

Coronavirus Job Retention Scheme Advice for Employers Update 6.4.20



Coronavirus Job Retention Scheme

HM Government provided more guidance on the Coronavirus Job Retention Scheme on 4 April. The government guidelines are continually evolving so please do get in touch with your usual contact for up to date advice. The key updates include more detail on the following points.

An Employee on Furlough

Will not be able to work for their employer. An employee can undertake training or volunteering subject to public health guidance, as long as they're not:

- making money for their employer or a company linked or associated to their employer
- providing services to their employer or a company linked or associated to their employer

If workers are required to, for example, complete training courses whilst they are furloughed, then they must be paid at least their appropriate minimum wage (NLW, NMW or AMW) for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

Whilst an employee is furloughed an employer cannot ask them to do work for another linked or associated company.

If a **contract of employment allows**, an employee may undertake other employment while their current employer has placed them on furlough, and this will not affect the grant that they can claim under the scheme.

- The employee will need to be able to return to work for the employer that has placed them on furlough if they decide to stop furloughing the employee and
- The employee must be able to undertake any training they require while on furlough.
- If the employee takes on new employment, the employee should make sure they complete the starter checklist form with their new employer correctly. If the employee is furloughed from another employment, they should complete Statement C. Any activities undertaken while on furlough must be in line with the latest Public Health guidance during the Covid-19 outbreak.

It is important to note that an employer can still make an employee redundant while they're on furlough or afterwards. Their rights as an employee are not affected by being on furlough, including redundancy rights.

If an employer chooses to place an employee on furlough, the employee will need to remain on furlough for a minimum of 3 consecutive weeks. However, the employer can place an employee on furlough more than once, and one period can follow straight after an existing furlough period, while the scheme is open. The scheme will be open for at least 3 months.

Employees You Can Claim For

- You can only claim for furloughed employees that were on your PAYE payroll on or before 28 February 2020.
- Employees hired after 28 February 2020 cannot be furloughed and claimed for in accordance with this scheme.
- Employees 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.

Calculating Earnings

Full or part time employees on a salary

Claim for 80% of the employee's salary, as of 28 February 2020, before tax.

Employees whose pay varies

For those employed (or engaged by an employment business in the case of agency workers) for a full year, employers will claim for the higher of either:

- the amount earned in the same month last year
- an average of monthly earnings from the last year

For those employed for less than a year, employers will claim for an average of the regular monthly wages since the employee started work. The same arrangements apply if monthly pay varies such as those on a zero-hour contract.

For those who commenced employment in February 2020 pro-rata earnings from that month will be used.

The grant paid will be calculated based on regular, contractual pay, such as wages, compulsory commission and past overtime. The calculation will not include discretionary commission (including tips) payments or bonuses, non-cash payments or benefits in kind.

If Your Employees are Working Reduced Hours

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme.

If Your Employee is Self-Isolating or on Sick Leave

- If your employee is on sick leave or self-isolating, they'll be able to get Statutory Sick Pay.
- You cannot claim for employees while they're getting Statutory Sick Pay, but they can be furloughed and claimed for once they are no longer receiving Statutory Sick Pay.

Shielding Employees

- You can claim for furloughed employees who are shielding in line with public health guidance (or need to stay home with someone who is shielding) if they are unable to work from home and you would otherwise have to make them redundant.

Employees with Caring Responsibilities

Employees who are unable to work because they have caring responsibilities resulting from coronavirus (Covid-19) can be furloughed. For example, employees that need to look after children can be furloughed.

If an Employee Currently has More Than One Employer

An employee can be put on furlough by one employer and continue to work for another. If they are put on furlough by more than one employer, they receive separate payments from each employer. The 80% of their regular wage up to a £2,500 monthly cap applies to each job.

Pregnant and About to Start Maternity Leave

An employee should start maternity leave as normal. If their earnings have reduced because they were put on furlough or off sick before their maternity leave started, this may affect their Statutory Maternity Pay. The same rules apply to adoption pay, paternity pay and shared parental pay.

If Your Employee is on a Fixed Term Contract

Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee's contract ends because it is not extended or renewed you will no longer be able claim grant for them.

Employees on Probation

The advice is that probation can and should be paused if an employee is new in post (appointed pre 28 February) and still on probation. Note that this will not happen automatically, but it is advisable to add this to any furlough agreement.

Employees Who Refuse to be Furloughed

Depending on the content of their contract of employment, an employee will need to consent to furlough. Furlough is an alternative to redundancy, so employers faced with this issue should consider what other alternatives might be agreeable. The final alternative would be to start the redundancy process if they refuse, although it is likely that an employer could make a strong case for enforcing furlough in the current situation, even where an employee refuses.

Administrators

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme. However, we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business.

Other Specific Categories

Employees may be eligible to be furloughed, and receive a grant of 80% of their regular wages up to a monthly cap of £2500, if they are paid via PAYE and are in one of the following categories:

- An agency worker
- A company director
- A salaried member of a Limited Liability Partnership
- An office holder
- Limb b worker

The guidance below sets out specific considerations for those individuals who are paid via PAYE, but who are not necessarily employees in employment law. Unless explicitly set out below, all other guidance is applicable to these cases, and should be followed.

Guidance for Specific Workers

1. An agency worker (including if employed by an umbrella company)

Where agency workers are paid through PAYE, they are eligible to be furloughed and receive support through this scheme, including where they are employed by umbrella companies.

Furlough should be agreed between the agency, as the deemed employer, and the worker. As with employees, agency workers should perform no work for, through, or on behalf of the agency that has furloughed them while they are furloughed, including for the agency's clients.

Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.

2. An office holder

An office holder who is remunerated by PAYE can be furloughed and receive support through this scheme. The furlough, and any ongoing payment during furlough, will need to be agreed between the office holder and the party who operates PAYE on the income they receive for holding their office. Where someone is a company director or member of a Limited Liability Partnership (LLP), the furlough arrangements should be adopted formally as a decision of the company or LLP.

3. A company director

As office holders, salaried company directors are eligible to be furloughed and receive support through this scheme. Company directors owe duties to their company which are set out in the Companies Act 2006. Where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed.

Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would be judged reasonably necessary for the purposes, such as, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.

This also applies to salaried individuals who are directors of their own personal service company (PSC).

4. A salaried member of a Limited Liability Partnership (LLP)

Members of LLPs who are designated as employees for tax purposes ('salaried members') under the Income Tax (Trading and Other Income) Act (ITTOIA) 2005 are eligible to be furloughed and receive support through this scheme.

The rights and duties of a member of an LLP are set out in an LLP agreement and in the absence of an agreement, default provisions in the LLP Act 2000, based upon company and partnership law. Such an agreement may include separate agreement between the LLP and an individual member setting out the terms applicable to that member's relationship with the LLP.

To furlough a member, the terms of the LLP agreement (or any such agreement between the LLP and the member) may need to be varied by a formal decision of the LLP, for example to reflect the fact that the member will perform no work in the LLP for the period of furlough, and the effect of this on their remuneration from the LLP. For an LLP member who is treated as being employed by the LLP (in accordance with s863A of ITTOIA 2005), the reference salary for this scheme is the LLP member's profit allocation, excluding any amounts which are determined by the LLP member's performance, or the overall performance of the LLP.

5. Limb (b) Worker

Where Limb (b) Workers are paid through PAYE, they can be furloughed and receive support through this scheme.

Those who pay tax on their trading profits through Income Tax Self-Assessment, may instead be eligible for the Self-Employed Income Support Scheme (SEISS), announced by the Chancellor on 26 March 2020.

National Minimum Wage

Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW)/ Apprentices Minimum Wage (AMW) for the hours they are working or treated as working under minimum wage rules.

This means that furloughed 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 their appropriate minimum wage. However, time spent training is treated as working time for the purposes of the minimum wage calculations and must be paid at the appropriate minimum wage, taking into account the increase in minimum wage rates from 1 April 2020. As such, employers will need to ensure that the furlough payment provides 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.

Where a furloughed worker is paid close to minimum wage levels and asked to complete training courses for a substantial majority of their usual working time employers are recommended to seek independent advice or contact the LRA.

Record Keeping

Employers are reminded that they must retain documentation designating their staff as a furlough worker for five years.

For more information on the Coronavirus Job Retention Scheme please contact:

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