

We now have some long-awaited clarity on The Coronavirus Job Retention Scheme following the Government's announcement on Friday 27 March 2020.

First and foremost, the Coronavirus Job Retention Scheme is a temporary measure to assist businesses whose operations have been severely affected by coronavirus to retain their employees and protect the UK economy.

The ethos of the scheme is to protect those employees who would have lost their jobs as a result of the pandemic. These employees can be 'furloughed' in order to try and protect their jobs.

Importantly, businesses will only be able to benefit from the scheme if they both NOTIFY and AGREE and CONFIRM IN WRITING with those employees that they are furloughed employees.

In terms of the 'AGREE' part, when agreeing changes in hours (and acceptance of 80% pay), if the contract does not already permit the change, normal employment law applies. The employer should take care and must be very careful not to discriminate in deciding who to offer furlough too.

Once an agreement has been reached, this must be CONFIRMED IN WRITING and a record of this communication must be kept for 5 years.

It is worth noting that an employer does not have to agree to an employees' request to be furloughed.

The employer business will then have to submit information to HMRC about the furloughed employees and their earning through a new online HMRC portal. HMRC will be carrying out audits to ensure the employers have not claimed incorrectly or fraudulently.

Employers will then be able to apply to HMRC for a grant to cover 80% of the furloughed employees usual monthly wage costs up to a total of £2,500 a month. The furloughed employee remains employed by the employer during the furlough period and cannot carry out any work for the employer during this period. This includes providing services or generating revenue.

Which businesses can take advantage of the scheme?

- The scheme is open to all UK employers that had a PAYE scheme in place on 28 February 2020
- The scheme is open to all UK employers that enrolled for PAYE by 28 February 2020
- The employer must have a UK bank account

- Any organisation with employees can apply. The government does not expect public sector employers to use it whilst central government continues funding wage costs in the normal way as it is anticipated that most of their essential public services will continue to function.
- The Scheme is open to recruitment agencies however will only be available to those agency employees that are not working.

How much can an employer claim and how much will the employee receive?

- Employers can reclaim up to 80% of wage costs/salary up to a cap of £2,500 per month. You'll still need to pay employer National Insurance (NI) and pension contributions on behalf of your furloughed employees, and you can claim for these too. You cannot claim for additional NI or pension contributions you make because you chose to top up your employees salary or, any pension contributions you make that are above the mandatory employers contribution.
- The employee's wage/salary will be subject to the usual tax and other deductions while on furlough leave. You can claim for regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. Employers should therefore agree with employees as part of the process that such payments will not continue during the period of furlough leave, unless employers are happy to continue to make these payments in addition to the grant payment.
- An employer can choose to top up the 80% grant to 100% of the employee's salary but there is no requirement to. An employer should be cautious if they are topping up some employees' salary to 100% but not others.
- For employees whose pay varies e.g. zero hour or variable hour contracts, the employer can claim for the higher of (i) the same month's earning from the previous year (e.g. earnings from March 2019); or (ii) average monthly earnings in the 2019-20 tax year.
- Employers can only claim once every three weeks, i.e. they cannot get weekly reimbursement. Claims can be backdated to 1 March 2020.

What about pension contributions?

- The amount employers can claim includes minimum automatic enrolment contributions based on the furloughed employee's wage/salary.

- Regarding the employee's ability to opt out, temporarily suspend or even temporarily reduce payments into a pension scheme, employers should check the pension scheme rules as well as employment terms and conditions for any restrictions on the way in which employee pension contributions are calculated.

Does an employee have to be paid NMW?

- Individuals are only entitled to the minimum wage for the hours they work. So, if they are furloughed, they are not working. 80% of their normal earnings would take them below the minimum wage based on their normal working hours however, they still only receive 80% as they are not working. (There is a specific exclusion for any time spent training – see below).

Which employees are eligible?

- Any employees on the payroll as at 28 February 2020. If they were hired later e.g. start date after 28 February 2020), they are not eligible. Employees can be on any type of contract, including full-time, part-time, agency, flexible or zero-hour contracts. Foreign nationals are also eligible to be furloughed. Be cautious if you have foreign nationals who have conditions attached to their visas; you will need to take specific advice.

What about former employees that have been made redundant preceding the Coronavirus Job Retention Scheme being introduced?

- Anybody who was on the payroll on 28 Feb and has since been made redundant can be re-employed and put on the scheme. Be cautious though as holiday will continue to accrue as will length of service. Speak to an expert before you agree to re-employ any former employees.

Can I furlough an Apprentice?

- Apprentices can be furloughed in the same way as other employees and continue to train. Apprentices must be paid at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage as appropriate, for all of the time they spend training, even if this is more than 80% of their normal wages.
- Note – both the Apprenticeship levy and Student Loans should continue to be paid as usual. Grants from the Job Retentions Scheme do not cover these.

Is there a minimum period for which employees can be ‘furloughed’?

- Yes, furlough leave must be taken in minimum blocks of three weeks to be eligible for funding. Claims for the grant should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status.
- As yet, we have seen nothing that suggests that employers are prohibited from rotating furlough leave amongst employees, only that each period of furlough must meet the minimum period of three weeks as prescribed. This rotation mechanism may circumvent the requirement for placing workers on short-time working for which there is currently no grant available.

Can an employee carry out any work when they are ‘furloughed’ for their employer?

- The employee must not carry out any work at all. If they work for even an hour, they are not eligible. They cannot provide any services to or make any money for their employer BUT they can undertake training and volunteer work.

Can an employee carry out work for another employer during the furlough period?

- Each job is treated separately, and the cap applies to each employer individually, this means that an employee can be furloughed from one or both employers. This also suggests it is possible for furloughed employees to take on a temporary job elsewhere provided this is not in breach of their contract with their original employer/s. If there is a clause in the employment contract that states that the employee cannot work for another employer, you must provide your consent that they can, otherwise they will be in breach of contract. The employee should remain available to return to work for you at any time (subject to the 3-week minimum furlough leave period or any other agreement you have reached with them)
- It appears that the crux of the matter is that the employee must not carry out any work for the employer who has ‘furloughed’ them, neither can they carry out any work for a ‘linked or associated’ company.

Can employees on sick leave or self-isolating be ‘furloughed’?

- No, employees on sick leave or self-isolating cannot be furloughed, however they can be furloughed on their return from sick leave or self-isolation. Be cautious where employees request to return from long term / sick leave and are then to be placed on furlough leave, in order to benefit from 80% or more pay as opposed to SSP. You may want to consider obtaining occupational health / medical evidence confirming that they are fit for work.
- Employees who are shielding can be placed on furlough.

What about employees who are currently on maternity leave?

- Employees on maternity (or similar) leave can continue to draw SMP (or similar) payments. The guidance does not prohibit women on maternity leave agreeing to return to work early and then being furloughed, or, electing to change to shared parental leave and then being furloughed. Remember however, that once an employee has returned from maternity leave, they cannot then return to maternity leave so, a request to return to work early on in maternity leave in order to benefit from furlough may not be in the best interests of the employee as that employee should remain ‘available for work’ and can be called back to work at any time (excluding the initial 3 week minimum furlough period).
- Any element of enhanced (earnings related) contractual maternity is included as a wage/salary cost and can be claimed through the scheme. The same principle will apply to contractual paternity, adoption pay or shared parental pay.

What about paying an employee NMW/NLW if they are ‘furloughed’ and training?

- If the employee is required to complete any training courses. including online training courses during any period of furloughed leave, they must be paid at least the NLW/NMW for the time spent training. If this means they should be paid more than 80% of their normal monthly wage for the training undertaken (time spent training), then the employer will need to top up their earnings to ensure the NLW/NMW minimum is met.

Can an employee take holiday whilst they are ‘furloughed’?

- We are waiting for clarity on this as the government guidelines as of 1st April is completely silent on this and there are differing views amongst solicitors. There are two schools of thought regarding this so be aware that any advice currently comes with a health warning to employers until such a time that we receive clarification from the Government.

- What is clear however, is that the Government has introduced new measures that allow employers to insist that employees roll over up to 4 weeks holiday over the next 2 years, (Regulation 15 of Working Time Regulations) where ordinarily this would not be permitted. However, this needs to be interpreted and put into place with caution.

Please contact us if you have any specific queries in relation to holiday.

When will the new Coronavirus Job Retention Scheme online portal be available? What should employers do until then regarding paying employees?

- The employer will be required to make the initial payment to furloughed employees and claim it back from HMRC through the online portal once this is set up, intended to be up and running by the end of April. Employers can agree with employees to defer payments to them however this should be done by 'agreement' and confirmed in writing.

Can an apprentice be put on furlough leave?

- Yes, and they may be in a position to continue with their apprentice training whilst on furlough. You should contact their training provider who will be able to clarify what training may be available.

Please do not hesitate to Contact Absolute Works on 01926 355 560 or info@absoluteworks.co.uk if you have any queries.

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