

CORONAVIRUS JOB RETENTION SCHEME

SUMMARY

- the aim is to get the scheme up and running before the end of April.
- the 80% is based on the higher of (i) the earnings in the same pay period in the previous year; or (ii) the average earnings in the previous 12 months (or less, if they've worked for less)
- employees taken on after 1 March 2020 are excluded from the scheme. Presumably as an anti-fraud measure to stop employers hiring their spouses, mums, dads and siblings after the scheme was announced.
- businesses can re-employ people who have been made redundant since 1st March, and then furlough them.
- to qualify for the payment, an employee must be furloughed for a minimum of three weeks. They can then come off furlough. This means that employers cannot rotate staff **weekly** between furlough and non-furlough.
- employees on furlough leave can do volunteering or training, providing it does not generate any money for their employer.
- any large or small employer can apply to put workers on temporary leave or "furloughed" status. The government will then pay them cash grants of 80 per cent of their wages up to a cap of £2,500, providing they keep the worker employed.
- employers will receive the grant from HMRC. All UK organisations can self-certify that it has furloughed employees. The scheme will cover the cost of wages backdated to March 1st. All UK-wide employers with a PAYE scheme will be eligible, including the public sector, local authorities and charities.
- the scheme will be open initially for at least 3 months, but will be extended for longer if necessary. There is no limit on the amount of funding available for the scheme.

Q&A

Do individuals still have to pay tax on this?

· Yes – individuals will pay Income Tax and National Insurance on any payments received through this scheme as they are replacement for income in line with normal practice for benefits or grants that replace income.

Will this cover the cost of employer National Insurance contributions and employer pension contributions?

Yes – employers will be able to apply for a grant to cover the Employer National Insurance contributions and minimum automatic enrolment pension contributions on paying the lower of 80% of regular salary or £2,500 per month.

How will this work for those on zero-hour/flexible contracts/agency workers?

This scheme aims to support all those employed through the PAYE system regardless of their employment contract, including those on zero-hour contracts. · Zero-hour and flexible contracts can cover a whole range of working arrangements.

The 80% grant is applied to the higher of: (1) the earnings in the same pay period in the previous year; or (2) the average earnings in the whole previous 12 months (or fewer if they have worked for less time than this, including a part month calculation if they were taken in February).

Can a business furlough someone after hearing the announcement and then claim back to March 1st even though they had been working that whole time?

No – the scheme is backdated to March 1st with a view to covering those who have already been made redundant as a result of the coronavirus.

What about employees taken on after 1 March?

They are excluded from the scheme.

To qualify, does the business need to be 'essential'?

No, all businesses which employ and pay workers through the PAYE system are eligible.

Why am I not being supported if my hours are reduced?

The scheme is designed to help those who otherwise would have been made unemployed.

It is recognised that some people will work fewer hours. · The welfare system has been strengthened to support those whose hours change including an increase to the UC standard allowance and the working tax credit basic element.

This builds on the initial package announced at Budget including enhancements to contributory employment support allowance, which will now be available from day 1 and making advances for all new UC claimants available online with no requirement to attend a job centre.

Why isn't this supporting part-time working?

The scheme is designed to help those who otherwise would have been made unemployed.

The public health guidance is clear that people should stay at home unless they are a key worker.

Can my employer top this up?

Yes. In order to qualify for the scheme, employers must pay their staff at least 80% of wages, up to the cap of £2,500 per month. It is up to them if they wish to top up the additional 20 per cent.

What about employees that have already been made redundant?

The scheme will be back dated to March 1 with a view to covering those who have already been made redundant due to the Coronavirus outbreak.

If firms re-employ staff made redundant after March 1st, they are eligible to then be furloughed and the employer would qualify for the grant.

Can my employer sack me while I'm on furlough? Is my employer allowed to sack me as soon as the furlough scheme comes to an end?

Yes, you can still be made redundant while on furlough or immediately after. There is no requirement to bring the employee back to work after the period of furlough. If an employee is made redundant during the period of furlough then grant payments will cease.

However, in both cases normal redundancy rules and protections will apply.

Where a business feels that redundancy is the only option, this must still follow the rules which include giving a notice period and consulting staff before a final decision is reached.

Can I be furloughed for a short period of time, e.g. a week or a couple of days, and then re-employed?

A worker must be furloughed for a minimum of 3 weeks for their employer to be eligible to claim under this scheme.

This is consistent with the public health guidance seeking to minimise the number of people outside of their homes on a regular basis. The scheme supports employers asking the maximum number of employees to remain at home during the coronavirus outbreak.

A clear minimum period also aids a clear definition of who is and who is not furloughed.

Can I volunteer or do training whilst furloughed?

If you are furloughed you cannot work for your employer during this period.

You can volunteer or train, provided that this does not involve the manufacture or creation of an item or part thereof than can yield revenue for the company, the provisions of services to the company, or the provision of any service that can yield revenue for the company. Firms can require workers to undertake training from home, provided it meets the above criteria.

SUPPORT FOR THE SELF EMPLOYED KEY POINTS:-

- a new self-employed income support scheme will pay self-employed people a taxable grant worth **80% of average monthly income**, capped at £2,500pm
- income will be calculated by taking the average of income over the last three years
- self-employed people can claim these grants **and continue to do business** (so it's not the same as furlough leave, where employees have to remain at home)
- the scheme is only open to anyone with trading profits of up to £50k (this covers 95% of self-employed people). Self-employed people who earn more will not qualify.
- the scheme is only open to those who make the majority of income from self-employment; if you are employed but have a 'side job' which is self-employed, you will not be eligible
- the scheme is only those who have submitted a tax return for 2019 (this is to minimise fraud). However, those who did not submit their tax return by the due date of 31 January 2020, and have not yet submitted one, can still submit a tax return for 2019 for a further four weeks from today
- there are no steps to take. HMRC will contact eligible self-employed people directly and pay the grant straight into their bank account after inviting them to fill out an online form
- the self-employed income support scheme will be open to people across UK for at least 3 months. However, the scheme is **unlikely to be up and running before the end of June**, so it will not help with immediate cash flow issues.

WORKING TIME (CORONAVIRUS) (AMENDMENT) REGULATIONS 2020

The Government has announced it is allowing workers to carry over up to four weeks (not 5.6 weeks) annual leave into the next two leave years.

The (as yet unpublished) forthcoming *The Working Time (Coronavirus) (Amendment) Regulations 2020* amend regulation 13 of the Working Time Regulations to allow workers to carry over EU holiday 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).

The change is aimed at allowing businesses under particular pressure from the impacts of COVID-19 the flexibility to better manage their workforce, while protecting workers' right to paid holiday.

See govt announcement: <https://www.gov.uk/government/news/rules-on-carrying-over-annual-leave-to-be-relaxed-to-support-key-industries-during-covid-19>

STATUTORY SICK PAY (GENERAL) (CORONAVIRUS AMENDMENT) REGULATIONS 2020

An employee is entitled to Statutory Sick Pay if they are self-isolating in accordance with regulations laid down by Public Health England, Public Health Wales, or NHS Scotland.

The guidance deals with what happens if you or a member of your household are displaying symptoms and it says in those circumstances you have to self-isolate. If you or a member of your household is displaying symptoms, you have to self-isolate and you get Statutory Sick Pay. But the guidance says that for the vulnerable, which includes the over- 70s, you should simply engage in social distancing. Doesn't require self-isolation.

Because the guidelines don't require self-isolation for those over 70, the new regulations do not extend Statutory Sick Pay to that group of people so for example, if a 74-year-old is self-isolating. As long as she isn't displaying symptoms herself, she isn't self-isolating in accordance with the guidelines, and therefore isn't entitled to Statutory Sick Pay. There are 4 changes to SSP rules:

SSP will be extended on a temporary basis to cover:

- individuals who are not ill but are unable to work because they have been advised to self-isolate in line with Government guidance.
- SSP will be payable from day 1 instead of day 4 for affected individuals
- People who are advised to self-isolate for COVID-19 are now able to obtain an alternative to the fit note to cover days seven and eight, they must go to 111.nhs.uk and obtain an Isolation Note using the online system.
- Those not eligible for SSP e.g. the self-employed or people earning below the Lower Earnings Limit can now more easily make a claim for Universal Credit or Contributory Employment and Support Allowance.

The first 14 days is reclaimable from Government.

The first is that in a company sick pay scheme, 'sick' means 'sick', so unless you're actually sick, you don't get company sick pay. Self-isolation isn't enough because you're not actually sick.

LAYOFF AND SHORT TIME

Layoff is a statutory concept when people are sent home without pay, and there's got to be a clause in the contract allowing that, if not there must be agreement with the employee. Short time is when an employee's hours are less than half their normal hours and they are given less than half their normal pay, and there is a clause in the contract allowing the employee to be placed on short term working.

If there is no clause in the contract (express right) to lay someone off or put them on short time then agreement must be reached with the employee to vary their contract terms.

GUARANTEE PAYMENTS

Anyone who is laid off is entitled to a guarantee payment of £29 a day for a maximum of five days in three months. From April the rate increases to £30 a day.

STATUTORY REDUNDANCY PAYMENT

Entitlement to a statutory redundancy payment is available for employees who are on layoff or who has been on short time working for either four consecutive weeks or six weeks in any rolling 13-week period. The employee must send a letter asking for a statutory redundancy payment. If the employer does nothing, the employee can resign and claim a statutory redundancy payment. Resignation must be on notice, or they are not eligible for the statutory redundancy payment. On receipt of the letter, the employer can write back and say that within the next four weeks, it is expected that at least 13 weeks' uninterrupted work at full pay will be available. If that happens then there is no redundancy. This is subject to 'good faith' principles.

FURLOUGH FAQs

Will it be unreasonable to dismiss for redundancy if 'furlough' is available?

Section 98.4 of the ERA says that the tribunals have to have regard to the resources of employers, it's likely to revolve around cashflow. Therefore, if an employer cannot reasonably be expected to find 80% of salary to pay employees until the Government portal is up and running for six to 12 weeks, and all other alternatives have been considered in terms of trying to prevent redundancies, for example asking employees to defer their furlough salary, then it might be deemed reasonable to dismiss.

However, once the scheme's up and running, or if a business has big cash reserves, it's likely that unless redundancy is inevitable, such as the business is closing, it's strongly arguable that not wanting to pay 80% of salary for a few weeks before it can be reclaimed from the Government will not be a sufficient reason to justify dismissal.

This of course is only an issue if the employee has 2 years' service (subject to some limited exceptions which may, for example, include discrimination).

Does 'employee' in the scheme mean those on PAYE or does it mean an employee as a tribunal would see it? It would appear to be just PAYE. Not least because HMRC already has figures from people having been paid PAYE over years and it's easy for them to check figures are not fraudulent.

The Chancellor's statement refers to the payment being made 'if the employer cannot afford' to pay the employees. Does that mean it's a means-tested payment for employers? Very unlikely. It is more likely just a reference to businesses having to send people home because they are struggling.

Does the furlough scheme apply to short time working or only those who were fully laid off? Only those fully laid off. You cannot do any work if you're furloughed. So if an employee is working 50% of the time the employer cannot designate them as furloughed and will not be able to recover any of their salary from HMRC.

Do employers have to pay the employees as normal from 1 March and claim the money back in six to eight weeks' time when the Portal is up, or do they have to actually show to reclaim money that employees weren't paid? Unknown, but presumably the former, for the very simple reason that the Government does not want to incentivise the non-payment of salary, and to make reimbursement conditional on non-payment of salary would go completely against what the Government's trying to achieve.

Can you force an employee to take furlough leave? Yes. If you have the contractual right to lay them off, but if not, you have to either get their agreement to 80% of salary or top it up and pay 100%.

How do you choose which employees to furlough? In an ideal world you'll have a matrix selection system. This would be a defence against claims that you have targeted certain employees not to be furloughed. Everyone is likely to want to be furloughed, particularly those with protected characteristics. However, it's all down to business need.

Can you prioritise elderly and vulnerable employees when deciding who gets furloughed? Yes, some employees who are disabled should be prioritised under the reasonable adjustments regime. And then prioritising the elderly of course is direct discrimination on grounds of age against people under 70. However, following the official guidance, it's a legitimate aim, so prioritising those over 70 for furlough leave is almost certainly justified.

Can you rotate furlough amongst employees? As long as they are furloughed for periods of 3 weeks or more.

What if a furloughed employee has two jobs? If they had two jobs before, a morning job and an afternoon job, that's fine. They can be furloughed from one job or both.

Can an employer award a temporary 25% pay rise so that 80% of the new salary matches the original salary? The legislation has measures to avoid this. There will be very strong measures to prevent fraud and HMRC will be able to analyse arrangements after all this has calmed down and claw back any furlough payments made to employers that it didn't think should have been made. And, of course, HMRC will know through PAYE records if somebody suddenly had a massive pay rise or if somebody was suddenly being hired at a time when they'd been put on furlough. It's unlikely to be possible and HMRC will be wise to it.

How do you deal with employees who object to their colleagues getting 80% of pay on furlough leave when they still have to work? It will be difficult, however it's all down to business need. Staff can be rota'd on a minimum of 3 weeks furlough.

Does holiday continue to accrue during furlough? Yes.

Can employers require employees to take holiday during furlough so the Government ends up paying 80% of holiday and the employee uses it up? Yes. Provided the employer gives the necessary notice in the Working Time Regulations—which is twice as many days as the employer is requiring the employee to use as holiday.

Can employees on long-term sick announce they want to return to work to take advantage of the furlough scheme? An employer can say 'no' in the same way they could say 'no' if an employee tried to return to work from sick when their company sick pay runs out. In those circumstances, and as long as you can back it up with occupational health evidence that they're not ready you can refuse. It might be that the employer is only too happy to allow the employee to have 80% of full salary. However it might be that HMRC will get wise to that and its anti-avoidance measures by seeing a rise in PAYE levels and might investigate.

Is it a breach of trust and confidence if the employer doesn't top up the extra 20%? No.

Can you continue with disciplinary or grievance proceedings when an employee is furloughed? Yes, they can be continued with. This is on a similar footing to women absent on maternity leave because, as we know, maternity leave, is not a block to disciplinary and grievance matters being proceeded with.

Can employees currently on maternity and similar leaves cut their absence short in order to be furloughed to increase their payments funded by the Government?

Yes. The Maternity and Parental Leave etc Regulations 1999, regulation 11.1, says that an employee has to give eight weeks' notice to return early from maternity leave. But an employee and employer can agree between themselves to give a shorter notice period or no notice period at all. Women can decide and agree with the employer and by analogy, other types of family friendly leave recipients, can agree to cut maternity leave short and get the benefit of furlough leave.

Can the employer give notice under a redundancy process during this period, so the Government in effect contributes under the Coronavirus Job Retention Scheme to the cost of the notice period? Yes.