

As part of its response to the COVID-19 pandemic the government has introduced the Coronavirus Job Retention Scheme. This will allow all UK employers with employees on a PAYE scheme to designate those employees as 'furloughed workers'. The employer will have access to government support to continue paying part of these furloughed employees' salaries and protect the employees from redundancy.

This guide outlines the key facts about designating employees as furloughed workers and gives advice on considering implementing this new type of leave.

Changes under extended furlough scheme

Q: What changes have been made to the extended Coronavirus job retention scheme?

The key changes to the extended Coronavirus job retention (or flexible furlough) scheme are:

- **From 1 July the employer and employee can operate new arrangements where employees are partly furloughed and partly return to work.**
- **In June and July, the Government will continue to pay furlough grants for the hours not worked by furloughed employees (ie 80% of wages, capped at £2,500).**
- **From July onwards employers will be required to pay normal salary for any hours worked by employees.**
- **From August employers will have to pay employers' NI and relevant pension contributions on furlough pay or salary regardless of whether the employee is fully or partly furloughed.**
- **In September and October employers will be required to contribute at least 10% and 20% respectively towards employees' furlough pay so that the cap on the part of the grant paid reduces before the scheme ends in October.**

Although employer contributions will increase from August onwards employees' income should not fall below the 80% figure subject to the cap. The Government will therefore continue to contribute towards any non-working time of furloughed staff until the end of October.

Other points

From July onwards claim periods must be limited to a calendar month to fit in with the changing level of grant; overlapping months will only be permitted before July. The period claimed needs to be for at least three weeks before July and at least one week afterwards, although monthly or fortnightly pay periods can be used.

The extended furlough agreements must be confirmed in writing and employers must report the hours employees have worked compared to the hours the employee would usually work. The grant claim will be based on the

percentage of hours not worked and between July and October the grant cap will be proportional to the hours not worked.

A similar longer period of government support applies to the [Self-Employment Income Support Scheme](#). Further government guidance will be published on 12 June although the current [Government fact sheet](#) confirms the essential points.

Q: What are the main dates for the extended furlough scheme changes?

The main dates for the changes to the extended Coronavirus job retention or flexible furlough scheme are:

June

- **10 June:** Any employees being furloughed for the first time must be placed on furlough by this date for a minimum period of three weeks.
- **30 June:** The furlough scheme closes to new applicants.

July

- **1 July:** The new flexible furlough scheme starts for employers who have furloughed these employees previously. Furloughed employees can be partly furloughed and partly working from home or in the workplace and the grant can be claimed for the hours not worked.
- **13 July:** Applications for grant under the first self-employed income support scheme close.
- **31 July:** Final date for employers to make claims for the period to 30 June 2020.

August

- **1 August:** From this date the level of the grant employers can claim from the Government will progressively reduce. Although 80% of furloughed employees' wages can still be claimed up to a cap of £2,500 for hours not worked, employers must pay employer NICs and pension contributions even if the employee is fully furloughed. The ability to reclaim these items ends. Employers must pay employees for hours worked, plus NI and pension payments in the usual way.

September

- **1 September:** The amount of Government grant that can be claimed reduces to 70% of wages, subject to a cap of £2,187.50, for the hours that the employee does not work. The employer must pay 10% to make up the shortfall and ensure the employee still receives the 80% up to a cap of £2,500 plus employers' NI and pension contributions.

October

- **1 October:** The amount of Government grant that can be claimed reduces to 60% of wages, subject to a cap of £1,875 for the hours the employee does not work. The employer must now pay 20% to make up the shortfall and ensure the employee still receives the 80% up to a cap of £2,500 plus employers' NI and pension contributions.
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Q: Is the most critical date for the furlough scheme changes the 10 or 30 June?

The most critical date for the furlough scheme changes is the 10 June. The scheme will close to new entrants on that date – so employers intending to furlough employees, who have not previously been furloughed, must do so by 10 June. Employers will not be able to access grant payments under the Coronavirus Job Retention Scheme if they try to put employees on furlough for the first time after that date.

The existing furlough scheme runs until 30 June with the Government paying 80% of employees' salaries, up to £2,500 per month, and employees can't work for that employer while on furlough until the end of June. From 30 June 2020 the scheme changes to a new flexible furlough scheme. With effect from 1 July 2020 furloughed employees can work for the employer part-time from the workplace or from home whilst still being entitled to a proportion of furlough grant payments in respect of the hours not worked.

What is furlough?

The word 'furlough' generally means temporary leave of absence from work. This can be due to economic conditions affecting one company, or matters affecting the whole country. Until now the expression has not carried any meaning in UK employment law but has been temporarily introduced in response to the unprecedented situation presented by the COVID-19 pandemic. This does not mean that the fundamentals of employment law have changed, simply that this scheme adds to them.

Furlough leave has been temporarily introduced by the government to provide employers with an option to keep employees on the payroll without them working. As the furloughed staff are kept on the payroll, this is different to being laid off without pay or being made redundant. The ability to furlough employees is designed to support employers who are severely affected by coronavirus.

This provides employers with another option when reviewing the circumstances of their business (as an alternative to redundancies or being laid off without pay) and each employer will need to review this option carefully (alongside legal advice) to pursue the best option for them.

The Job Retention Scheme will be extended **until October 2020** (as announced by the Chancellor on 12 May) as this will give businesses the breathing space they need to bring people back from furlough gradually on reduced hours as lockdown measures are unwound.

Which employers are eligible?

Any employer (of any size) is eligible for the scheme. This includes:

- businesses
- charities
- recruitment agencies (if the agency workers are paid through PAYE)
- public authorities.

To be eligible the employer must have created and started a PAYE payroll scheme on or before 19 March 2020 and have a UK bank account.

It has been confirmed that where a company is in administration, the administrator will be able to access the [Coronavirus Job Retention Scheme](#).

More information is available on the [government website](#) and further details are expected in due course. The situation is evolving rapidly and future regulations and guidance may resolve the remaining uncertainties.

Public sector

The government does not expect much public sector use of the scheme because many public sector employees are continuing to work throughout the coronavirus outbreak.

Non-public sector employers who receive public funding for staff costs are expected to continue to pay staff and not to place them on furlough. However, where staff cannot be redeployed to assist with the coronavirus response, then the furlough scheme may be applicable.

Which employees are eligible?

The employees that can agree to being furloughed are those working for employers whose businesses have been severely affected by coronavirus.

The furloughed employees must have been on the employer's PAYE payroll on 19 March 2020, including:

- full-time employees
- part-time employees
- agency employees on agency contracts (provided they are not working at all)

- zero-hour contract workers (provided that they are employees albeit on flexible contracts).

There are complexities for employees who have been:

- on sabbatical or unpaid leave
- recently made redundant or laid-off
- are pregnant or on maternity leave or adoption/paternity/shared parental leave pay
- caring for children
- migrant workers

Employees who have been on sick leave can be placed on furlough leave after the period of sick leave has ended if there is no work for them to do and employer's operations are severely affected by coronavirus. Employees who are shielding themselves in line with government advice can also be placed on furlough leave.

Does furlough only apply to those at risk of redundancy?

When the coronavirus job retention scheme was launched in March the first set of guidance said the scheme applied to employees who "would otherwise have been made redundant or laid-off". However this has now changed, and the original reference to redundancy and lay off in the [government guidance for employers](#) has been replaced with wording which says that coronavirus must have "severely affected" the employer's business operations. This means there is now no specific requirement for furlough to be offered only if there is an underlying risk of redundancy. However, any redundancy process is likely to be unfair if the employer does not at least consider furlough as a potential alternative at the planning stage. On the government portal for making a claim, employers confirm they are claiming the costs of furloughed employees due to health, social and economic emergencies resulting from coronavirus.

Due to the evolving nature of the guidance employers should keep written evidence to show that their operations have been negatively affected by coronavirus and the effect this has on their workforce, plus evidence:

- to show that each furloughed worker has no work ; or
- the employee was furloughed for another reason arising from coronavirus (for example they live with a person who is shielding or cannot work due to childcare commitments).

The [employee section of the guidance](#) adds that employees can be furloughed if their employer has no work for the employee to do or where an employer is unable to operate.

Employees who work elsewhere

Employees with two or more employers can be furloughed for each job separately but the £2,500 cap applies to each employer individually. This means that an

employee with two jobs can have 80% of their salary reimbursed with a cap of £5,000, or more, if the employers top the salary up above the grant level.

Consider this, if an employee works two days a week for Employer A and three days a week for Employer B they would receive their 80% of their actual salary for those two days if on furlough from Employer A. If their other role continues the employee could receive their normal salary from Employer B as well.

The guidance does specifically cover the position if the employee is then offered additional work from Employer B. Employees can be furloughed from one job and receive their 80% furlough payment, and work for another employer during the hours they would normally be working for the employer who has furloughed them. Therefore, it seems that working elsewhere while on furlough from employer A is an inadvertent benefit for the employee. However normal legal principles apply too, as outlined below.

Coronavirus Job Retention Scheme

If furloughed employees work for another employer during the hours they would normally be working for the employer who has furloughed them payments by HMRC will be paid even if the employee picks up other work. The employee will receive the furlough payments from the first employer and their normal wages from the new employer. The government details only prevent the employee from doing any work for the same employer that has furloughed them.

General legal position on working elsewhere

The scheme may pay a grant for the furloughed employee, but this is a different legal issue to the relationship between the employer and employee. In many employment contracts there is either an express or implied term that the employee should loyally and faithfully work for that employer and not work elsewhere.

It could technically be breach of contract with the employer if employees pick up work elsewhere. Similarly, it could be a breach of contract, including a breach of mutual trust and confidence, if the employer unreasonably refuses consent, especially if the employer only allows furlough on 80% pay.

Example

For example, two full-time employees have contracts with similar express restrictions on working elsewhere. The contracts say the employees must faithfully serve the employer and are prohibited from taking up additional work or directly or indirectly engaging in any competing business.

Employee A earns about £2,000 a month as an assistant for a film location company which has temporarily closed. He is furloughed on 80% of pay, receiving approximately £1,600. To supplement the furlough pay he takes a temp job as a supermarket delivery driver earning a further £2,000 per month (in addition to the furlough payment). The original employer should evaluate this and as there is no business threat can agree to the employee's proposed second job.

Employee B earns £6,000 per month as a business developer for a financial services company. She is furloughed on the maximum £2,500 payment but the employer does not top this up. Some other colleagues have not been furloughed and are receiving their full salaries. Employee B is concerned that she will not meet all her outgoings and takes a temp development job with a similar company earning £4,000 per month. The employer is concerned as there is a threat to its business by working for a competitor. If the employer refuses consent to the employee's proposed second job Employee B can seek another role or may try to refuse to agree to being furloughed given the pay cut. The employer then has a choice to pay the full salary, or reverse the furlough decision, or perhaps commence a redundancy process.

Ultimately what happens may be a question of negotiation between the employer and employee. Employees do have to agree to being furloughed, unless there are lay off provisions in their contract, so an informed employee may say they only agree to being furloughed and taking a 20% pay cut if the employer agrees to them working elsewhere during their normal working hours. The safest course of action is to agree with the employee the nature and length of any other work that may be done, ideally in writing. Employers may ask employees to agree new or reconfirmed restrictions on working elsewhere, especially if for a competitor. The employer may agree to furloughed employees working in limited sectors, for example, food, health and social care or other essential services. Special rules also govern volunteering.

Business owners and partners

Owners of small businesses who pay themselves a PAYE salary are covered under the furlough scheme. The scheme does not apply to dividend payments so director-shareholders who are paid partly or mainly in dividends will only be covered to the extent that they receive PAYE earnings.

The [Coronavirus Self-employment Income Support Scheme](#) has been introduced to provide a similar sort of support to those not eligible under the job retention scheme. This means self-employed directors with taxable profits below a £50,000 annual threshold may be eligible to apply for support under the self-employment scheme.

Salaried partners who are paid through the PAYE payroll are eligible under the furlough scheme. Partner owners and LLP members who are treated as self-employed (and not paid through the PAYE payroll) will not be covered. Like directors, self-employed partners with taxable profits below the annual threshold may be eligible to apply for support under the self-employment scheme.

How to agree which employees are furloughed

Employees must be consulted and have to agree to be furloughed.

Changing the status of employees always is subject to existing employment law so it's important to bear this in mind. Depending on the employment contract wording there may be an ability to lay-off workers to impose a furlough period.

If there is no lay off provision in the existing contract the employer will need to agree with the employee that they are going to become furloughed because no work is available. Most employees will agree to this as the alternative is dismissal by reason of redundancy (with the possibility of a delayed redundancy payment or no redundancy payment for employees who have worked for less than two years).

In some cases, the unions may join in a collective consultation process to agree the furlough change. As normal employment laws apply when furloughing employees, equality and discrimination laws will apply and so employers will need to be aware of certain risks, for example, choosing a disproportionate amount of men or women, which could lead to discrimination claims later.

In a minority of cases there may be some negotiation, as for some employers some staff may be needed and others not. Some employees may be resentful that they are having to work as they are classed as being essential whilst others are being furloughed on 80% of salary. Others may be resentful that they are classed as dispensable whilst others are working and receiving their full package.

It may help to select employees for furlough using a process like redundancy selection (for example, using objective criteria, such as a scores matrix based on skills, productivity, previous appraisals etc). Discuss all of the available options with employees and stay up to date with the latest on the [Government website](#).

If employees do not agree to be furloughed then employers can dismiss them by reason of redundancy (if the redundancy definitions are met and a proper process is followed).

How to apply to the scheme

The ability to furlough employees under the Coronavirus Job Retention Scheme will be operational from 20 April. Employers can apply on the Gov.uk website and use the [step by step guidance](#) to help them make their claim. The scheme is backdated and will apply from 1 March 2020.

Once employers have reached an agreement with employees about being furloughed, they should write to the affected employees confirming that they have been furloughed and should keep a record of this for five years.

Employers access the scheme through an online portal, providing details of the affected furloughed employees and information about their earnings and any other information required (such as the employee's NI number). Guidance on [how to calculate 80% of employees' wages](#) and [step by step guidance on making a claim](#) are available on the Government website.

Employers should take the following steps to prepare to make a claim:

- Design a furlough process and agree a furlough policy. A template policy from HR-inform is available on the support materials page.

- Decide which employees are affected perhaps using criteria similar to redundancy selection.
- Decide whether to pay 80% of salary or to supplement it. You can use the [Gov.uk guidance](#) on calculating 80% salary to help make your decision.
- Gain the employees' written consent even if contractual provisions already cover lay off; express agreement is advisable especially if salary is not being topped up.
- Stop the employees from working.
- Check communication details with employees to update them, perhaps with a list of answers to key questions such as what happens to discretionary payments, volunteering, working elsewhere etc.
- Calculate the amounts they are claiming from HMRC, using the [Gov.uk guidance](#). To work out what amounts they are claiming employers will have to work out the total amount being paid to furloughed employees, as well as employer NI and minimum automatic enrolment employer pension contributions for all employees.

To make a claim, employers must apply with the following information:

- number of employees being furloughed
- claim period (start and end date of furlough period)
- full amount being claimed
- full name and NI number of each furloughed employee
- employer PAYE scheme reference number
- employer's Corporation Tax Unique Taxpayer reference, Self Assessment Unique Taxpayer reference or Company Registration Number (as appropriate)
- employer's UK bank details
- employer's registered name and address.

Employers with more than 100 employees will need to upload this information in one of the following formats; XLS, XLSX, CSV, ODP.

Employers will need a Government Gateway ID and password and an active PAYE enrolment to access the system to make a claim.

Applications needs to be made in one session as there is no save and return option so employers should ensure they have all of the necessary information before they start to make a claim.

After following the steps to make a claim online, employers should ensure they take a note of their claim reference number (as there won't be a confirmation email). You should inform furloughed employees that you have made a claim but make clear to them that they do not need to take any action; they will receive their pay as normal.

[Step by step guidance](#) on making a claim can be found on the government website.

Timing

Employers are advised by the government to claim in advance of an imminent payroll or at the point when they run their payroll. Employers cannot make more than one claim during a claim period; you need to claim for all employees in each period at one time as it is not possible to make changes to a claim.

HMRC will retain the right to retrospectively investigate and audit employers' claims.

Once HMRC have the claim and agree the employer's eligibility a BACS payment will simply arrive directly into the bank account supplied in 6 working days after making an application; this means employers will need to submit a claim at least 6 working days in advance for the money to clear into their bank account. HMRC have advised employers not to contact them unless 10 days have gone by.

Employers make a collective claim for the group of furloughed employees under the scheme (not for individual employees) but employers will probably need to make more than one claim throughout the period of furlough.

Employers will probably submit one claim at least every three weeks (as three weeks is the minimum length of time an employee can be furloughed for).

What happens during furlough?

Length of furlough

The minimum furlough period is three weeks.

Working

People who get furloughed must not work for the employer during the period of furlough. They will usually return to their job afterwards (unless redundancies follow).

Pay

Under the scheme furloughed workers will receive either 80% of their regular wage or £2,500 per month, whichever is lower. Employers can choose to top up the employee's salary above 80% but they are not obliged to. All of the monies paid by the government must be paid to the employee. Employers must not divert any part of the reclaimed grant, for example by deducting administration charges.

Regular payments of wages, variable PAYE wages, fees, and compulsory payments including commission and bonuses, are included when working out the 80% figure.

However, current government guidance has confirmed that payments at the discretion of the employer such as discretionary bonuses and commission payments are excluded. Tips and non-cash payments such as health insurance or use of a company vehicle should be excluded as well.

This means that the following payments are included when working out the 80% share:

- Regular wages
- Variable PAYE wages
- Fees
- Compulsory bonuses
- Compulsory commissions

While the following payments are excluded:

- Discretionary bonuses
- Discretionary commission
- Tips
- Tronc shares
- Non-cash payments such as health insurance
- Use of a company vehicle.

Employers who furlough employees can also claim employers' national insurance payments and minimum pension contributions.

For regular salaried employees, employers should base calculations on actual salary before tax, as at 19 March 2020. For employees with variable pay employers can claim the higher of either:

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

If an employee with variable pay has been employed for under a year employer can claim for an average of monthly earnings since they started work. For workers who only started part way through February 2020, the wage will have to be taken pro-rata.

The furloughed employees are unlikely to receive £2,500 exactly. Employees who earn under £3,125 a month will receive less than £2,500. This is because for those earning £3,125 a month, 80% of salary would be £2,500:

- Employees who earn less than £3,125 a month normally, will get 80% of their salary for three months (or more).
- Employees earning in excess £3,125 a month will have the £2,500 cap applied. These employees will receive less than 80% of their salary for those three months (or more) unless the employer chooses to supplement it.
- The £2,500 a month figure has presumably been chosen as it is broadly £30,000 a year which is the national median net salary.

Guidance on calculating payment amounts is now available on the [Gov.uk website](#). For more information see the FAQs on national insurance and pensions for more information.

Employers will receive a grant to cover part of the salaries of any employees who would otherwise have been dismissed. Employers do not have to pay this grant back. Employers must pay over the entire grant received to the furloughed employees, plus any top up payment they are choosing to pay.

Annual leave

If furloughed workers do not book any holiday time their statutory minimum holiday entitlement of 5.6 weeks per year will accrue while they are furloughed. The exact amount will vary depending on how much leave the employee has already taken. Employers can ask for employees to agree to any contractual (as opposed to statutory) holiday not to accrue during furlough.

Special provisions govern the current situation which mean that workers can carry-over up to four weeks' holiday into the next two holiday years. The interrelationship between leave and furlough is legally complex and has not been fully addressed in official guidance as yet, although the most recent employee's guidance confirmed that employers have to top up pay to 100% for any employees who take annual leave during furlough. It is thought that employers can alternatively insist employees take holiday during the furlough, provided the appropriate notice is given but this is yet to be confirmed in guidance. In this situation employers would then have to pay the holiday pay in full and could claim for the 80% grant towards this.

Training

If employees are required to complete any job-related training while they are on furlough leave (which is permitted as long as it doesn't involve them in providing services to, or generating revenue for or on behalf of their organisation) they should be paid at least the National Minimum Wage rate. Similarly, apprentices should receive at least the National or Apprenticeship Minimum Wage or the National Living Wage.

Communicating with staff who are furloughed

Communication with staff during furlough presents employers with some issues. Furloughed staff must not work for their employer until furlough ends. If the employees do any work, then the employer's claims for the government grant may be jeopardised. On the other hand, an employer's duty of care for employees continues during furlough so employers must maintain non work-related contact furloughed staff to discuss any personal matters, including their health and well-being, and to allow employees to ask any questions or raise concerns. Contact also helps maintain furloughed employees' loyalty and engagement so that they can return to work smoothly after the lockdown. Contact should be arranged ahead of time, so it is expected. Here are some key considerations:

- Furloughed staff should be given an HR contact, in case any HR-related questions or concerns arise (for example sickness, pregnancy).
- Government guidance does not address the use of work email, and so employers must use their discretion. Any work, including online team meetings, checking work related emails and forwarding them on, could count

as work. If organisations choose to communicate with furloughed employees through existing email systems, the employer must ensure that employees do not log on to undertake any work at all. There must be no provision of any services or any revenue generated for the employer or for any linked or associated organisation.

- To ensure employees do not undertake any work it is may be easier to limit access to work emails, with a mechanism for incoming emails to be monitored and diverted. Employers can then switch to personal email for their own communications, checking that employers have up to date details (including current personal email and postal addresses) for each employee. This makes it harder for employees to work and creates clear a distinction between furloughed employees and those who are still working.
- Some employees use work laptops, telephones and emails for personal matters so employees can still be allowed to use their devices, but employees must not send or respond to any work-related matters while furloughed.
- You should also advise employees on what to tell clients/customers. Keeping in touch with key customers or suppliers is permissible if purely social but it could amount to work even if personal emails are used. This could jeopardise the furlough payment so employers must decide how they want to proceed.
- Employers should establish a communication plan for furloughed employees and should outline how often employees can expect to hear from the organisation. Employers can set different means of communication (besides email) including a specific temporary website section for keeping in touch newsletters and well-being communications. Employers should make it clear these communications are not related to the provision of services or generation of revenue. This could include employee assistance programme information to assist employees with health, mental, and emotional well-being. A dedicated furlough support site ensures furloughed staff don't feel forgotten and can access any furlough Q&As, guidelines and updates. Surveys may be another useful tool to deal with any issues and feedback.
- Purely social contact is acceptable so social platforms can help furloughed employees keep in touch. Telephone contact between team members is also permissible as long as no work is undertaken. A strong, positive corporate culture can keep employees connected without them undertaking actual work.
- Employers may wish to keep furloughed staff updated via their public social media platforms. This method should be carefully considered, as these communications may be seen by wider audiences and the overall effectiveness of these channels may be impacted.
- Furloughed directors and owner-managers can continue carrying out statutory duties but must not generate commercial revenue or provide services to their own business, or other businesses.

Remember, breaching any of the above rules could jeopardise the employer's ability to claim the grant.

Returning to work

Employees can be moved in and out of furlough on a three week or longer basis.

First Minister Nicola Sturgeon has reinforced the Scottish Government's message that people should not be routinely returning to work here yet.

As those in England who cannot work from home are being "encouraged" to return to work from this week Ms Sturgeon said lockdown restrictions still apply in Scotland, with a presumption that most people here will NOT go to work.

14 working groups covering different sectors and comprising businesses, unions and government officials are working towards guidance for safe working when people do return to workplaces.

"We believe that this partnership approach is the right and responsible way to proceed.

"It will allow businesses to reopen when they can safely do so – and we all want that to be as soon as possible – and it will hopefully provide employers, workers and the wider public with the vital reassurance that reopening would not be putting your health at unnecessary risk."

The priority sectors are retail, manufacturing and construction, but other groups are also looking at measures for tourism, energy, finance and food and drink.

Ms Sturgeon said: "As I have emphasised over the past couple of days, the lockdown restrictions remain in place for Scotland and so it may be worth stressing what this currently means in relation to employers and employees.

"I know that the UK government published guidance for businesses yesterday.

"I want to stress that guidance is not yet operational in Scotland since, at this stage, we are not currently encouraging more people to go back to work.

"I would ask instead that all employers follow Scottish Government guidance.

"I am very grateful for the fact that the vast majority of employers have been very responsible through this crisis and so I'm sure that most will do this and will not urge workers to come back to work prematurely.

"And for employees, I would remind you that if you think your working conditions are unsafe then you have rights under employment legislation.

"If you have a trade union in your workplace and you have concerns about your working conditions then you should also be able to talk to them.

End