



Furlough fact sheet – 6 April 2020

As information around the Coronavirus Job Retention Scheme and furlough is constantly changing, this fact sheet reflects the latest guidance.

Coronavirus Job Retention Scheme

This is a temporary scheme which is open to all UK employees for at least three months, starting from 1 March 2020. The scheme is expected to be running by the end of April, and has been designed to support employers whose operations have been severely affected by coronavirus.

Employers can use a portal to claim for 80% of furloughed employees' usual monthly wage costs, up to £2,500 per month, PLUS the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage.

It is open to all UK employers that had created and started a PAYE payroll scheme on 28 February 2020. It is only available to employees who were already on the payroll at the 28th February, any new joiners beyond that date are not entitled to a furlough payment.

Definition

A furloughed employee is an employee who is not required to undertake any work of any kind for the employer and who would otherwise have been 'laid off'.

To clarify the term 'furlough' is not a legal term, it is the label the government has given to employees that an employer wishes to retain, but is unable to currently provide any work of any kind for them to undertake.

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Who can claim?

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 28 February 2020 and have a UK bank account. Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme.

Which employees can you claim for?

Furloughed employees must have been on your PAYE payroll on 28 February 2020, and can be on any type of contract, including:

- full-time employees
- part-time employees
- employees on agency contracts provided you are the employer
- employees on flexible or zero-hour contracts provided you are the employer.

The latest guidance suggests that ALL employees are eligible, and not just those who would have been otherwise made redundant.

How do you furlough an employee?

Employees can only be furloughed by agreement. Therefore, both parties, the employer and the employee must agree to the employee being furloughed. In the absence of a short term or lay off clause in the employment contract, employees must give their consent to being furloughed.

Employees may not request to be furloughed; this should be offered by the employer.

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Employees must be notified that they have been selected to be furloughed and this must be confirmed in writing as a change to their terms and conditions of employment via a furlough agreement.

Currently the furlough scheme has been set by the government for a period of 3 months commencing 1st March 2020. This will be subject to review. This record must now be kept for five years.

Employers can furlough staff at any time during this three-month period. Employees can be furloughed multiple times provided they are furloughed for three weeks at a time.

Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme.

Can commission be reclaimed?

Employers can reclaim compulsory commission from HMRC as well as basic salary (however, this only applies to past commission as those furloughed would not be able to generate commission whilst on furlough).

The claim cannot include non-monetary benefits (for example, the value of health insurance or a company car).

Can employees who resigned or who were made redundant be furloughed?

Yes, you can re-hire employees and then furlough them, provided they were on the payroll on or after the 28 February.

Can company directors be furloughed?

Yes, the latest guidance advises that they can and still perform their statutory duties, but no other work.

Can apprentices be furloughed?

Yes the same rules applies to apprentices as to other employees.

Can furloughed employees continue to work?

No, to be eligible for the subsidy, when on furlough, an employee can not undertake work for or on behalf of the organisation. This includes providing services or generating revenue. While on furlough, the employee's wage will be subject to usual income tax and other deductions.

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Furloughed employees do not undertake any work of any kind during the furlough period. Therefore, employees can't be furloughed for part of their working week i.e. 2 days working and 3 days furloughed. This scheme is only for employees on agency contracts who are not working. If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme and you will have to continue paying the employee through your payroll and pay their salary subject to the terms of the employment contract you agreed

However, the government has now announced that furloughed employees can start a new job for another employer. So they can receive 80% of their original salary and earn 100% elsewhere.

A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of your organisation. However, if workers 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.

Can you furlough employees who have already been made redundant?

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

Can you furlough some employees and make others redundant?

Yes, you may choose to furlough some employees and make some employees redundant, whilst requiring other employees to continue to work. Employees can be made redundant either during or at the end of the furlough period.

Employers need to be mindful that employees with less than two years' service who are furloughed, may cross the two-year threshold during this period and therefore become entitled to a redundancy consultation process and payment. Continuous service will apply during the furlough period.

Employees who are currently facing redundancy, or have been confirmed as redundant but are not yet in receipt of their P45, can consent to being furloughed. This has the potential of delaying the redundancy decision.

Employers are able to commence redundancy consultation with employees during the furlough period, if the company's financial situation worsens.

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Can employees on unpaid leave be furloughed?

No, unless they were placed on unpaid leave after 28 February.

Can employees on statutory sick pay (SSP) be furloughed?

Yes, but once the sick leave or self-isolation SSP pay period is complete. However, those who are shielding in line with public health guidance can be placed on furlough. Employees on sick leave or self-isolating should get Statutory Sick Pay, but can be furloughed after this. Employees who are shielding in line with public health guidance can be placed on furlough.

Does it apply to employees with more than one job?

Yes, if your employee has more than one employer they can still be furloughed for each job. The cap would apply separately to each job and employer.

Maternity leave, contractual adoption pay, paternity pay or shared parental pay

Employees who qualify for Statutory Maternity Pay (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.

If you offer enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs that you can claim through the scheme. The same principles apply where your employee qualifies for contractual adoption, paternity or shared parental pay.

What are employees' rights whilst furloughed?

Employees that have been furloughed have the same rights as they did previously. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments. Once the scheme has been closed by the government, HMRC will continue to process remaining claims before terminating the scheme.

Holiday leave and furlough

Are employees who are absent on sick leave, furlough leave and unpaid entitled to accrue holiday?

Whilst on sick, furlough or unpaid leave, the right to accrue statutory holiday of 28 days remains. The basic rule is anyone who remains an employee will accrue holiday regardless of the type of leave they are on.

Can you take holiday whilst on sick leave?

No, you can only be on one type of leave at once. However, an employee can choose to end their sick leave and take holiday leave instead.

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What happens if an employee becomes sick whilst on annual leave?

If an employee falls sick during a period of holiday leave, and reports it to his or her employer then the employee may opt to take the applicable period as sick leave, and take the holiday leave at a later date.

Can you take holiday whilst on furlough leave?

Currently legislation is silent on this point and HMRC may provide clearer guidance in the future. However in the absence of clear guidance it is reasonable to assume that an employee can take annual leave whilst furloughed, and employers can claim the 80% for employees who are on annual leave and furlough. It is recommended that employers pay holiday at 100% for the 5.6 weeks and claim 80% of salary from HMRC. This is because employees can't contract to be paid less than their normal remuneration whilst on holiday and the furlough period is not a long enough reference period to fairly calculate normal remuneration.

Can an employer make a payment in lieu of holiday?

This is not possible during employment. Annual leave can only be replaced by a payment in lieu on the termination of employment. The basic principle (subject to the specific points on furlough leave), is that if holiday is not taken, it is lost.

Do employees have to use holiday within the holiday year?

As stated above the normal principle is that employees should use holiday during the year that it is accrued or it will be lost, with the exception of long-term sick leave (see below). However, during the corona virus period it is recognised that this may be more difficult and employees may be getting to the end of their leave year with holiday still left to take. Accordingly, the government have introduced new legislation to cover this scenario (see below).

Holiday carry over whilst on long-term sick leave

Employees on long term sick leave are only able to carry forward the 20 days required by the European Directive, not the additional 8 days provided under UK law unless an agreement says otherwise (such as the employee's contract of employment).

In what circumstances are employees now allowed to carry over holiday due to the impact of the corona virus?

The potential circumstances which may create a need for holiday to be carried over are:

- they're self-isolating or are too sick to take holiday before the end of their leave year
- they've been temporarily sent home as there's no work ('laid off' or 'put on furlough')
- they've had to continue working and could not take paid holiday.

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What happens to the holiday of employees/workers who cannot take holiday during the current holiday leave year because they need to work?

If a worker cannot, or does not wish to take holiday during the current leave year (because of the need to work to fight the coronavirus), it can be carried over to the next leave year. The Working Time (Coronavirus) (Amendment) Regulations 2020 amend regulation 13 of the Working Time Regulations to allow workers to carry over the 20 days required by the European Directive into the next two leave years, where it is not reasonably practicable for them to take some, or all, of the holiday they are entitled to due to coronavirus. Note regulation 13 only deals with the EU four weeks' leave. The balance of 1.6 weeks' statutory leave will not be affected (although it can be carried over for up to a year by agreement under existing law).

When does the two year carry forward period start from?

The Coronavirus Amendment regulations came into force with immediate effect on 27 March 2020. Therefore, they will apply to the accrual of holiday on or from 27 March 2020. The two year carry forward period will depend on when the employers holiday year runs. For example, if the holiday year ends on April 2020, holiday accrued in the April 19 to April 20 holiday year can be potentially carried forward until April 2022. If the holiday year began in January 2020, then holiday can potentially be carried forward to January 2023 (because the next two leave years are January 2021 to January 2022 and January 2022 to January 2023 respectively).

Do employees whose employment is terminated have the right to receive payment for any accrued but untaken holiday?

Under the Working Time Regulations 1998 an employee is entitled to receive payment for any untaken holiday on termination. This would include any carry forward holiday.

Do you have to alter the holiday entitlement for those members of staff who decrease and then increase their number of hours they work in response to the corona virus pandemic?

Yes. If you have workers who change their hours of work, you must look at each period separately to work out how much holiday they are entitled to receive.

Can you force an employee to take holiday?

The normal principle, and we have seen no indication so far that this won't be allowed, is to require employees to take holiday you would need to give twice as much notice as the length of the holiday you want them to take (e.g. ten days' notice for five days' holiday) unless the contract says something else. This is consistent with the requirements of the Working Time Directive which states that an employer can insist that an employee take holiday on set dates. Therefore an employee can be furloughed for three weeks and told to take the third week as holiday and the correct notice period would have been given. There is also nothing to stop an employer and employee agreeing that a period of leave should be designated as annual leave.

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What about bank holidays during furlough leave?

Bank holidays should be taken as holiday leave as normal, where possible. If employees and workers cannot take bank holidays off due to coronavirus, they should use the holiday at a later date in their leave year. If this is not possible, bank holidays can be included in the 4 weeks' paid holiday that can be carried over. This holiday can be taken at any time over a 2-year period.

What happens to previously booked holiday?

If an employee no longer wants to take time off which they had previously booked, for example because their holiday's been cancelled, their employer may still tell them to take the time off (see "can I force an employee to take holiday" above). If the employee wants to change when they take this time off, they'll need to get agreement from their employer.

How do you calculate holiday leave and pay for variable hours staff?

Variable hour employees are paid holiday pay at the rate of 12.07% of the hours worked as this is the percentage to ensure they have the pro-rated equivalent of 5.6 weeks paid holiday, at the correct rate of pay, per annum. For employees or workers whose hours differ from week to week and/or are paid at different rates, holiday pay will be calculated on the average pay currently earned in the past 12 weeks, but increasing it to 52 weeks from April 2020.

How can I manage my employees' holiday leave?

- Actively encourage employees to book and take holiday in the relevant holiday year.
- Remind employees that the usual, use holiday or lose it rule applies and that the carry forward only applies where it is not reasonably practicable for employees to take holiday in the relevant holiday year.
- Reach mutual agreements with employees regarding the taking of holiday during any period of furlough leave or switching unpaid leave to holiday. For example, an employer could suggest that employees take a day or a number of days off per month to ensure they have adequate breaks from work.
- Devise a fair policy for the booking and agreeing of holiday leave, after the lockdown period, anticipating potential business needs, with a view to devising a strategy to use holiday up in the relevant holiday year (if this is preferable to the business).
- Instruct employees to take holiday by giving them notice of twice the amount of the holiday leave you require them to take.

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Furlough payments

Employers will need to make a claim for wage costs through the scheme, and will receive a grant.

At a minimum, employers 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. We will issue more guidance when it is released on how employers should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions, before the scheme becomes live.

How will it work?

The employer is required to pay the employee the 80% in the usual way and claim this amount back from HMRC each month. For example, the employee is paid the 80% furlough amount in the March payroll, following which the employer claims back the March payment from HMRC. This process must be followed for each month that the furlough payments are made. Employers can claim the 80% for all employment costs including employee NI and pension payments.

How do you calculate full time and part time employees' wages?

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

Employees with varied pay

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:

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.

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

Employer National Insurance and Pension Contributions

All employers remain liable for these on behalf of furloughed staff. You 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.

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You can choose to provide top-up salary in addition to the grant. Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this 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).

National Living Wage and 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 workers, 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 workers 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.

How to claim

You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim. You 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.

What happens next?

Once HMRC have received your claim and you are eligible for the grant, they will pay it via BACS payment to a UK bank account. You should make your claim in accordance with actual payroll amounts at the point at which you run your payroll or in advance of an imminent payroll. You must pay the employee all the grant you receive for their gross pay, no fees can be charged from the money that is granted. You can choose to top up the employee's salary, but you do not have to.

What happens at the end of the scheme?

Once the scheme closes, you must decide whether your employees can return to their positions. If not, you may have to consider redundancy.

Get in touch with our team if you would like more guidance around this. Information correct as of 2 April 2020.