



The Government has updated guidance for employers (on 15 April 2020) which can be found [here](#). We summarise the main practical considerations below.

1. WHAT IS THE SCHEME? The stated purpose of the Coronavirus Job Retention Scheme is to allow employers to claim for costs of employment "in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus". The scheme allows employers to place employees on 'furlough leave' by agreement and provides access to a grant towards employment costs. The scheme was announced on 20 March 2020. Guidance is being provided incrementally by the Government and we will continue to update this summary document.

2. WHO IS ELIGIBLE?

a) The scheme is applicable to all UK businesses and all PAYE employees (including part-time, agency, flexible and zero hours contracts) who were **on payroll on or before 19 March 2020**. An RTI submission notifying HMRC of a payment to those employees must have been made on or before 19 March 2020 (see 3, below).

b) Those transferred from another business after 19 March 2020 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 are eligible.

c) The scheme also applies to PAYE office holders (including company directors), salaried LLP members, agency workers, apprentices and "workers" who fall under s.230(3)(b) of the Employment Rights Act.

d) An employee must be furloughed for a minimum period of 21 calendar days and have entered into a written agreement in respect of furlough leave, for a claim for wages to be valid.

3. WHAT ABOUT NEW STARTERS? The scheme does not apply to anyone starting work after 19 March 2020. Also, anyone who had not been paid by 19 March 2020 will be excluded because of the requirement for an RTI payroll submission by this date. This means monthly paid staff who commenced work at the beginning of March will not be caught by the scheme, although weekly paid staff will be caught.

4. WHAT HAPPENS DURING FURLOUGH LEAVE?

a) The employee remains employed by the employer, but they **cannot work** for the employer. They should not attend the workplace or work remotely. If employees continue to answer emails and telephone calls (for example) then HMRC may see this as abuse of the scheme and could well seek repayment from the employer of part or all of the funding.

b) The employee can, however, volunteer or train provided that "the employee does not provide services to, or generate revenue for, or on behalf of their organisation". The employer can require employees to undertake training from home. Where training is undertaken by furloughed employees, at the request of their employer, they are entitled to be paid at least their appropriate national minimum wage for this time.

5. CAN FURLOUGHED EMPLOYEES WORK FOR ANOTHER EMPLOYER?

a) Employees who already have more than one job can be furloughed by one employer and continue to work for the other.

b) The scheme does not prevent furloughed workers from taking on new employment while furloughed provided that this is by agreement. If the contract prohibits additional employment, employers may be asked to vary this provision. Employers may wish to take steps to warn employees about working for competitors and remind employees of their contractual duties.

6. HOW LONG WILL THE SCHEME LAST? The scheme is open for initial period until 31 May 2020 after which date it may be extended. It is good practice to inform employees the scheme will be kept under review.

7. HOW IS IT IMPLEMENTED? Furlough leave must be seen as a change of status and will therefore **require consent** or a contractual right. The guidance requires that employers agree the leave with the employee and confirm their new status in writing (and keep a record for 5 years). Once the new portal is open (see 11, below), the employer will report this status to HMRC. When deciding who should be furloughed, wider employment rights and obligations continue to apply, including equality considerations.

8. IS THERE A REQUIREMENT TO CONSULT WITH EMPLOYEES? If the employee is proposing to furlough 20 or more employees in circumstances where they would have otherwise made redundancies, then the requirement to collectively consult seems likely to have been triggered. The special circumstances defence may be available to employers if there is insufficient scope to consult properly with employees, given these extraordinary times.

9. WHAT ABOUT THOSE WHO ALREADY LEFT EMPLOYMENT OR ON NOTICE? The scheme is backdated in order to provide for those who had been put on notice of redundancy or who stopped working

in the period 28 February to 19 March 2020 (inclusive). It allows employers to rehire and furlough employees who were made redundant or stopped working during that specific period. Employers can also claim for those employees who agreed to take unpaid leave on or after 28 February 2020. It is also possible to extend or renew fixed term contracts during the furlough period and keep those employees on furlough leave.

10. CAN EMPLOYEES REQUEST FURLOUGH LEAVE AS AN ALTERNATIVE TO REDUNDANCY? An employee can ask to be placed on furlough leave but the employer does not have to agree. However, we expect that many employers will see the scheme as preferable because, in the short term, it will avoid payments of notice, accrued holiday and any statutory redundancy entitlement payable and allow access to a grant.

11. WHAT CAN THE EMPLOYER CLAIM BACK AND HOW?

- a) The employer will be able to claim a grant of up to 80%, of an employee's regular wage (before tax) up to a cap of £2,500 per month. The guidance states that this can include wages, past overtime, fees and compulsory commission payments. However, the Treasury has issued a Direction which clearly states that it does not include payments which are conditional on any matter or vary in accordance with business or employee performance. This means most commission payments will be excluded.
- b) Discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. The cost of monetary and non-monetary benefits, including taxable Benefits in Kind and benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should also be excluded.
- c) In addition, the employer will be able to claim the associated Employer NICs and minimum (3%) automatic enrolment employer pension contributions on that subsidised wage. Employees will be required to pay tax and NIC on payments received.
- d) Claims will be made via a HMRC portal which is being implemented and it is expected to be up and running on 20 April 2020.
- e) Claims should only be made in relation to the period **after the employee finishes work**, not when the decision to furlough is made, or the date of any correspondence.
- f) No claim can be made if it is "abusive or is otherwise contrary to the exceptional purpose of the scheme" (see 1, above)

12. CAN THE EMPLOYER "TOP-UP?" The employer may seek to pay only at the rate recoverable from HMRC. The employer may opt to top up the employee's salary if the grant does not cover it in full, but this is not a requirement.

13. HOW IS THE 80% OF EMPLOYMENT COSTS CALCULATED FOR THOSE WITH IRREGULAR EARNINGS?

The 80% grant will be applied to the higher of: (1) earnings in the same month in the previous year; or (2) average monthly earnings in the 2019/2020 tax year. If the employee has worked for less than a year, the employer can claim for an average of their monthly earnings for the time that they have worked.

14. WHAT IF 80% OF SALARY IS AN AMOUNT WHICH FALLS BELOW NATIONAL LIVING WAGE/NATIONAL MINIMUM WAGE? Furloughed employees are not working therefore NLW and NMW do not apply. If the employer agrees with the employee that they will undertake training during furlough leave, the employee is entitled to a minimum of their NMW for the training period.

15. CAN EMPLOYEES BE MOVED ON AND OFF FURLOUGH LEAVE (OR ROTATED)? Yes, but an employee must be furloughed for a minimum of 21 calendar days on each rotation.

16. WHAT HAPPENS WITH ANNUAL LEAVE AND CONTINUITY OF SERVICE? Continuity of service will be unbroken. We believe that annual leave will continue to accrue. ACAS has stated that holidays can be taken during furlough leave and must be paid at 100% of normal salary. However, this has not been stated anywhere in the Government guidance. It has not been confirmed whether an employer can make a claim for wages paid for holiday taken during furlough leave.

17. WHAT HAPPENS WITH FAMILY LEAVE? Employees already on or due to go on any form of family leave (e.g. maternity leave) will remain on such leave and cannot be furloughed. Employees who are unable to work because they have caring responsibilities resulting from coronavirus can be furloughed.

18. WHAT HAPPENS WITH SICK LEAVE? Those already on sick leave or self-isolating remain on sick leave until they are fit to work, out of isolation or designated as furlough by the employer. During sick leave or self-isolation, they are paid at the relevant rate (SSP or contractual sick pay). Aside from those on short term sick leave/self-isolation, employers can, for business reasons, furlough employees who are currently off sick. They can also furlough employees who are shielding in line with public health guidance.

19. WHAT ABOUT SPONSORED WORKERS UNDER TIERS 2 OR 5 OF THE POINTS BASED SYSTEM? Home Office guidance indicates that it is possible to furlough such workers and provides for temporary reductions in pay. However, it also requires that the reductions in pay are "*part of a company-wide policy to avoid redundancies and in which all workers are treated the same*". Further guidance is available [here](#).

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See www.constantinelaw.co.uk for further information or contact John Hayes or Alan Lewis at Constantine Law on (0)203 696 8230.



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