

UPDATED GUIDANCE NOTE:

Coronavirus job retention scheme

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Executive summary

As part of a package of measures to help businesses cope with the effect of Coronavirus, the Government announced on Friday 20 March 2020 that it was introducing a Coronavirus job retention scheme (the “Scheme”).

Subject to the conditions of the Scheme being met, this means that employers will be able to apply to HMRC for a grant of up to 80 per cent of pay for employees who cannot perform their work due to the economic impact on their employer and who would otherwise have been made redundant.

The Government has issued guidance on the operation of the Scheme and the key information is set out in this note. It should be noted that it is guidance only and not legislation.

The Government anticipates the Scheme will be up and running by the end of April.

What is the purpose of the scheme?

At the same time as announcing the launch of the Scheme, the Government instructed the closure of restaurants, bars and other leisure and entertainment venues. This came against the backdrop of other measures such as school closures, self-isolation and social distancing. To alleviate the economic impact on businesses and, crucially, to protect jobs of those who would be at risk of redundancy, the Government has taken the unprecedented decision to step in and provide payroll funding through the Scheme.

The clear intention of the Scheme is to save jobs and protect employee's pay during this crisis. In turn, relieving businesses of a large proportion of their payroll costs will clearly allow a number of businesses to continue trading when they may otherwise not have been able to do so in the current economic situation.

What do we know about the scheme?

Based on the guidance issued on 26th March 2020:

- **Employers will be able to apply to HMRC for a grant to cover the lower of 80 per cent 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 for employees who are not working but are "furloughed" and kept on payroll, rather than being "laid off".**
- **The Scheme covers any UK organisation with employees including businesses, charities, recruitment agencies and public authorities (although there is a clear expectation that employers who receive public funding for staff costs won't furlough staff).**
- **The Scheme covers employees who were on an employer's payroll on 28 February 2020. It doesn't cover any employees who started working with their employer after 28 February 2020.**

- **Employees who have been made redundant since 28 February 2020 can be furloughed if they are re-hired by the employer who had them on their payroll on 28 February 2020.**
- **Employees must be furloughed for a minimum of three weeks.**
- **Employees who are furloughed cannot undertake work for the employer who has furloughed them but can take part in volunteer work or training. (If your employee has more than one employer they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.)**
- **The Scheme will cover the cost of eligible employee’s wages, backdated to 1 March 2020 and for at least three months going forward.**
- **Employer’s can choose to “top up” the salary of those employees on furlough, but are not obliged to do so under the terms of the Scheme.**
- **An employee on furlough can be paid less than the national minimum wage without legal risk as long as they do not undertake any training for their employer during furlough.**
- **There will be no limit on the amount of funding available to the Scheme.**
- **It is not a condition of the grant under the Scheme that employers have an overall freeze on redundancies – furloughed (or other employees) can still be made redundant subject to existing employment law.**

Which employees will be covered by the scheme?

It is clear from the Scheme that the Government intends furloughing of employees to mean agreed leave of absence as an alternative to redundancy. That would, in effect, mean no work is done by the employee during the furlough period due to workplace closure or other economic impacts on their employer associated with the crisis. It could be viewed as being similar to career break/agreed leave of absence, with the intention being that it is temporary in nature and that once the barriers preventing the employer allowing the employee to work (such as a workplace being closed) and/or paying the employee (extreme economic difficulties meaning

the employer cannot pay the employee) are removed, the employee will return to work and receive pay as normal.

Any employees who would, in the absence of being furloughed, be made redundant as a result of the impact of the crisis on their employer, will be caught by the Scheme. The following employees will be covered:

- **employees of employers who must shutdown their premises under direction from the Government, where such employees cannot do their job from home; and**
- **employees' of employers who are so affected by the crisis from an economic point of view that they cannot afford to pay their employees and would, in the absence of the Scheme, make employees redundant.**

The guidance is clear that employees who are shielding in line with public health guidance can be placed on furlough.

It is also clear that employees must not work for their employers during the furlough period, so only those who are performing no work will be caught. This rules out employees who have agreed to work shorter hours and receive lower pay (i.e. the Scheme cannot be used to top up reduced hours/pay arrangements).

Employees who were placed on unpaid leave after 28 February 2020 can be furloughed.

Employers can furlough part or all of their workforce. The guidance doesn't provide any information on selection process where part of the workforce is to be furloughed but does state equality and discrimination laws will apply in the usual way.

An employee on maternity leave who is furloughed and qualifies for statutory maternity pay will retain their entitlement to SMP. If an employer offers enhanced maternity pay the enhanced pay is treated as wages for the purposes of the grant and a claim can be submitted in respect of these costs (subject to the other terms of the Scheme).

Which employees will not be covered by the scheme?

The following employees will not be covered by the Scheme:

- **those employees who are already absent from work as a result of self-isolation/social distancing guidance from the Government and who are eligible for statutory sick pay (and perhaps occupational sick pay);**
- **employees who were on unpaid leave before 28 February 2020;**
- **those employees who are able to do their job from home even if their normal place of work has been shutdown;**
- **as above, those employees who have reduced their hours/pay but are still working; and**
- **those employees who are otherwise able to attend work and whose employers are not considering redundancies.**

It should be noted that there is potential for a non-eligible employee to switch into the eligible category, depending on the circumstances of the business. This could be the case, for example, where a self-isolating employee completes their seven or 14 day period of isolation but whose employer has, at that point, had to close their workplace and they cannot work from home.

How do we claim under the scheme?

The Scheme will be operated by HMRC.

Employers wishing to make a claim will need to calculate the amount they are claiming. The Government have stated that they will issue more guidance on how employers should calculate the amount they are claiming before the Scheme becomes live but the guidance provides the following information:

- **For full time and part time salaried staff the employee’s actual salary before tax at 28 February 2020 should be used to calculate the 80 per cent- fees, commission and bonuses should not be included;**
- **For employees whose pay varies:**
 - a) **if the employee has been employed for a full 12 months employers can claim the higher of (i) the same month’s earnings from the previous year or (ii) average monthly earnings from the 2019-20 tax year: or**
 - b) **if the employee has been employed for less than 12 months employers can claim for an average of their monthly earnings since they started work.**

Once employers know how much they are claiming they will have to work out the amount of employer NI contributions and minimum automatic enrolment employer pension contributions they are entitled to claim in addition to the 80 per cent of wages.

In addition to the amount they are claiming employers will have to provide the following information to HMRC:

- **ePAYE reference number;**
- **number of employees being furloughed;**
- **the claim period (start and end date);**
- **bank account number and sort code;**
- **contact name; and**
- **phone number.**

If an employer is eligible for the grant HMRC will pay the amount claimed via a BACS payment. Employers are then required to pay the employee the full grant received.

HMRC will have the right to retrospectively audit any claims that are made. There is no reference to what action HMRC can take if it is found that a claim should not have been made or was made incorrectly.

The Scheme will be operated by HMRC and we have been told that they are working “day and night” to get the Scheme up and running.

Employers wishing to make a claim will need to submit information to HMRC about the workers who have been furloughed and their earnings through an online portal. We understand that further details on what information will need to be provided will be released by HMRC in the coming days.

What rights do employees who have been furloughed have?

Placing an employee on furlough will be a change to their contract of employment. The Government's guidance is clear that employers should make any changes to the employee's contract by agreement (although this is not a condition of payment of the grant) and that it may be necessary to carry out collective consultation where more than 20 employees are involved. Our understanding is that there is no change to the current triggers for collective consultation and that this obligation would only be engaged where an employer contemplates 20 or more dismissals by reason of redundancy (including dismissal and re-engagement where consent to changes to terms and conditions are not obtained).

It is a strict condition of the Scheme that employers write to any employee who is to be furloughed to notify them that that is the case. Employers must keep a record of the written communication. If no written notification is issued an employer will not be eligible to receive the grant.

The Government's guidance states that employees who have been furloughed have the same rights as they did previously including Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and the right to a redundancy payment if they are made redundant.

The guidance doesn't mention whether an employee will continue to accrue holiday entitlement during a period of furlough but that would appear to be the case in light of the statement that employees will have the same rights as they did previously.

What are the payment timescales for the grants?

On the basis that the Scheme will be opened at the end of April it is likely that the first payments will be made no earlier than the end of April/beginning of May. Employers will therefore have to decide whether to delay placing employees on furlough until the Scheme is in operation, pay furloughed employees 80 per cent of their salary until the grant is received (and claim for reimbursement) or place employees on furlough on an unpaid basis until the grant is received (on the basis that any back-pay received would be passed onto the employees as soon as it is received). It's important to note that reducing payments due to employees before the Scheme comes into operation or placing employees on a period of unpaid furlough pending receipt of the funding would be a change to the employees' contract and the usual principles on changes to terms and conditions would apply.

Businesses who cannot afford to wait until the Scheme is in operation are urged to consider the other business support measures introduced by the Government such as business interruption loans and other tax relief measures.

How do we communicate this to employees?

Communicating this change to employees is the area in which the highest legal risks are likely to arise. Changing the status of employees' remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation.

The usual principles of changes to terms and conditions will apply to placing employees on furlough. We don't anticipate many employees will push back on this designation of furlough status, given it will be far more attractive than the alternative option.

Reference to the arrangement being subject to existing employment law and terms of the current contract will essentially mean that employers will need to be careful to act in a manner consistent with their existing express and implied obligations to employees when seeking to implement the Scheme. Any union obligations will also need to be borne in mind. However it is

worth noting that the Scheme has been endorsed by a number of trade unions and was created in consultation with the TUC.

One key point to note is that the language you use in staff communications will need to be extremely carefully crafted so as to hinge any entitlement afforded to employees upon acceptance of your claim under the Scheme, so that no contractual entitlement is created inadvertently by way of general promises by an employer to keep people employed and pay them a certain amount of their wages for a specific period of time.

What should we do next?

If you are considering placing employees on furlough under the Scheme the next steps will be:

- **identifying which of your employees are to be furloughed;**
- **if required, considering how you will select employees for furlough;**
- **deciding whether to retain employees on full pay/reduced pay until the Scheme is operational or whether to take other steps to reduce your costs pending the grant becoming available;**
- **implementing the relevant changes to a furloughed employee's contract of employment (mindful of the usual legal principles);**
- **issuing written confirmation of furlough to employees who are to be placed on furlough;**
- **calculating the amount you are going to claim and the NI and pension costs; and**
- **submitting the information required to claim the grant to HMRC once the Scheme is in operation.**

How can we help?

We can help you to put the steps in place to successfully implement furlough and provide you with the documentation you need.

We will be hosting a virtual roundtable webinar to discuss the Scheme on Wednesday 1 April from 12.30-1.30pm. Please register on our website [here](#) and do of course get in touch before then if we can help you deal with the ongoing crisis and its impact on your people.

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