



(as at 1 June 2020)

Do I need to consider having “Furloughed Workers”?

On Friday 20 March, the government announced the Coronavirus Job Retention Scheme (CJRS). Under the Scheme, it will be possible for employers (including churches and charities) to be reimbursed some costs where staff are designated “furloughed workers” and meet the terms of the Scheme.

This is a new legal concept for the UK, a (probably one-off) temporary alternative to the more technical legal concept of a “lay off” (where the employee has some right to a small guarantee payment and may request to be made redundant after 12 weeks).

We now have all of the expected official details on how the Scheme currently operates. These have changed over time, are not always clear and conflict in some areas. Further details will be forthcoming on 12 June, with regard to changes to the Scheme – allowing furloughed employees to undertake part time work for their employers, whilst furloughed. Our understanding of how these will work together in practice and can be reconciled is set out below. This cannot constitute legal advice - it is our best steer based upon the current information available:

What has been said	How we currently think it will work in practice
The Scheme is now up and running. The HMRC online portal is live, allowing claims to be made. To access it, you will need to submit information about the employees that have been furloughed and their earnings to HMRC through the Government Gateway. The grant will be paid by HMRC to employers by BACS	We expect that payments will normally take up to 6 working days to process. You will be able to make a claim up to 14 days in advance, so if your June wages are paid on 30 June, you can submit the claim to HMRC on 16 June.
The Scheme was originally to run for the period 1 March to 31 May, was then extended to 30 June and has now been extended to 31 October 2020	It may be extended again, but we consider this less likely.
The Scheme allows claims backdated to 1 March 2020	You can claim from the date you asked eligible employees not to undertake work for you (i.e. the date they were effectively “furloughed” even if you did not use that label).
All UK employers with a UK payroll and UK bank account are eligible, including not-for profits, charities and public sector organisations	Those working overseas for qualifying employers are eligible. Foreign internationals working for qualifying employers are eligible.



Mark Jones, Solicitor

www.edwardconnor.com

info@edwardconnor.com

01858 411568

Before you can submit a claim, you must enrol with PAYE online, which may take up to 10 days to set up	If you have not yet enrolled with PAYE online, you can do so at https://www.gov.uk/payee-online/enrol
The Scheme is designed to help employers whose operations have been severely affected by coronavirus to retain their employees and protect the UK economy. However, all employers are eligible to claim under the Scheme	The Scheme may be used by employers not yet affected or who have immediate financial reserves but who wish to take steps to limit future impact. This includes churches and charities who rely upon giving and anticipate this reducing because of coronavirus, creating a risk of redundancy.
The Employee must be unable to work for a reason connected to coronavirus	This would cover a church or charity that furloughs staff now in order to increase its financial viability as giving reduces (as a consequence of coronavirus). This would cover an employee who is unable to work because of shielding or because they are looking after children whose school has closed.
The Scheme covers employees who are PAYE (including part time, full time, zero hours and apprentices).	Fixed term employees whose contracts are due to end during the furlough period are eligible until the contract ends (if you extend it, they will continue to be eligible).
Provided they are PAYE, the Scheme also covers: office holders; company directors; salaried members of LLPs; agency workers; and Limb (b) workers¹	Church leaders who are paid via PAYE as office holders rather than as employees will be eligible.
The self-employed are not eligible	
The employee must have been on your PAYE payroll on 19 March (changed from 28 February 2020). And you must have sent HMRC an RTI submission notifying a payment in respect of the employee on or before 19 March 2020	Employees who commenced their employment before 19 March, but who did not come on the payroll and receive a payment notified to HMRC until after 19 March are not eligible.
Employees transferred to you (under TUPE) after 19 March are eligible	
Employees on “unpaid leave” as at 28 February cannot be furloughed until the date it was agreed they would return from that unpaid leave	This is intended to exclude those on unpaid sabbatical (or similar), unpaid sick leave and unpaid statutory leave (such as emergency dependant leave or post-SMP maternity leave). You cannot agree with the employee to artificially foreshorten their return date. They are not eligible until after that leave ends.
Employees who started unpaid leave after 28 February 2020 can be put on furlough instead	If you do this, it ends the unpaid leave, so they are no longer unpaid for the time off work but can get furlough pay. An employee entering unpaid maternity leave on or after 1 March can foreshorten their leave and be furloughed.

¹ A Limb (b) worker is a “worker” within the definition of s230(b) Employment Rights Act 1996: generally, someone who is not an employee but who is contractually obliged to provide services personally to a business that is not his client/customer. It covers many in the ‘gig’ economy.



Mark Jones, Solicitor

www.edwardconnor.com

info@edwardconnor.com

01858 411568

From 1 July, employees who had not previously been furloughed for a period of at least 3 weeks, can no longer be furloughed	An employee who has not been furloughed before 10 June, would therefore need to be furloughed from 10 – 30 June in order to be able to be furloughed after 30 June.
You can claim for employees on maternity leave who are being paid enhanced contractual maternity pay (or adoption pay, paternity pay or shared parental pay)	<p>Those on paid maternity leave (or similar) can be furloughed. This includes during the first 2 weeks (compulsory) maternity leave</p> <p>Employees cannot be paid less than the statutory maternity (or similar) payments they are entitled to, such as the 90% of pay for the first 6 weeks</p> <p>The same principles would also apply to a furloughed employee about to go on maternity leave (whose SMP calculation would take into account relevant time furloughed and receiving reduced payments)</p>
If an employee who is on sick leave, self-isolating or shielding is furloughed, they should no longer receive sick pay	<p>An employee receiving SSP may be financially better off being furloughed, ending their sick leave</p> <p>Where they would have been eligible for SSP, their furlough pay cannot be less than SSP</p>
If a furloughed employee becomes ill and is paid SSP by you, you cannot claim furlough pay	<p>You can keep an employee who becomes ill (self-isolating or shielding) on furlough, receiving furlough pay</p> <p>If you pay SSP the furlough does not end, but you cannot claim the grant for the SSP you pay. It therefore does not make commercial sense to put a furloughed employee on sick pay</p> <p>If you paid non-discretionary contractual sick pay to a furloughed employee, you can base a claim for that period on the amount paid (in excess of SSP)</p>
Employees made redundant or who stopped working for you after 28 February are eligible, if rehired by you. This includes an employee who resigned after 28 February to go to a new job that fell through for reasons related to coronavirus (even if they started the new job)	<p>There is no minimum or maximum period of time between the termination date and the re-hire date</p> <p>Those who resign (or are dismissed) after 28 February for reasons unrelated to coronavirus, e.g. in order to have a career break, are not eligible</p> <p>You can only claim for the period from when they are furloughed (i.e. after being re-hired)</p>
Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended before their natural conclusion	<p>You can extend an employee's contract beyond its normal end date in order for them to benefit from the Scheme</p> <p>An employee whose fixed term contract ended before 20 March, in circumstances where it was not extended for reasons relating to coronavirus, is eligible if rehired (see above)</p>
The employee needs to be designated a "furloughed worker" by you	Consultation is recommended, but a failure to consult does not make you ineligible. (If >20 are staff affected, a failure to consult could be a breach of your statutory consultation obligations)



Mark Jones, Solicitor

www.edwardconnor.com

info@edwardconnor.com

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You need to notify the employee in writing that they have been designated a “furloughed worker”	A verbal communication is not sufficient on its own, but a written global (rather than individual) communication is.
Both you and the employee must agree to putting them on furlough	Although good industrial practice, we do not consider a general agreement to furlough is necessary where the furloughed employee is receiving their normal pay and benefits and suffers no detriment (but see below)
The employee needs to be instructed to cease all work in relation to their employment. This needs to be agreed in writing	<p>This was not in the original guidance but appears in the official Direction given by the Treasury to HMRC on 15 April and so is highly controversial. (The same Direction omits any need to notify the employee they have been designated a “furloughed worker” or wider agreement to be put on furlough).</p> <p>A written agreement with the employee (instructing them to cease work) should be sufficient where it is created after the date the employee was furloughed but before the date you submit your payment claim. (Otherwise it would be impossible in practice to ever make a claim backdated to 1 March).</p> <p>An email to the employee documenting their (historic) agreement should be sufficient and the employee does not have to provide a further written response to this to create the agreement.</p>
A written record must be kept for 5 years	This includes your calculations and the payments made to each employee. Keeping a written record does not mean you need to keep copies of the written notification etc (although it would be wise to, to prove compliance if audited).
<p><i>For the period up to 30 June:</i></p> <p>The employee must be furloughed for a minimum period of 3 consecutive weeks</p>	<p>To be eligible, the furlough period must be for not less than 21 complete, consecutive calendar days.</p> <p>The minimum three week period does not have to coincide with the period you are claiming for, but can overlap it</p>
<p><i>For the period up to 30 June:</i></p> <p>Employees can be furloughed multiple times, but each separate instance must be for a minimum of 3 weeks</p>	<p>If the furlough period is for less than 3 weeks, you must still pay the employee at least their furlough pay, but you will not be able to claim the grant from HMRC for this period.</p> <p>Any continuation of the original period does not need to be for a minimum amount.</p> <p>You can rotate staff, taking them on and off furlough, and swapping their duties to facilitate this.</p>
<p><i>For the period from 1 July:</i></p> <p>The employee must be furloughed on each occasion for a minimum period of 1 week, in order to be able to claim payment</p>	<p>To be eligible, the furlough period must be for not less than 7 complete, consecutive calendar days.</p> <p>If the furlough period is for less than 1 week, you must still pay the employee at least their furlough pay, but you will not be able to claim the grant from HMRC for this period.</p> <p>Any continuation of the original period does not need to be for a minimum amount.</p>



Mark Jones, Solicitor

www.edwardconnor.com

info@edwardconnor.com

01858 411568

<p>[The furlough period you can claim for runs from the date they are furloughed, not the date they were notified in writing]</p>	<p>This wording has now been removed without explanation from the guidance, but is likely to still be the position in practice.</p>
<p>You need to keep the employee on your payroll</p>	<p>The furloughed employee should be paid in line with the Scheme but can be made redundant or otherwise dismissed (ending their furlough).</p>
<p>Employees can take holiday whilst on furlough</p>	<p>Employees can be held to their pre-booked holiday whilst furloughed.</p> <p>The right to require employees to take statutory holiday on notice can be exercised for furloughed workers (except those on maternity or similar leave).</p>
<p>Where holiday is taken whilst on furlough, you should pay the employee their usual holiday pay</p>	<p>Holiday payments should be calculated on the same basis you would normally use. For those whose pay varies, their calculation would take into account time spent furloughed on reduced pay. Within the Scheme's financial cap, these holiday payments form part of your claim.</p>
<p>For the period up to 30 June:</p> <p>To be eligible for the grant, when on furlough, the employee cannot undertake work for, or on behalf, of your organisation (but see below). This includes providing services or generating revenue.</p>	<p>The employee will be able to carry on in an existing second job for you. You will not otherwise be able to employ them in a new/ different role whilst furloughed.</p> <p>If an employee has a separate role, for example as an elder or trustee, they will be able to carry on in that role but should not stray beyond what is reasonably necessary for them to do.</p> <p>If an employee has a separate function as a volunteer, they will be able to carry on in that role but should not stray beyond what is reasonably necessary for them to do.</p> <p>If the employee works for you in a way that is not permitted, they can't be treated as furloughed for the period in which they worked. If that makes the continuous furlough period less than 3 weeks, you cannot claim.</p> <p>Save as set out below, there is no general exception allowing furloughed employees to do tasks that are business critical (but see below).</p>
<p>For the period from 1 July:</p> <p>The furloughed employee can be required to work by you (within the terms of their contract). The grant will be calculated against the normal hours they are no longer working.</p>	<p>The furloughed employee who normally works, say, a contractual 40 hour week, can (whilst furloughed) be brought back for a 39 hour week, allowing a claim to be made on the basis of the 1 un-worked hour</p> <p>They will now be allowed to do paid work for an organisation connected to you or otherwise work indirectly for you, with these hours for this work being taken into account when claiming the grant</p> <p>Directors will now be allowed to undertake any duties requested by you (within the terms of their contract), with these hours for this work being taken into account when claiming the grant</p> <p>They will now be allowed to do voluntary work for you or any linked/associated organisation, with these hours for this work being taken into account when claiming the grant</p> <p>They will now be allowed to do any training requested by you, but where this provides services to you or generates revenue for or on behalf of you or any linked/associated organisation, these hours would be taken into account when claiming the grant</p>



Mark Jones, Solicitor

www.edwardconnor.com

info@edwardconnor.com

01858 411568

<p>For the period up to 30 June:</p> <p>Directors who are furloughed may undertake duties to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company</p>	<p>They should not go beyond what is reasonably necessary to comply with that obligation.</p> <p>Others under similar personal statutory obligations arising from their position will be treated similarly.</p>
<p>For the period up to 30 June:</p> <p>The employee can do voluntary work provided this does not provide services to or generate revenue for, or on behalf of you or any linked/associated organisation</p>	<p>This is intended to prevent fraud (e.g. where the employer is using the Scheme to pay the wages of an employee who is still working. It is not intended to capture a situation where church work undertaken by an existing volunteer (such as cleaning), who is no longer able to volunteer, is undertaken as an act of service by a furloughed employee of the church.</p>
<p>For the period up to 30 June:</p> <p>The employee can undergo training for you, provided this does not provide services to or generate revenue for, or on behalf of you or any linked/associated organisation</p>	<p>Where you request the employee to do this training, you must ensure the furlough payment for the time spent training complies with minimum wage legislation.</p>
<p>For the period up to 30 June:</p> <p>Your employee may work for another employer whilst furloughed. They may not work for an organisation connected to you or otherwise work indirectly for you</p>	<p>Within this limitation, the employee is able to continue or take up new employment (or self-employment) whilst furloughed and may be able to provide paid services to you through that employment (or self-employment).</p>
<p>For the period up to 30 June:</p> <p>Whilst furloughed, the employee's gross pay from you must not be less than whichever is lower of: 80% of their "reference salary"; or £2,500 pcm</p> <p>For the period 1- 31 August:</p> <p>The same caps apply, but will be pro-rated to take account of hours worked for you</p> <p>For the period 1- 30 September:</p> <p>The cap reduces to whichever is lower of: 70% of their "reference salary"; or £2,187.50 pcm, but you must make up the difference to match the original cap</p> <p>For the period 1- 31 October:</p> <p>The cap reduces to whichever is lower of: 60% of their "reference salary"; or £1,875 pcm, but you must make up the difference to match the original cap</p>	<p>This is the maximum amount you can claim under the Scheme. Detail on "reference salary" is given below</p> <p>Example: If working 10 of their normal 50 contractual hours, the cap is the lower of: 80% of their reference salary or £2,500, pro-rated against the balance of the unworked 40 hours (i.e. 40/50 hours x 80%; or £2,000 (40/50 x £2,500).</p> <p>In the above example, this would mean the lower of 40/50 hours x 70% or 40/50 x £2,187.50, with you paying 40/50 x 10% or 40/50 x £312.50.</p> <p>In the above example, this would mean the lower of 40/50 hours x 60% or 40/50 x £1,875, with you paying 40/50 x 20% or 40/50 x £625.</p>



Mark Jones, Solicitor

www.edwardconnor.com

info@edwardconnor.com

01858 411568

<p>If the employee is salaried, the grant is based on their last pay period prior to 19 March.</p>	<p>It will also include regular payments you are obliged to pay, which could in some cases include overtime, fees, and compulsory commission, but not any discretionary payments.</p> <p>There is detailed guidance here (including an online calculator):</p> <p>https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme</p>
<p>If the employee is not salaried:</p> <p>If employed for >1 year, it is based on whichever is higher of: their pay for the same month in the previous tax year; or their average earnings for the previous tax year</p> <p>If the employee has been employed for <1 year, it is based on their average monthly earnings</p> <p>If the employee did not work a full pay period before 19 March 2020, it is a pro-rated calculation of their earnings</p>	<p>It will also include regular payments you are obliged to pay, which could in some cases include overtime, fees, and compulsory commission, but not any discretionary payments.</p> <p>There is detailed guidance here (including an online calculator):</p> <p>https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme</p>
<p>For the period up to 31 July 2020, you can also claim your compulsory statutory employers auto-enrolment contributions, assessed on the minimum amount you must pay the employee under the Scheme</p>	
<p>For the period up to 31 July 2020, you can also claim your compulsory employers NICs, assessed on the minimum amount you must pay the employee under the Scheme</p>	
<p>The Scheme does not release you from your obligations to deduct/account for income tax, NICs and auto-enrolment pension contributions</p>	
<p>You must pay the employee the full amount of the grant received</p>	<p>You may not make deductions from it, save those required by statute or by law (for example to comply with an attachment of earnings order).</p>

Conclusion

There are still some areas that will require clarification, but we now have a clearer idea how the Scheme operates (which is not 100% in line with the announcements) and it will be a very powerful tool to enable organisations to keep going.

There may be further significant changes, for example the guidance states that the position on treatment of holidays is being kept under review, and so this advice may quickly become out of date. We are unlikely to distribute updated factsheets each time, but will endeavour to keep our clients apprised.

Health Warning - This factsheet is not intended to be a full summary of the law, and advice should be sought on individual situations.



Mark Jones, Solicitor

www.edwardconnor.com

info@edwardconnor.com

01858 411568