

Coronavirus Job Retention Scheme (the “Scheme”) FAQs

Overview of the Scheme

➤ *Who is covered by the Scheme?*

Any UK organisation with employees can apply, including:

- businesses
- charities
- recruitment agencies (agency workers paid through PAYE)
- public authorities

You must have:

- created and started a PAYE payroll scheme on or before 19 March 2020
- enrolled for PAYE online
- a UK bank account

Where a company is being under the management of an administrator, the administrator will be able to access the Job Retention Scheme.

➤ *Can public sector organisations access the Scheme?*

The Scheme is likely to be unavailable for the majority of public sector employers, as a lot will be continuing to supply essential services. It will not be available for those who continue to receive public funding for the majority of wage bill.

Those who are not primarily publicly funded and whose staff cannot be redeployed to assist with the coronavirus response may be able to access the Scheme.

➤ *What does the Scheme offer?*

The Scheme is essentially a safety net for those employees who would have otherwise been laid off, made redundant or otherwise dismissed in response to the current pandemic.

The scheme offers a grant to cover up to 80% of usual monthly wages (capped at £2500), plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage, of people who are not working but are furloughed and kept on payroll, instead of being laid off.

➤ *What is the definition of a furloughed worker?*

This is not a term that we would usually use in UK employment law and therefore there is no legal definition. From our research, it is a term that appears to derive from US labour law and means mandatory suspension from work without pay.

In the UK will be akin to a lay off and will be a temporary suspension for a specific period of time whereby the furloughed worker will not be able to carry out any work but will remain an employee.

➤ *Is this different to laying off staff?*

Yes, employers have a limited ability to lay off staff and this is subject to an existing contractual provision. A lay off clause can enable employers to reduce hours and cut wages, as necessary for business needs. Furloughed employees will not be able to carry out any work during the furloughed period but still receive 80% pay.

➤ *Who qualifies for the Scheme?*

The Scheme will apply to all employees who are on the payroll who have been furloughed, where they would otherwise have been laid off or made redundant due to the current pandemic.

The employee must have been on PAYE payroll on or before 19 March 2020 and can be on any type of contract, for example:-

- full-time employees
- part-time employees
- employees on agency contracts
- employees on flexible or zero-hour contracts
- office holders (including company directors)
- salaried members of LLPs

To be eligible, the employee cannot carry out work for the employer that furloughs them. This includes providing services or generating revenue.

Casual/zero hours workers ("limb b workers")

It is clear that casual/ zero hours workers can be furloughed provided that they were on a UK employer's PAYE payroll and notified to HMRC on an RTI submission on or before 19 March 2020 (or 28 February if re-engaged).

Fixed term employees

Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period provided that the extension takes place before the contract ends.

Reduced hours/ pay

The Scheme will not apply to those employees who have already had their hours or pay reduced, but who are still working for their employer.

If hours have already been reduced and then the employee is furloughed, it is likely that the employee would be entitled to 80% of his/her reduced hours only, unless the employer rescinds the reduction.

Employees who have recently been made redundant since 28 February 2020

The Scheme covers employees who were made redundant since 28 February 2020, if they are rehired by their employer. The employer can rescind redundancy and agree to place these individuals on furlough to enable the employee to qualify.

Employees on unpaid leave

If an employee started unpaid leave after 28 February 2020 employers can place them on furlough leave instead. They must then be paid at least 80% of their regular wages up to the £2,500 cap.

If an employee went on unpaid leave on or before 28 February 2020, you cannot furlough them until the date on which it was agreed that they would return from unpaid leave.

Employees who are self-isolating/on SSP

Employees who are shielding in line with public health guidance can be placed on furlough. Employees on sick leave or currently self-isolating should get SSP but can then be furloughed.

Employees on Maternity Leave

Employees who are currently on or planning to take Maternity Leave and who qualify for statutory maternity pay will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). If an employer offer enhanced maternity pay, this is included as wage costs that an employee can claim through the scheme.

Employees with more than one employer

The guidance states that an employee can be furloughed by one employer and continue to work for the other. Alternatively, they can be furloughed by both employers. Each employer will be entitled to make an application under the Scheme for 80% of the employee's salary.

An employee cannot be furloughed by their current employer and also accept re-engagement by a former employer with the view of being furloughed by that employer also.

Company directors

Salaried company directors can be placed on furlough and receive support through the Scheme. Directors' duties under the Companies Act 2006 must be considered when deciding whether to place a director on furlough. A decision to furlough a director should be formally adopted as a decision of the company, noted in company records and communicated in writing to the affected director.

Salaried individuals who are directors of their own personal service company and salaried members of LLPs may also be furloughed.

For further information relating to the furlough scheme and directors' statutory duties please read our [blog here](#)

Practical steps for employers to undertake

➤ *What is the process under the Scheme?*

Employers will need to fairly select those to be furloughed i.e. all if there is no work or closure, or fairly select those who would have been laid off or made redundant.

They would then need to agree the change to the status to furloughed with those employees and notify the employees once the change has been enacted.

Steps to take:

1. Select for furlough
2. Agree with employees – there are different ways of doing this and employers will need to act quickly
3. Notify employee in writing
4. Keep a record

➤ *How are employees selected?*

There is no law covering this however we suggest carrying out a mini redundancy selection. Employees do not need to be notified of this as businesses will have to act quickly. Fair selection criterion may include skills, qualifications and aptitude, standard of work and/or performance, attendance and disciplinary record.

You can select employees based on their length of service however this must be justified and must not be relied upon as the only selection criteria. It is good practice to keep your selection criteria as evidence in case the employee disputes the selection or HMRC ask for evidence.

Employers must be careful not to discriminate through selection and must not select due to protected characteristics.

➤ *Can employers choose employees based on their ability to work during the pandemic? (i.e. those with children or dependants? Or who are unable to work from home?)*

Workers who cannot work from home or who currently have no work to do may be obvious candidates for furloughing however, employers should take care not to discriminate (i.e. base decisions on the protected characteristics). In particular, we urge employers to exercise caution around age, pregnancy and disability.

➤ *Can employees volunteer to be furloughed?*

Yes, employers may need to consider a process of calling for volunteers. However employers must be careful to ensure that they can demonstrate a genuine need to furlough employees due to the crisis

➤ *How can employers change employment status to furlough status?*

1. In accordance with the contract itself – it is unlikely that the contract will contain relevant clauses to permit this change. Employers may therefore wish to put these clauses in place now;

2. With the agreement of the employee – employers should obtain consent from an employee to amend the terms of the contract; or
3. With union agreement – a status change is permitted if the terms of employment are collectively agreed between a union and employer. Large, unionised organisations will be able to change terms with union consent without the need for individual employee's consent. We recommend that employers check their contracts to see if the terms can be altered by collective agreement.

If employers are going to furlough and top up the employees pay to full, it will be very easy to obtain an employee's consent to change status. You must still notify them in writing.

➤ *What are the risks for the employer if you force the change?*

1. Any employee could bring a breach of contract claim – this is limited to their losses i.e. the 20% difference in pay;
2. Employees with over 2 year's service or who allege that the selection for furlough was discriminatory could bring a claim for unfair constructive dismissal. The employee would have to immediately resign to pursue this claim;
3. If the employer dismisses due to redundancy or some other substantial reason following non-acceptance of the new status, those with over 2 years or alleging discrimination could claim unfair dismissal;
4. Any employee could bring a claim for wrongful dismissal if proper notice of termination is not given;
5. Any employee could bring a claim for discrimination if an employee alleges that they have been selected for furlough due to a protected characteristic (e.g. age, sex, race, disability, maternity); and/or
6. Any employee could bring a claim in relation to collective consultation, if this applies.

➤ *How can an employee give consent to the change?*

Consent can be oral or in writing. In any event, a letter must be sent to the employee confirming the change to furlough status.

Consideration is required for the change and in most cases, the consideration will be the individual remaining an employee and on the payroll.

What if the employee does not agree to furlough status (and reduction in salary if employer not topping up)?

The risks for employers are set out above. In practical terms, the employer can either:

1. Force the change – taking the risk of a claim;
2. Agree an alternative;
3. Dismiss the employee due to some other substantial reason (as they will not agree change) or redundancy; or
4. Keep the employee on the same terms – unlikely to be sustainable in the current climate.

➤ *Is there a risk of furloughing too many employees?*

Yes if the business is unable to continue without the furloughed employees. However, the employer is entitled to call them back if necessary, and revert to normal employment status.

It is therefore important that this is set out in correspondence sent to the selected employees before the furloughed period starts. You must cover various points in a letter to furloughed employees.

Furloughed workers

➤ **What are furloughed employees rights?**

Furloughed employees remain employees during this period and are therefore still entitled to pay, benefits and their pension. Employees are entitled to refuse to be furloughed however, the only cause of action that is available to them should they be dismissed due to their refusal is an action for breach of contract/ constructive dismissal. Constructive dismissal is only usually open to those with over 2 year's service. However, due to the significant backlog at the Tribunal and the current climate this is likely not to be an attractive option.

➤ **Can employees undertake voluntary work for their employer once they are labelled a furlough worker?**

The employee will not be able to carry out any work for the employer that furloughs them – the employee will not be able to provide services or generate revenue.

Employers must be careful not to insist on work as this is likely to fall foul of the Scheme.

However, employees may be required to complete training courses whilst they are furloughed.

If this is the case, then they must be paid at least the national minimum wage for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

➤ **Can an employee work for another employer whilst on furlough leave?**

Yes. The Scheme provides that a furloughed employee can do work for another employer during furlough leave however; this will be subject to any restrictions in the employee's contract of employment.

➤ **Can a furloughed employee do volunteer work?**

Yes, they are entitled to carry out volunteer work, as long as this is not for the employee's employer and being used to circumvent furlough.

➤ **Can employees on furlough undertake training?**

Yes. Training can make place provided that it is not used by the employer to generate revenue or for the provision of services.

➤ **What happens to an employee's pension and the auto enrolment pension contribution?**

This will remain unchanged. However, the employer may change their pension contribution if their wages fall below a certain amount with the employee's agreement. The employer will be able to claim back the minimum auto enrolment pension contribution in respect of the 80% of wages.

➤ *Do employees continue to accrue holiday during furlough?*

Yes. Furloughed employees will continue to accrue annual leave during furlough. Employers can agree with employees to vary holiday entitlement although almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below.

➤ *Can annual leave be taken during furlough?*

Furloughed employees can take annual leave during furlough. Although, the employees will be entitled to their usual holiday pay during annual leave and therefore employers will be obliged to pay the additional amounts due to the employee over the 80% cap.

➤ *Can an employee be served notice whilst on furlough?*

It seems as though a furloughed employee can be served with notice of termination of employment. Whether this can be claimed under the Scheme is not clear.

The employee will be entitled to the greater of contractual or statutory notice i.e. one week for each year employed up to 12 weeks cap.

It is likely the employee will be entitled to full normal pay for their notice; however the guidance is not clear. For further information please see our ['Furlough and Notice' blog](#).

Notice: Normal working hours

Employees with normal working hours who are entitled to only statutory notice from their employer (or less than 1 week more than statutory notice) will be entitled to their normal pay for their normal hours, despite being furloughed. The employer can claim up to 80% of their notice pay but will need to top up the remaining 20%.

If an employee is entitled to at least one week more than statutory notice, their notice pay may be able to be based on their furlough pay (i.e. 80% of their normal pay) if they remain on furlough for the duration of their notice.

Notice: Hours which vary

An employee without normal working hours who is entitled to only statutory notice (or less than one week more than statutory notice) is entitled to a week's pay calculated based on the amount of pay for the average number of weekly normal working hours at the average hourly rate (s222 ERA 1996). The employer may need to 'top up' above the 80% if the employee is furloughed.

If an employee is entitled to at least one week more than statutory notice, their notice pay may be able to be based on their furlough pay if they remain on furlough for the duration of their notice.

➤ *Can an employee be made redundant whilst on furlough leave?*

Yes. The guidance confirms that employees can be made redundant whilst on furlough leave. The normal redundancy rules apply in relation to following a fair redundancy process.

The employer will not be able to claim back a statutory redundancy payment through the Scheme. The position on notice is not yet clear.

Payments under the Scheme

➤ *How much will employees receive from the Scheme and how is this paid?*

The Scheme means that the employer will be able to claim a grant equivalent to 80% of furloughed employee's normal pay (capped at £2500 gross). The employer will have to continue paying the employee through its payroll and that the employer can then claim this back through HMRC. In addition the Scheme will cover associated Employer NI contributions and minimum auto enrolment pension contributions on paying the furloughed wages.

➤ **How is furlough pay calculated?**

Employees/ workers with irregular earnings

If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, you can claim for the higher of either:

- the same month's earning from the previous year
- average monthly earnings from the 2019-20 tax year

If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work.

If the employee only started in February 2020, use a pro-rata for their earnings so far to claim.

Regular salary/wages

Employers can claim for 80% of employees' wages up to a maximum of £2,500 per month. NI and pension contributions still need to be paid to employees and these can be claimed also.

➤ **Should commission payments be included in the calculation for wages?**

The guidance states that non-discretionary commission payments should be included when calculating an employee's regular salary/wages. We understand non-discretionary to mean contractual commission. A commission payment may be expressed as contractual in the employee's contract of employment or this may be implied into the contract of employment i.e. by evidence that the employee has continually received commission for a significant period of time.

Other inclusions include:

- Non-discretionary overtime
- Non-discretionary fees
- Piece rate payments

➤ *Do employers have to pay the additional 20% to make up to full pay?*

No. It is ultimately up to the employer to decide whether they offer full pay to a furloughed employee. Employers will need to agree reduction to 80% with the furloughed employees.

If the employers top up, they will also need to top up Employer NI and automatic enrolment pension contributions.

➤ *Will the employer be required to repay any monies received?*

The Scheme is called a 'grant' and therefore this will be unlikely to be repayable.

How the Scheme operates

➤ *How to claim?*

The employer will need to be enrolled for PAYE online and submit an application via the Government gateway. The application must include:

- The employer's PAYE reference number
- The number of employees being furloughed
- The claim period (i.e. start date and end date)
- The full amount claimed (a CJRS calculator is available to calculate the monies due)
- The names, NI numbers and (optionally) payroll/employee numbers of the employees
- The employer's name, self-assessment unique taxpayer reference, corporation tax unique taxpayer reference or company registration number
- The employer's bank account details and contact details

Where a claim is being made in respect of 100 or more furloughed employees, the employees will be asked to upload a file containing the relevant information.

Claims can be backdated until 1st March, if applicable.

Claims should be made in accordance with an employer's normal payroll or in advance of an imminent payroll.

Step by step guidance can be found on the [Government website](#).

➤ *How long does it take for HMRC to pay employers after a claim is submitted?*

The guidance states that HMRC aim to pay employees within six working days. The payment will be made via BACS payment to a UK bank account.

➤ *Can an application be amended under the Scheme?*

HMRC has confirmed that employers cannot amend an application once this has been submitted. An employer is also only able to make one claim during a claim period for each PAYE scheme it operates.

Options following the furlough scheme

➤ *When will the furlough scheme end?*

The Chancellor has announced that the Scheme will be extended until the end of October 2020. There are likely to be a number of changes to the Scheme from August whereby the government will ask employers to start sharing the cost of the Scheme. Further details are due to be published by the end of May.

➤ *How does furlough end?*

The furlough period is likely to end following one of three events:

1. The employer or employee ceases to be eligible for funding under the Scheme
2. The employer gives the employee notice that their employment will resume on the terms and conditions which applied prior to their furlough period started, or on amended terms (if agreed with the employee)
3. The employee's employment terminates for any reason (i.e. by reason of redundancy)

This will also depend on the terms of any furlough agreement between the employer and employee.

➤ *What are the options for furloughed employees at the end of the furlough period?*

The idea is that the furloughed period is temporary and fixed term and that employees will return to the same job after the expiration of this period. However, employers may still need to terminate employees after the expiry of this period depending on business needs. If this is the case, the normal redundancy process should be followed.

For employees with less than 2 years' service, it would not be necessary to follow a redundancy process before dismissing the employee, however, the employer should take care to ensure that the employee is not able to bring a claim for discrimination based on their dismissal.

Alternatively, employers may wish to consider lay-offs or asking employees to reduce their working hours or pay on a temporary basis. As this constitutes a contractual change, there must be a contractual right to enable employers to put employees on short time working or, agreement must be sought from employees. Any permanent change must be agreed in writing with the employee.

➤ *What is collective consultation?*

Where an employer is proposing to make 20 or more employees redundant within any period of 90 days or less at one establishment, there is a legal obligation to inform, consult and notify the Secretary of State in the Department for BEIS. Employers must follow a constructive consultation process which involves notifying all relevant parties (i.e. employees, union representatives and/or elected representatives).

Useful links

Treasury Direction:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

Employers' guidance: <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

Employees' guidance: <https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme#history>

Contact Us

If you need any assistance with how to deal with workers or employees in these unprecedented times, please do not hesitate to contact Kate Brooks on 01202 057754 or kate.brooks@ellisjones.co.uk.