

## **THE CORONAVIRUS JOB RETENTION SCHEME:**

### **FURLOUGH Q & A**

#### **When will the scheme be ready?**

The government's intention is to have the scheme up and running by the end of April so that the April payroll can be reimbursed through the scheme. Claims can be backdated to 1<sup>st</sup> March 2020. However, employers do not need to wait until the grant scheme is up and running to put employees on furlough.

#### **Which employers is the scheme open to?**

The scheme will be available to all UK employers, including businesses, charities, recruitment agencies and public authorities, of any size and in any sector. To be eligible, employers must have created and started a PAYE payroll scheme on or before 28th February 2020 and have a UK bank account.

#### **How much can employers claim?**

HM Revenue & Customs (HMRC) will reimburse 80% of furloughed workers' usual wage costs, up to a cap of £2,500 (gross) per worker per month, *plus* the associated Employer National Insurance contributions and minimum automatic enrolment employer contributions on that wage.

Fees, commission and bonuses cannot be claimed for.

For salaried employees, you must use the actual salary before tax, as of 28th February 2020.

For employees whose pay varies (for example because they work shifts) you can claim for the higher of either:

- the same month's earning from the previous year
- average monthly earnings from the 2019-20 year

If an employee with variable pay has been employed for less than a year, you can claim for an average of their monthly earnings since they started work. If the worker only started in February 2020, you should use a pro-rata approach.

#### **Do we have to top up the subsidy?**

No. You can top up the subsidy if you wish, but you do not have to do so. For employers that are topping up, a key consideration is how to maintain a fair differential between furloughed employees and any employees who are still working.

#### **What if the subsidy is less than the minimum wage? Do we have to top it up?**

No. Workers are only entitled to the National Minimum Wage/National Living Wage for the hours they are working. You do not need to ensure that they are receiving NMW/NLW rates while on furlough.

The position is different, however, if you are asking workers to complete training – see below.

#### **Is it a grant or a loan?**

It will be a grant, not a loan, so it will not need to be repaid. Payments received by a business under the scheme must, however, be included as income in its calculation of taxable profits for Income Tax and Corporation Tax purposes - although businesses can continue to deduct employment costs as normal.

#### **What about pension payments?**

You can reclaim the minimum mandatory employer pension contribution on the subsidy. This claim can be made *on top of* the £2,500 cap.

The current minimum contribution under the auto-enrolment regulations is 3% of an employee's income above £512 per month (rising to £520 per month from 6 April 2020). Pension contributions over and above this cannot be claimed through the scheme but you will need to maintain them, unless you agree something else with employees.

#### **What about benefits such as health insurance, gym membership etc?**

These will need to be maintained, unless you agree something different with furloughed employees.

It does not look as though employers can claim the cost of benefits through the subsidy (except for pension contributions). In any case, many employers will opt to maintain benefits as the simpler option, particularly if they have already paid for the cost of them.

Employers that offer permanent health insurance or death-in-service benefits should check with their scheme provider about what salary would be used in the event of a claim – would it be normal annual salary or pay during furlough?

#### **Will the payment be taxable?**

Yes, payments you make to furloughed employees will be subject to PAYE and National Insurance contributions.

#### **How do we put someone in the furlough scheme?**

You should agree with the employee that they will be furloughed. You will then need to designate them as furloughed. The guidance says that, to be eligible for the subsidy, employers should write to their employee confirming that they have been furloughed and keep a record of this communication. They need to be on furlough for at least three weeks.

### **Does someone need to have been employed by 28th February 2020 to be put on furlough?**

This is still a grey area. The gov.uk guidance states that '*Furloughed employees must have been on your PAYE payroll on 28 February 2020*'. It also states that '*Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme*'. The choice of language here has created significant confusion and we still await clarification. However, please note that the key date is 28th February, even though 2020 is a leap year and there was a 29th February this year.

### **Can we only put people on furlough if redundancy was the alternative?**

The government previously indicated that the Job Retention Scheme was an alternative to redundancy or lay-off. The guidance for *employees* refers to furlough as applying when the employer is unable to operate or has no work for the employee to do, but there is no explicit requirement in the latest guidance for *employers* to show that redundancy was the alternative.

It seems that HMRC may have accepted that putting employees on furlough, which means they are not working is enough to show that they would otherwise have been made redundant. The guidance does state, however, that the scheme is '*designed to support employers whose operations have been severely affected by coronavirus*'.

Importantly, the government has indicated that it will retain the right to retrospectively audit employers, with scope to claw back fraudulent or erroneous claims. Ultimately, employers may be allowed some discretion, but they should not be abusing the scheme.

### **Can we rotate employees on furlough?**

We think so, yes. Some employers have work for some staff, but not enough work for all. One of the most pressing questions since the scheme was first announced was whether employees could rotate employees on furlough or if they would have to choose some employees to be furloughed while others stayed at work. The employer guidance is unclear on this point, but the employee guidance seems to answer the question, by saying that employees can be placed on furlough more than once.

This suggests that employers *can* rotate employees on furlough, so long as each employee spends a minimum of three weeks on furlough. This would mean, for example, that an employer can select an initial group of employees for furlough while a second group remain at work. The first group could then come back to work while the second group take their turn on furlough.

### **Can employees do the odd bit of work for us while furloughed?**

Absolutely definitely not! Employees cannot undertake work for or on behalf of an employer that has furloughed them. The guidance says that this includes "providing services or generating revenue". If they do any work for you at all, you may have to repay the grant.

Please draw this to the attention of any furloughed employee who could otherwise be doing some work from home. It is important that they don't do anything that could jeopardise your ability to claim the grant.

Directors and owner-managers can be furloughed if on PAYE and will still be allowed to do statutory duties in these roles – this will not count as work which disqualifies them from the grant.

### **Can we ask employees to do training while furloughed?**

Yes. A furloughed employee can do training if this does not involve providing services or generating revenue. The guidance points out that if workers are required to, for example, complete online training courses while they are furloughed, they must be paid at least the National Living Wage/National Minimum Wage for the time spent training, even if this is more than the subsidy.

### **Can someone who has been furloughed do work for other employers?**

Possibly. The guidance is clear that *agency workers* will only be eligible for the scheme if they are not working. The wording of the guidance suggests that working elsewhere may not be an absolute barrier to other types of employee being furloughed, but it is not entirely clear.

You should be able to impose restrictions on employees working elsewhere, even if this is allowed under the scheme, but you should think carefully about whether you want to do so. You will most likely want to stop furloughed employees from working for a competitor. However, you might want to allow furloughed employees to take on extra work in, for example, the health and social care sector or essential services.

### **Can furloughed employees do volunteer work?**

Yes, this is allowed.

### **Do employees have to agree to being furloughed?**

Yes - generally they do, but this does not necessarily need to entail a protracted procedure. In our view, most employees will be willing to accept furlough on the basis that the other options are worse and to give the best chance of ensuring they still have a job to return to when the crisis is over.

### **Can employees put themselves on furlough?**

No. You, as the employer, need to designate them as furloughed.

### **How long can we keep workers on furlough?**

The minimum length of furloughing is three weeks. However, an employee can be furloughed multiple times, subject to the minimum time period of three weeks, as often as the employer and employee agree.

The scheme will be open for an initial period of three months (1st March to 31st May 2020) but it may be extended.

Employers are likely to want to reserve the right to call employees back from furlough if trading conditions improve.

### **What if we've already made redundancies?**

If you have made employees redundant since 28th February, it is possible to give those former employees the option of being rehired and then put straight on the scheme.

### **Can we make some people redundant, continue to employ others and furlough others?**

Yes. The guidance clearly says that you do not need to place all your employees on furlough.

### **How should we select which employees should be furloughed?**

Workers who cannot work from home and who currently have no work to do will be obvious candidates for furloughing. Otherwise, employers may need to consider a process of calling for volunteers, pooling and selection – as with a redundancy process. There is a risk of claims (including discrimination claims) if the process is not handled correctly.

### **Can we do a partial furlough to put somebody on reduced hours?**

No. An individual cannot work for you at all if they are furloughed.

If you have some work for an individual, but not enough, you can still have a discussion with them about going down to a reduced working week. They will need to agree to this, except in the unlikely event you have reserved the right to put them on reduced pay for reduced work. They will then not be furloughed.

### **What is the process for claiming the payment?**

You will need to submit information to HMRC about workers who have been furloughed and their earnings, via a new HMRC online portal. The portal will hopefully be open in April. If you need short-term cash flow support in the meantime, the government has said you may be eligible for a Coronavirus Business Interruption Loan.

### **What about casual workers and workers on zero-hours contracts?**

The scheme will cover all workers on the PAYE system as at 28<sup>th</sup> February 2020, including any casual or zero-hours worker who are paid in that way. For workers whose pay varies, you can claim for the higher of either:

- the same month's earning from the previous year
- average monthly earnings from the 2019-20 year

If the worker has been employed for less than a year, you can claim for an average of their monthly earnings since they started work. If the worker only started in February 2020, you should use a pro-rata approach.

### **What about agency workers?**

Agency workers on PAYE can be furloughed by the agency, so long as they are not doing any work.

### **Can workers be in the furlough scheme if they are off sick?**

The guidance says that *'employees on sick leave or self-isolating should get Statutory Sick Pay but can be furloughed after this'*.

The guidance does not deal explicitly with employees who *become* sick while on furlough, although it does say that employees will retain their entitlements to SSP. Since SSP is likely to be lower than furlough pay, they will however have no incentive to declare themselves sick.

### **What about employees on maternity or other family leave?**

The guidance says that employers can claim for enhanced maternity pay through the Scheme. This suggests that employees can furlough employees on maternity leave. They will be able to reclaim SMP in the normal way and subject to the normal rules and can then claim for any enhanced contractual pay on top through the Scheme.

Currently, employers can reclaim 92% of SMP (or 103% if they qualify for Small Employers' Relief). It is unclear if employers can claim the 8% balance of SMP through the Scheme, along with enhanced contractual pay.

The same principles appear to apply to other types of family leave.

### **Will workers continue to accrue holiday allowance while they are furloughed?**

Yes, because they remain employed. You could agree that no contractual holiday (beyond the statutory minimum of 5.6 weeks per year) will accrue during furlough, but employees will retain their right to accrue statutory annual leave under the Working Time Regulations.

### **Can people take their holiday allowance while furloughed?**

This is not entirely clear. You could refuse requests for holiday during furlough if you want to do so, but you might prefer employees to use up their holiday allowance rather than storing it up. To require employees to take holidays (if this is going to be allowed), 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.

### **What should we pay staff who take holiday during furlough?**

This is still a grey area. We expect that you will be able to claim for holiday pay through the grant, in the same way as wages or salary, although the guidance is not yet clear.

**Will employees continue to accrue continuous service during furlough?**

Yes, the underlying relationship will continue if a worker is furloughed, so their period of continuous employment will continue to accrue throughout and will be recognised in full once the furlough comes to an end.

**What happens at the end of the period of furlough?**

The idea is that employees will be able to come back to work. The scheme is designed so that employers don't need to make redundancies and then recruit a new workforce once the crisis is over - their existing workforce will be ready and waiting in the wings to resume work.

However, if trading conditions have not improved sufficiently for you to take all the furloughed employees back when the scheme ends then you will be able to make them redundant, subject to the usual rules on redundancy.

***Much of the advice on this has come from various employment law websites that I use regularly, so I am pretty sure it is reliable but please bear in mind that we are still having to interpret much of this guidance as not all questions have been answered.***

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Correct on 6/4/20