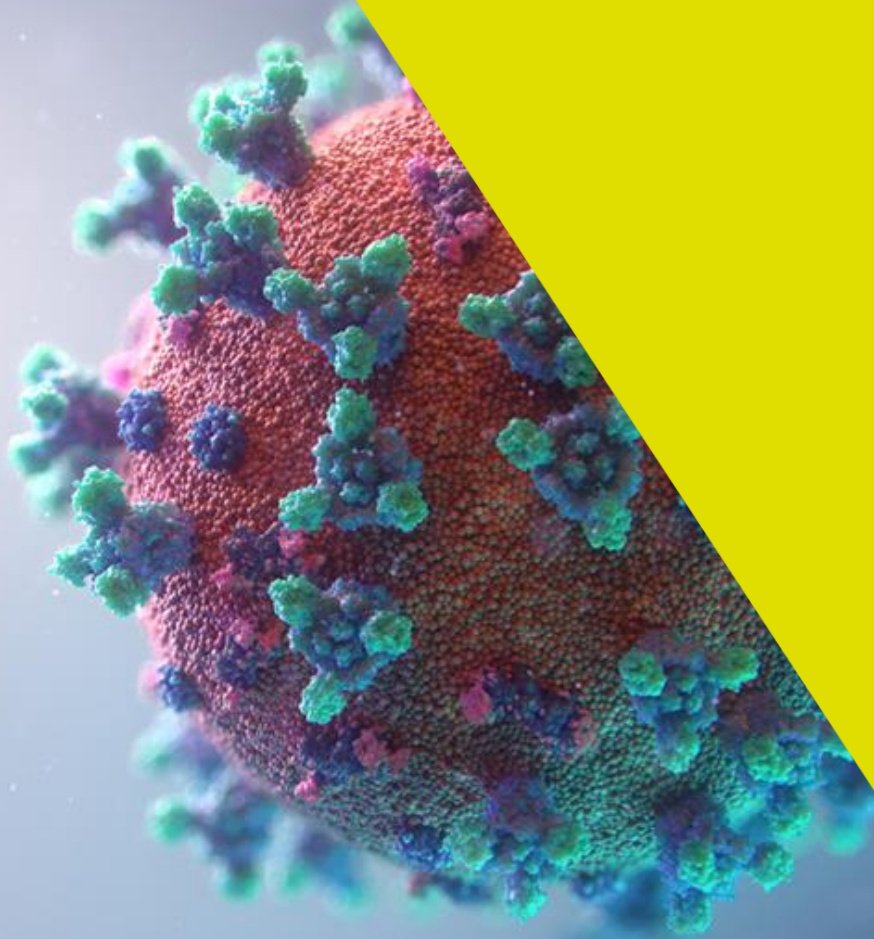


GUIDANCE NOTE:

Updated Coronavirus job retention scheme



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Executive summary

We now have the next iteration of the Government's guidance on the job-retention scheme:

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

Given that there is no underpinning legislation to regulate the conditions and implementation of the scheme, all employers are urged to consider carefully the terms of the guidance to minimise the risk of any claims being rejected by HMRC.

We have outlined below some of the key changes and clarifications to the guidance.

Which employers can claim?

The following section of the guidance includes a new eligibility criterion, highlighted in bold:

You must have:

- created and started a PAYE payroll scheme on or before 28 February 2020
- **enrolled for PAYE online - this can take up to 10 days**
- a UK bank account

Any entity with a UK payroll can apply, including businesses, charities, recruitment agencies and public authorities.

Note, however, that the guidance states that it is not expected that many public sector employers will use the scheme, so any employer which is publicly funded should consider carefully whether they should make claims.

Individuals can furlough workers, such as nannies, if they were paid through PAYE and on their payroll on or before 28 February 2020.

The guidance clarifies the circumstances in which it is envisaged administrators will claim under the scheme, stating that:

“...we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business.”

Do you have to be avoiding redundancies to be eligible to furlough?

The updated guidance explains that employers can furlough staff “*if you cannot maintain your current workforce because your operations have been severely affected by coronavirus (COVID-19)*”.

It is also noteworthy that the employee guidance states: *if you and your employer both agree, your employer might be able to keep you on the payroll if they're unable to operate or have no work for you to do because of coronavirus (COVID-19)*.

There's therefore still a question mark over how high the hurdle might be for employers to demonstrate they had to furlough – i.e. were they doing it because they would otherwise have made redundancies (definitely covered by the scheme) or because they were otherwise significantly impacted by the effects of COVID-19 (perhaps a step before making redundancies)?

It would seem, when the scheme guidance is read as a whole, that the Government is keen to give as many employees cover as possible and so, in our view, as long as employers are genuinely trying to protect their workforce from wage loss and potential redundancy, then they would likely be covered. Employers should test their rationale for furloughing against the following statement of purpose from the guidance:

“It is designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy. However, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus.”

Who do they mean by “employees” on your payroll at 28 February 2020?

The usual employment law definition is out the window. We’re looking at a much more binary test of whether the individual was on your PAYE payroll as at 28 February 2020. The guidance now helpfully states:

As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE:

- *office holders (including company directors)*
- *salaried members of Limited Liability Partnerships (LLPs)*
- *agency workers (including those employed by umbrella companies)*
- *limb (b) workers*

The guidance contains detailed information on each of these categories which should be considered carefully before claims are made.

Are apprentices covered?

We now have confirmation that apprentices are covered by the scheme and can be furloughed just like other employees. The guidance states that the apprentices can continue to be trained during furlough. However, it’s questionable in any event how training could be undertaken if an employer’s operations are effectively shut down as a result of COVID-19.

It’s crucial to note that, if your apprentices do undertake training, they need to be paid the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) as appropriate for all the time they spend training. The employer would need to cover any shortfall between the amount claimed under the scheme and the relevant wage threshold.

Can you claim for people who started working for you after 28 February 2020?

Despite heavy lobbying, the Government has decided not to allow furlough in respect of so called “new starts” and clarifies in the guidance that eligible employees must have been on their employer’s PAYE payroll on or before 28 February 2020. This leaves a large number of workers without coverage, assuming that any previous employer on whose payroll they were at 28 February does not wish to re-hire them (see further below). During a live Twitter Q&A, the Chancellor explained that the cut-off of 28 February 2020 was necessary to avoid the scheme being abused and so that claims made can be verified against payroll data as at 28 February 2020.

Employers will need to address the question of what they will do with new starts, mindful that it looks like there will be no further movement from the Government on this issue. The Chancellor stressed that new starts may be eligible to apply for universal credit.

The guidance clarifies that foreign nationals can be furloughed, something which we did not envisage had been a question in employers’ minds given the key criterion was whether the individual was on your PAYE payroll at 28 February 2020.

What about employees who left after 28 February 2020?

The earlier guidance stipulated that the re-hiring and backdating provisions applied to anyone you had **made redundant** after 28 February 2020. This rehiring mechanism now reads as follows (meaning that all types of post-28 February 2020 terminations are covered):

If you made employees redundant, or they stopped working for you on or after 28 February 2020, you can re-employ them, put them on furlough and claim for their wages through the scheme.

Employers are not obliged to re-hire employees who fall into this category and there remains a question over whether continuity of service would be preserved if re-hiring occurs. Care should be taken in terms of the contractual mechanism and statutory employment law effect for such re-hires.

We consider that employers will also need to ensure that any such arrangements are consistent with the purpose of the scheme and be prepared to demonstrate that such individuals would have been furloughed had they not left.

What about employees on reduced hours/pay?

The guidance confirms that employees who agree to work on reduced hours/pay are not eligible for the scheme. Our reading of this is that they are not eligible *while they are still working* on reduced hours/pay, but that they could (if the employer can justify their decision) be furloughed at any time as long as they then do no work at all.

What about employees receiving SSP?

Employees receiving SSP (either because they are unwell or because they are now covered under the emergency SSP legislation, which extends coverage to those who are self-isolating) cannot be furloughed while in receipt of SSP. They can be furloughed after their illness/incapacity or self-isolation comes to an end and they would therefore no longer be entitled to SSP.

What about employees who are shielding and cannot work from home?

The updated employer guidance states:

You can claim for furloughed employees who are shielding in line with public health guidance (or need to stay home with someone who is shielding) if they are unable to work from home and you would otherwise have to make them redundant.

The updated employee guidance states:

If you are shielding in line with public health guidance or required to stay home due to an individual in your household shielding and are unable to work from home, then you should speak to your employer about whether they plan to place staff on furlough.

It's therefore now clear that those who are shielding **and** those who have to stay at home with individuals who are shielding are within scope for furlough – it would appear simply by virtue of the shielding status.

The reference to redundancy in the employer guidance is somewhat confusing and needs clarification. On one view it appears to impose a stricter hurdle for shielding individuals (that they would have otherwise been made redundant). However, our reading of it is that because these individuals are not covered by the emergency SSP legislation (unless they become ill or have to self-isolate as above), the Government's intention is to provide a furlough mechanism to give them protection from potential dismissal in circumstances where they cannot attend work (because the Government tells them not to) and they cannot do their work from home.

So it would appear that an employer might have two justifications for furloughing shielding employees: the first by reason of their status (so if they can't work from home then they can be furloughed); and the second being the "standard" furlough situation where you are furloughing them like any other employee because of the effect COVID-19 has had on your business.

This should have the result that, if you bring your standard furlough situation to an end for business related reasons, it may still be right to keep a shielding employee on "status" furlough if they are still covered by the relevant Government guidance on shielding.

What about employees who cannot work because of caring responsibilities?

The guidance makes it clear that the scheme covers employees who are unable to work because they have caring responsibilities resulting from COVID-19. The example given is employees who need to look after children (most likely because of school/nursery closures). This is a significant change to the original guidance which did not confer this protection. Our reading of it is that this would be a second example of “status furlough”, comparable to the shielding status furlough and so the same analysis would apply as set out above (i.e. the employer may have two reasons to furlough such employees).

Can an employee be furloughed by you and then earn money in a second job?

The answer is yes. An employee’s furlough status with their employer is not linked to or contingent upon any other employment arrangements they have, albeit their employer may have a contractual restriction in place which would prevent the employee having a second job.

Can fixed term employees be furloughed and their contracts extended or renewed during furlough?

The answer is yes, and extension or renewal of fixed term contracts will not create a barrier to a successful claim under the scheme.

When does furlough start?

The guidance now includes the following information about the period for which claims can be made:

Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status.

It is also stated that *grants “will be prorated if your employee is only furloughed for part of a pay period.”* However, this would still be subject to the three week minimum period.

How do you work out the employees’ wages?

The employer guidance contains details on the calculation methods that apply to different situations. The employee guidance provides employees with reassurance that their employer will be able to claim for 80% of their *regular monthly wages*, up to the £2,500 cap.

The guidance reiterates the types of payments that can and cannot be claimed, stating that:

You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

The shift to include commission (except for discretionary commission) has been a welcome relief for many employers and employees given that the earlier guidance excluded commission payments completely.

Employer pension contributions above the mandatory auto-enrolment contributions cannot be claimed for.

The following guidance regarding benefits in kind and salary sacrifice is given:

The reference salary should not include the cost of non-monetary benefits provided to employees, including taxable benefits in kind. Similarly, benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should also not be included in the reference salary. Where the employer provides benefits to furloughed employees, this should be in addition to the wages that must be paid under the terms of the Job Retention Scheme.

Notably, the Government has confirmed that COVID-19 counts as a "life event" enabling an employee to switch out of salary sacrifice should they so wish (subject to the relevant contractual change being made).

Finally, it has been confirmed that both the apprenticeship levy and student loans should continue to be paid as usual and these payments cannot be claimed under the scheme.

What information needs to be supplied when you make the claim?

To claim, you will need:

- your 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 consecutive weeks)
- your bank account number and sort code
- your contact name
- your phone number

Employers will need to do calculations themselves before they submit their claims and HMRC reserves the right to audit claims retrospectively.

When making the claim, employers are advised to use the information contained in their payroll (either shortly before or during their payroll run).

It is confirmed that claims can be backdated to 1 March 2020 “where employees have already been furloughed”.

What else has been clarified?

The online portal will be opened by the end of April and HMRC will process all claims before the scheme ends.

It has been confirmed that you can come on and off furlough multiple times, but that for any claims under the scheme the minimum furlough period must be three weeks.

In addition to enhanced maternity pay, claims can be made under the scheme for enhanced adoption, shared parental and paternity pay (where such employees are furloughed).

Employers must keep a record of them communicating to employees (in writing) that they are being furloughed. These records must be kept for five years.

Which questions remains unanswered?

The key issue which remains unanswered is that of holidays while on furlough. If, as we assume must be the case, holidays continue to accrue, can holidays also be taken? And if so, what pay is due for such leave?

ACAS has notably updated their guidance in relation to holidays, which now states that employees can still request and take holidays during furlough. However, crucially, employers must receive clarity from the Government on this issue including whether any annual leave taken during furlough would result in an interruption of the furlough period (potentially impacting on the three week minimum requirement).

Cautious employers may, therefore, wish to await further Government guidance on this point and meantime not permit holidays to be taken during furlough leave, so as not to jeopardise their claims under the scheme.

Similarly, the interplay between furlough leave and other types of leave such as sick leave and family leave is still somewhat muddy. Employers will need to take care on these issues prior to further guidance being issued.

Finally, any employers wishing to re-hire employees who left after the 28th February should seek advice on the employment law consequences of doing so.

How can we help?

We will be hosting a webinar which will discuss the updated guidelines for the Scheme on [Tuesday 7 April](#). You can register for the webinar [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.

This note is provided for your assistance in these unprecedented and fast moving times. It does not constitute legal advice and it is provided on the basis that it does not create any duty of care or liability on our part. If you require specific advice, one of our employment law experts would be delighted to assist. Please contact:

Across the firm, we have a team of specialists dedicated to provide up the minute advice on COVID-19. For more details, [click here](#).



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