in the latest details. Our view based on the information so far is that so long as an employee is furloughed for at least three weeks, it is then possible to bring them back and put another employee on furlough in their place. What isn't clear yet is whether someone can be furloughed more than once, although it seems for now that it is likely to be possible.

Whether this is practical for employers, bearing in mind that the employees in work might become ill and cover may be required, will need to be carefully considered.

Can employees who are ill, self-isolating or shielding be furloughed?

Our clients have been keen to ask us whether employees who are directly affected by the coronavirus (such as those who are ill or self-isolating, or are off work because a family member is vulnerable) will be eligible to be furloughed. Fortunately, some further information on this has been included in the latest announcement.

Employees who are either ill or self-isolating cannot be furloughed while they are getting Statutory Sick Pay (many employers of course pay more than Statutory Sick Pay, but although the guidance does not specifically deal with the point, our view is that it is likely the same principle would apply to company sick pay). They can however be furloughed after their period of sickness or self-isolation ends.

The guidance states that employees who are 'shielding' in line with public health guidance (i.e. those who are isolating along with a vulnerable family member) can also be placed on furlough.

Can employees do voluntary work or training while they are furloughed?

While someone is furloughed, they are still allowed to take part in volunteer work or training. However, this cannot involve providing services to or generate revenue for your organisation.

If you require them to undertake training then they should be paid at least the National Minimum Wage (or National Living Wage, depending on their age) for the time they spend doing the training, even if that takes them above the 80% of pay that you are claiming under the CJRS.

What if the 80% takes someone below the National Minimum Wage (or National Living Wage)?

The Government has specifically addressed this point in the latest guidance and has confirmed that the NMW/NLW only apply to hours worked. Therefore under the scheme it is possible for furloughed workers on 80% of pay to go below NMW/NLW rates.

What implications are there regarding family friendly leave?

Someone who has been furloughed will still start their family friendly leave (e.g. maternity, paternity, adoption, shared parental) as normal.

The fact that they have been furloughed may reduce the level of statutory pay they receive during their leave.

If an employer offers enhanced pay during family friendly leave (e.g. company maternity pay) then 80% of the costs of that (up to £2,500) can be reclaimed through the CJRS.

We hope you have found our briefing note useful. If you would like advice on the CJRS and how you could furlough your employees, or if you would like assistance with any other employment law issues, please do not hesitate to contact a member of the Pure Employment Law team – our contact details are below. We provide regular employment law updates via our free ebulletins, so if you do not currently subscribe you are welcome to join our mailing list via our website [here](#).

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