

Coronavirus Job Retention Scheme (furlough leave)

The introduction of a new Coronavirus Job Retention Scheme (furlough leave) was announced by the government on 20 March 2020. Under the scheme, all UK employers, regardless of size or sector, can claim a grant from HMRC to cover 80% of the wages costs of employees who are not working but kept on the payroll ("furloughed"), of up to £2,500 a calendar month for each employee. Employers can choose to top up the remaining 20% if they wish.

On 20 March 2020, the Chancellor announced that the scheme will be backdated to 1 March 2020, be open for at least three months and will be extended if necessary. HMRC are urgently working to set up the new system of reimbursement, but the government hopes that the first grants should be paid within weeks.

The government has not, as yet, published much written guidance on the scheme. However, it has updated the [COVID-19: support for businesses guidance](#) and [COVID-19: guidance for employees](#) to provide basic details.

What employees are covered?

The scheme will apply in respect of all employees on PAYE, including those on zero-hours contracts. This means that it will cover many workers as well as employees.

What steps must employers take to put employees on furlough leave?

Employers will need to:

- Decide which employees to designate as furloughed employees.
- Notify those employees of the intended change.
- Consider whether it needs to consult with employee representatives or trade unions. For example, where the employer intends to vary the contracts of 20 or more employees, and it intends to dismiss employees who do not consent to the change in their terms, for the purposes of *section 188* of TULRCA, those employees will be classed as dismissed by reason of redundancy. The employer will therefore have a duty to inform and consult appropriate employee representatives and notify the Secretary of State using form HR1. It is unclear, however, at this stage, whether the government expects employers to follow this process before placing employees on furlough leave.
- Agree the change with the furloughed employees. Most employment contracts will not permit an employer to reduce an employee's pay, provide them with no work, and change their employment status, without agreement. However, faced with the alternatives, which are likely to be unpaid leave, lay-off, or redundancy, the majority of affected employees are likely to agree to be placed on furlough leave.
- Confirm the employees' new status in writing. Ideally, the employer should advise how long it expects furlough leave to continue, however, this may be difficult in the current climate.

Employers may wish to put employees on furlough leave for an initial period, subject to review.

- Submit information to HMRC about the employees that have been furloughed and their earnings through the new online portal. The [COVID-19: support for businesses guidance](#) states that HMRC will set out further details on the information required.
- Ensure that the employees do not carry out any further work while they are furloughed.

What does the £2,500 cover?

The [COVID-19: support for businesses guidance](#) states employers will be reimbursed "80% of furloughed workers wage costs, up to a cap of £2,500 per month". The [COVID-19: guidance for employees](#) states that the scheme will allow an "employer to claim a grant of up to 80% of your wage for all employment costs, up to a cap of £2,500 per month".

It is unclear at this stage whether the £2,500 reimbursement is intended to cover anything other than the employee's basic salary. However, the use of the words "all employment costs" in the guidance for employees suggests that this could include additional costs such as pension contributions or other benefits. The intention also appears to be that the employee will actually receive £2,500 net. However, confirmation on this point is required from HMRC.

Are employers obliged to top up the remaining 20%?

The [COVID-19: guidance for employees](#) states that "your employer could choose to fund the differences between this payment and your salary, but does not have to". Withholding 20% of an employee's salary, will however, amount to breach of contract and unlawful deduction of wages unless the employee gives their consent. It is expected that the majority of employees will consent since furlough leave is a better alternative than unpaid leave, lay-off, or redundancy.

Can an employee request their employer puts them onto furlough leave?

Yes, an employee can request this, but the employer does not have to agree. It is the employer's decision which employees to place on furlough leave, if any. It seems that it is also the employer's decision whether to place employees on furlough leave, or make them redundant. Potentially redundant employees do not have a right to require their employer to place them on furlough leave as an alternative to redundancy. However, it is hoped that many employers will see the new scheme as preferable to business closure and making redundancies.

What about employees who have already been given notice of redundancy or placed on unpaid leave before furlough leave was announced?

The government has advised that, once up and running, the scheme will be backdated to 1 March 2020. It would therefore be possible, in theory, for an employer to propose to employees who are still employed, but have been given notice of redundancy or placed on unpaid leave, that they be put onto furlough leave instead. However, the position is more complicated where an employee's employment has already terminated by reason of redundancy. It would seem in keeping with the purpose of the scheme for such employees to be re-engaged (assuming the employee's consented) and placed onto furlough leave. However, the government has not advised at this stage whether it will be possible to do this.

Can an employer move employees who are already on reduced hours onto furlough leave?

Some employers have already placed employees temporarily onto reduced hours and pay due to the downturn in work as a result of the pandemic. Little detail of the scheme has been provided. However, its purpose is intended to be for employers to retain employees who would otherwise be made redundant. There is an argument that the scheme does not apply if an employer is managing with employees working less hours and redundancies are therefore not anticipated at this stage. However, it seems unlikely that employers will have to prove to HMRC that redundancies will be made unless employees are placed on furlough leave. We will have to wait and see what information HMRC requires.

The difficulty for employers, however, is that the scheme may financially disincentivise them from keeping their business open. Keeping a business running with staff on reduced hours allows an employer to keep a revenue stream and retain customer loyalty. However, this is likely to be more expensive for the employer than putting all staff on furlough leave and have HMRC pay 80% of their wages.

Can employees who elected to take unpaid leave to be able to look after their children home from school or nursery be put on furlough leave instead?

This depends upon whether HMRC imposes specific conditions on the circumstances in which employers can claim reimbursement of wages paid during furlough leave. For example, if there is a requirement that the reimbursement will only be made where the furlough leave was agreed as an alternative to redundancy (which appears to be the intention) then this type of situation may not qualify unless they were genuinely at risk of redundancy. However, it seems unlikely that employers will have to prove to HMRC that redundancies will be made unless employees are placed on furlough leave. The government's *FAQs* do state that the government will retain the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claims.

If further detail clarifies that there are no specific qualifying requirements for furlough leave, employees on unpaid leave could be put on to furlough leave if they agree to a temporary contractual variation in pay.

Is the idea of furlough leave unfair on employees who have to continue working, particularly when many are going to have childcare difficulties?

It may seem unfair that some employees will be required to continue working, potentially increasing their risk of infection if they are unable to work from home, and others will be permitted to receive a substantial proportion of salary and not be required to do so. However, provided the employer has used appropriate, non-discriminatory criteria to choose who is granted furlough leave, it is possible for an employer to lawfully choose to furlough only part of the workforce. Some employees may look at this issue the other way and prefer to continue to receive full pay so the employer may find that seeking volunteers for furlough identifies the preferences of individual employees and avoids a feeling of unfairness.

Will workers continue to accrue holiday during furlough leave?

Furlough leave is an entirely new concept to employment law in the UK. However, it seems likely that the 5.6 weeks' leave under the Working Time Regulations 1998 would continue to accrue during furlough leave.

An employer could attempt to negotiate a change in contractual terms such that any annual leave over and above statutory leave does not accrue during furlough leave, but this may make it less

attractive to workers and it is not clear whether the employer is entitled to add extra conditions to furlough leave, beyond a reduction in pay.

Is the £2,500 the net amount the employee receives or is it subject to tax and NI?

The government has not provided enough information on the scheme at this stage for us to know. The [COVID-19: guidance for employees](#) states that the scheme will allow an "employer to claim a grant of up to 80% of your wage for all employment costs, up to a cap of £2,500 per month". It is unclear whether tax and NIC will need to be paid on the £2,500 or whether HMRC will treat the reimbursement as already taxed. However, some allocation will need to be made by HMRC in relation to employees' NICs if the situation continues long-term, as NICs affect entitlement to benefits and state pension.

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How is the 80% calculated for those with irregular earnings?

It is not currently clear what wage costs HMRC will take into account when determining the level of reimbursement that can be claimed. It will be particularly difficult to identify what 80% of wages are for a zero hours employee whose wage fluctuates. The employer will need to have clarity on this point before it agrees furlough leave with the worker because they are agreeing to a contractual variation in terms of payment and will want to ensure that they do not commit to payment in excess of that which may be recovered from HMRC.

Some employers may take the view that those casual or zero hours workers and employees who are not guaranteed work from the employer do not need to be put on furlough leave at all because the employer can instead simply refrain from offering them work. However, this approach is not in the spirit of the scheme which intends to ensure that employees and workers retain a basic income during the crisis stages of the pandemic.

How is salary calculated for employees who are on or have been on sick leave and SSP?

It remains to be seen whether employees who are on sick leave can be put on furlough leave. It is also currently unclear how wages will be calculated and whether they will be based on normal basic pay or recent pay (which could affect what an employer can recover for an employee who has just returned from sick leave).

If the employee remains sick at the time the employer is considering furlough leave then the employer may decide not to put the employee on furlough leave until their sick leave comes to an end. Small employers will be able to claim back SSP in full so there may be no financial benefit to the employer in putting a sick employee on furlough.

An employer who is unable to reclaim SSP may prefer to agree a change in terms with a sick employee so that they are on furlough leave and their pay can be recovered from HMRC (and employees are likely to agree to this as they will be receiving a higher rate of pay).

Can you put employees on long-term sick leave on furlough leave?

It is up to the employer to decide whether to designate an employee as "furloughed", although it is possible that there will be conditions attached to the reimbursement which may require the employee to be available to work. Further detail will be required before we can say with any certainty whether an employee on sick leave could be put on furlough leave.

Where an employer is selecting which employees to designate as furloughed, they must be mindful of the risk of discrimination if selection is linked to a protected characteristic such as disability.

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