

# **THE ACUITY GUIDE TO CORONAVIRUS JOB RETENTION**

---

## **SCHEME - FAQs**

### **1. What is the Coronavirus Job Retention Scheme?**

On 20 March 2020 the Chancellor of the Exchequer, Rishi Sunak, announced an unprecedented support package to support UK businesses and employees suffering from the economic effects of Covid-19. The most significant revelation was undoubtedly the introduction of the Coronavirus Job Retention Scheme which created the new employment status of 'furloughed worker' and promises to reimburse employers for a proportion of that individuals wages.

This guidance note details all information currently available in relation to how the Scheme will operate. Please note, the details below are based on Government guidance to date (27 March 2020). It is unclear if legislation will be passed to implement the Scheme, or if HMRC will impose additional restrictions. We hope to receive further guidance over the forthcoming weeks and will provide regular updates once further information is made available.

### **ELIGIBILITY**

#### **2. Is the Scheme available to all businesses?**

The Scheme is available to all UK businesses that has a PAYE Scheme in place on **28 February 2020**. The size of the business does not limit eligibility. However, the Government does not intend for public sector employers to utilise the Scheme.

At present, there is no indication that the Scheme will be means tested for businesses, or that businesses will be required to prove that there was no work available for their furloughed employees. The intention of the Scheme is to provide an avenue for employees who would otherwise have been laid off or made redundant to see receive some income. Therefore, this implies it should only be used for those who cannot undertake any work, or there is no work available. However, this is a grey area and there is currently no restriction that we have seen that prevents a business from furloughing an employee even if work is available to do, so long as the employee isn't permitted to work during the furlough period. Further guidance has been requested.

### **EMPLOYEE ELIGIBILITY**

#### **3. Employees businesses can claim for under the Scheme**

Furloughed employees can be on any type of contract, including:

- full-time employees
- part-time employees
- employees on agency contracts
- employees on flexible or zero-hour contracts

The Scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.

There are no continuous service restrictions.

However, some restrictions apply:

- the employee must be “furloughed” and not undertaking ANY work during the period they are benefiting under the Scheme.
- the employee must have been paid via PAYE and on the employer payroll as at **28 February 2020**. This is to prevent businesses adding children, spouses etc. onto the Scheme retrospectively.

the employee must remain on the employers PAYE Scheme during the furloughed period. If the employee has already been dismissed, provided the dismissal was after 1 March, the employee can be placed back on the employer’s PAYE payroll and benefit from the Scheme.

Casual workers are excluded under the Scheme. For advice on the distinction between worker v employee status, please contact our employment team.

#### **4. Does the Scheme apply to employees who have already been dismissed or laid off?**

Yes, provided that the lay off or dismissal was on 1 March 2020 or after and the employee and business satisfies all other eligibility criteria (as above).

#### **5. Does the Scheme apply to employees who have been placed on short term working or reduced hours and pay?**

No. If the employee is undertaking work of any kind during the furlough period, they will not be eligible.

#### **6. Can a business director undertaking statutory duties alone be furloughed?**

Yes. In such circumstances, any non-employment costs will not be recoverable under the Scheme, e.g. dividends.

### **MAKING A CLAIM**

#### **7. How can businesses access the Scheme?**

HMRC are currently setting up a new online portal for businesses to access the Scheme. It is expected that this will be set up by mid-late April 2020, however we expect there may be some delays and technical issues. Unfortunately, this is the first Scheme of its kind therefore glitches are expected.

## **8. Making a claim**

To claim, businesses will need:

- their ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- the business bank account number and sort code
- the business contact name and phone number

Businesses must also be able to provide proof that they have confirmed to the furlough employee in writing that they will be furloughed under the Scheme. Records must be kept of this communication for HMRC.

Businesses will need to calculate the amount they are claiming. HMRC will retain the right to retrospectively audit all aspects of each claim.

Businesses can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1 March (if applicable). Businesses should make their claim in accordance with actual payroll amounts at the point at which they run their payroll or in advance of an imminent payroll.

Businesses must pay the employee all the grant they receive for the employees' gross pay, no fees can be charged from the money that is granted.

## **9. How will HMRC pay out under the Scheme?**

Once HMRC have received the claim and the business is eligible for the grant, HMRC will pay the grant via BACS payment to a UK bank account.

This is critical as it was initially believed that HMRC would issue credit for future HMRC payments. However, businesses can be reassured that they will get the cash back.

## **10. How long is the Scheme available for?**

The Scheme is currently available for employees who have been furloughed from 1 March 2020 to 31 May 2020. Any extension to the Scheme will be subject to Government discretion and may not be confirmed until mid-end May 2020.

When the government ends the Scheme, businesses must make a decision, depending on their circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider termination of employment (redundancy).

## **IMPLEMENTING THE SCHEME FOR EMPLOYEES**

### **11. What is “furlough”?**

The concept of “furloughing” an employee is new and not currently categorised in law. Nonetheless, it is the phrase that has been adopted by the Government and HMRC to identify an employee who has been allocated to be eligible under the Scheme.

To “furlough” an employee, they must have been released from all work duties on a special leave of absence. Please see below for further information.

### **12. Designating and allocating employees to be “furloughed”**

To benefit under the Scheme, employees must have first been “furloughed”. This will entail a change of legal status for the employee, therefore usual employment law practice must be followed to implement the change.

Changing the status of employees to “furloughed” is subject to:

- **An employer’s lawful right** – if there is a contractual lay off provision in contract of employment businesses can exercise this to place employees on “furlough” leave. However, this right is limited to furlough leave itself and does not confer a right on businesses to implement wider changes to the employee’s terms and conditions of employment.

**OR**

- **Employee consent** - in the absence of a “lay-off” provision, businesses are advised to consult with their staff to reach an agreement that the employee’s status shall be changed to “furlough” for a set period. Any contractual changes should be clearly explained to the employees and confirmed in writing within 1 month of change. Although, we recommend obtaining consent in writing from day 1.

**OR**

- **Formal consultation to unilaterally change terms and conditions of employment** - this is the least preferred route due to the time involved to formally consult. Subject to the number of employees involved:
  - if 20 or more employees = 30-day consultation is required;
  - if 100 or more employees = 45-day consultation is required.

For further information on consultation obligations, please contact our employment team.

When writing to employees to confirm their “furloughed” status, businesses should include details as to what will happen to holiday entitlement, sick pay, wider benefits, pay arrangements etc.

Businesses can also seek to introduce a lay off clause into the employee’s employment contracts going forward if they wish. This will allow businesses to furlough employees more easily in the future. However, businesses should appreciate that an employee may push back on this as there will be no guarantee that a comparable Job Retention Scheme would be made available by the Government after 31 May 2020. Therefore, any future lay off would be subject to the current statutory structure of £29 per day of lay off, limited to 5 days in a 3-month period only.

**13. Why would employees agree to furlough?**

In our experience, most employees will agree to be furloughed to avoid the risk of redundancy or a business enforcing a lay off on nil pay in breach of contract. Whilst an enforced lay off would give businesses the risk of a potential claim, the employee would have to wait several months to be able to recover any monies.

Businesses will have a choice to “top-up” a furloughed employee’s pay if it wishes, however there will be no obligation to do so. Please see below for further information.

**14. Can businesses force an employee to be furloughed?**

Yes, if businesses have a lay off clause in the employee’s contract of employment. If not, consent or consultation is required.

Businesses can seek to incentivise employees to sign up, but we would hope this isn’t necessary.

**15. How should businesses select who gets furloughed?**

It is likely this will be determined by the job role. If the job role is not required because the employee is unable to work or they have no work available, they should be selected for furlough.

However, if a business has a group of employees undertaking the same role and a business only needs to furlough a proportion, it is recommended that some form of objective selection process is adopted to identify who should be furloughed or not. Alternatively, the business can decide not to furlough any, and seek agreement with the employees to reduce hours and pay to achieve greater fairness and consistency across the group.

Please note, usual discrimination law principles apply when selecting employees to be furloughed or not. Therefore, in such circumstances, it is recommended that businesses seek legal advice.

Government guidance permits businesses to utilise the Scheme for employees who are “shielding”. However, there is no guidance that any other category of employee should be prioritised under this Scheme.

**16. Can businesses place employees on the Scheme intermittently? Particularly to ensure fairness across a team of employees.**

The Government guidance states that the period of furlough for each employee is a minimum of 3 weeks. Therefore, a weekly/fortnightly rota would not be permissible.

However, provided the minimum 3-week period is satisfied, employees can then be allocated on and off furlough leave during the period of the Scheme.

## **EMPLOYEES TERMS AND CONDITIONS OF EMPLOYMENT DURING FURLOUGH LEAVE**

### **17. Will employees remain “employed” during furlough leave?**

Yes, subject to any changes businesses and employees have agreed to their terms and conditions of employment, their employment will continue as usual. Continuous service will remain protected.

### **18. What if an employee gets secondary employment during their furlough leave?**

Such conduct should be treated as potential misconduct, unless agreement has been made with the business to allow secondary employment. However, employees shouldn't be allowed to gain double recovery by accessing benefits under the Scheme and secondary employment.

Assuming the employee's secondary job is paid via PAYE, HMRC will find out about it!

If, however, an employee has two concurrent jobs, their entitlement for furlough leave for the one employment will not be affected by the other.

### **19. Can businesses continue with disciplinary / grievance proceedings during furlough leave?**

The Government guidance is unclear on this at present. Therefore, we recommend businesses act with caution and hold any current proceedings pending further Government guidance.

We do however expect that the Government will want to create a work around for this to allow such proceedings to continue.

### **20. Can employees volunteer or do training whilst furloughed?**

Employees can volunteer or train, provided that this does not involve *the manufacture or creation of an item or part thereof that can yield revenue for the company, the provisions of services to the company, or the provision of any service that can yield revenue for the company.*

However, for any period of training required, employees must be paid a minimum of the minimum wage and/or living wage entitlement (as applicable).

### **21. How should businesses manage probation periods during furloughed leave?**

The usual rules regarding probationary periods will apply. Therefore, businesses should first assess if employees will pass their probationary threshold date during their furlough leave and seek to extend the probation period accordingly. In the absence of a contractual right to extend the probation period, the business must seek the employee's agreement to any extension. If the employee refuses to agree, the business has the option to proceed or dismiss.

## **SICKNESS ABSENCE**

### **22. Are employees who are on sickness absence or isolating entitled to be put on Furlough Leave?**

Employees who are unavailable to work due to sick leave or self-isolating should continue to remain on sick leave and receive their sick pay benefits or Statutory Sick Pay in the usual way.

However, once the employee is willing and able to return to work, they will become eligible to be put on Furlough leave. Businesses may therefore receive requests from employees on long-term sickness absence to be furloughed and it will be up to the business if they wish to grant this. In such circumstances, it is advised that further legal advice is obtained.

### **23. Are employees who are on furlough leave subject to normal sickness absence procedures?**

This is optional for businesses. As employees are not permitted to work during furlough leave, there will be little incentive for either party to require an employee to take sick leave when unwell during furlough leave. Therefore, it seems sensible to lift the usual sickness absence requirements during this period.

However, it is recommended that whichever approach a business adopts, they notify the employee in advance. It is also advised that Business should still ask employees to report any health conditions that may impact their ability to return to work once the furlough leave comes to an end.

## **HOLIDAY**

### **24. Do employees who are on Furlough Leave continue to accrue annual leave?**

Yes. Employees who are on leave continue to accrue statutory holiday in accordance with the rules set out under the Working Time Regulations. However, the furlough agreement can include a waiver of accrual of any enhanced holiday entitlement.

### **25. Can employees be required to take annual leave during furlough leave?**

Yes, providing sufficient notice is provided. The Working Time Regulations provide that employees can be required to take annual leave at specific times providing they are given notice which is at least twice as long as the period of leave they are being required to take.

### **26. What should employees be paid during any annual leave taken in the furlough period?**

Employees should be paid for any annual leave taken at their agreed furlough rate of pay. This is advantageous to businesses who can require furloughed employees to use up their annual leave during a furlough period.

## **PREGNANCY AND MATERNITY**

### **27. Can employees who are on maternity leave, paternity leave, adoption leave or shared parental leave be put on furlough leave?**

Possibly. The Scheme rules provide that employees on such leave should continue to receive their statutory payments and the usual rules apply.

However, there is also a suggestion that it may be possible to furlough an employee on maternity leave in relation to the enhanced contractual element of maternity pay. The guidance is unclear on this point and it is suggested that businesses should take legal advice before proceeding in this area.

### **28. If your employee is on Maternity Leave**

Individuals who are on or plan to take Maternity Leave must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth.

If the employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, 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). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

### **29. If a business offers enhanced (earnings related) contractual pay to women on maternity leave, can these additional costs be included as “wage costs” that you can claim through the Scheme?**

It is understood, yes.

The same principles should therefore apply where your employee qualifies for contractual adoption, paternity or shared parental pay.

### **30. Can employees who are pregnant be put on Furlough leave?**

Yes, employees who are pregnant should not be treated differently to other employees although once their maternity leave period commences, they will be subject to the usual maternity arrangements.



## **MONEY MATTERS**

### **31. What costs will the Scheme cover?**

Businesses will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage. Fees, commission and bonuses should not be included.

As a minimum, businesses must pay their employee the lower of:

- 80% of their regular wage; or
- £2,500 per month.

An employer can also choose to top up an employee's salary beyond this but is not obliged to under this Scheme.

HMRC are due to issue more guidance on how businesses should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions, before the Scheme becomes live.

**KEY CONSIDERATION:** Businesses will need to pay their furloughed employees in accordance with the Scheme during the furloughed period and then recover the grant from HMRC. It is currently unknown when the grant monies will be received, and this may be delayed for weeks/months. Therefore, businesses need to ensure they have cash available to continue paying their employees until the grant monies are received. For businesses who do not have cash reserves, the Government are suggesting that businesses should access the new loan schemes that have been made available.

It is currently unclear if an employer and employee can agree to defer the employee's payments until after the grant is received. However, as HMRC are relying on their payroll information to verify and such grants, this could be an issue.

### **32. What will employees be entitled to receive under the Scheme?**

Furloughed employees will be entitled to receive the lower of (1) 80% of their regular wage or (2) £2,500 per month. Such payments will be subject to the usual PAYE deductions at the new lower salary rate.

Fees, commission and bonuses are not included, however it is unclear how "regular wages" should be calculated. As the Government have not referred to "basic salary" it suggests that the usual rules to calculate "normal remuneration" should apply. Therefore, payments of overtime and allowances should be included. However, this is currently unclear.

Businesses will therefore need to decide whether they will include additional payments (such as overtime and allowances) into their calculations and run the risk of HMRC not including this within their grant, and thus this payment not being recoverable. Or, using basic salary only and accepting

that they may have to top up the difference if such payments should have been included and the employee challenges the payments at a later date.

### **33. Full time and part time salaried employees**

For full time and part time salaried employees, the employee's actual salary before tax, as of 28 February 2020 should be used to calculate the 80%. Fees, commission and bonuses should not be included.

### **34. Employees whose pay varies**

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

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

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

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

Once a business has worked out how much of an employee's salary they can claim for, they must then work out the amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions they are entitled to claim.

### **35. National Living Wage/National Minimum Wage**

Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for the hours they are working.

Therefore, furloughed employees, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW.

However, if employees are required to, for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

### **36. Employer National Insurance and Pension Contributions**

All businesses remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

Businesses can claim a grant from HMRC to cover wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on paying those wages.

Businesses can choose to provide top-up salary in addition to the grant. However, Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through the Scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

## **DISMISSING EMPLOYEES**

### **37. Will it be unreasonable to dismiss for redundancy if furlough is available?**

Potentially.

First and foremost, any redundancy must be genuine and satisfy the current legal definition of redundancy - *Reduction in the work for employees to do work of a particular kind*. A temporary cessation of work due to COVID-19 may not be sufficient to qualify for redundancy if the work is likely to increase at a later date.

Further, the risk is only relevant to employees with over 2 years' employment who have the right not to be unfairly dismissed.

In our opinion - At present, the employment tribunals look at the resources available to the employer at the time of redundancy to assess if the redundancy was fair and reasonable in the circumstances. Therefore, employment tribunals may look at cash available to a business at the time of dismissal. It therefore follows that if a business doesn't have cash to pay employees for the furloughed period, until they can recover the employee costs under the Scheme, redundancy is likely to be fair provided usual due process is followed. However, if a business does have cash reserves and doesn't make use of the Scheme, premature dismissal could be deemed unfair.

Businesses who do not wait a couple of weeks for a grant, could possibly be exposed to an unfair dismissal claim.

Please note, this is a complex area of law that is new for businesses. It is therefore recommended that businesses seek legal advice before dismissing an employee as an alternative to accessing the Scheme.

### **38. Can businesses issue notice of termination of employment to run during a furloughed period?**

Yes, and for employees that a business intends to dismiss after the furloughed period, this is advised. However, employers must still dismiss fairly to avoid an unfair dismissal claim.

## **POTENTIAL PENALTIES**

### **39. What are the penalties if businesses are found to have abused the Scheme?**

The scope of potential penalties is currently unknown. However, the Chancellor has confirmed that there will be strong measures to ensure the Scheme is adopted appropriately and HMRC can go back to assess the Scheme and claw back where they can.