



The Government has updated guidance for employers (on 12 June 2020) which can be found [here](#). We summarise the main practical considerations below.

1. WHAT IS THE SCHEME? The stated purpose of the Coronavirus Job Retention Scheme is to allow employers to claim for costs of employment “*in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus*”. The scheme allows employers to place employees on ‘furlough leave’ by agreement and provides access to a grant towards employment costs.

2. WHO IS ELIGIBLE?

a) To be eligible under the scheme, an employee must have been furloughed for a minimum continuous period of 21 calendar days before 1 July 2020, unless they are returning from maternity, paternity, adoption, shared parental or parental bereavement leave.

b) The scheme is applicable to all UK businesses and all PAYE employees (including part-time, agency, flexible and zero hours contracts) who were **on payroll on or before 19 March 2020**.

c) The scheme does not apply to anyone starting work after 19 March 2020. Also, anyone who had not been paid by 19 March 2020 will be excluded because of the requirement for an RTI payroll submission by this date.

d) Those transferred from another business after 19 March 2020 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 are eligible.

e) The scheme also applies to PAYE office holders (including company directors, even if they pay themselves only once a year via PAYE), salaried LLP members, agency workers, apprentices and “workers” who fall under s.230(3)(b) of the Employment Rights Act.

3. WHAT ARE THE CUT OFF DATES?

a) The last day an employee could have started furlough for the **first time** was **10 June 2020, unless they are returning from maternity, paternity, adoption, shared parental or parental bereavement leave**. Employers will have until 31 July 2020 to make any claims for claim periods up to 30 June.

b) The scheme is due to end completely on **31 October 2020**.

4. HOW IS IT IMPLEMENTED? Furlough is a change of status and will therefore require consent or a contractual right. The guidance requires that employers agree the leave with the employee and

confirm their new status in writing (and keep a record for 5 years). The employer will report this status to HMRC on the portal. When deciding who should be furloughed, wider employment rights and obligations continue to apply, including equality considerations.

5. WHAT IS FLEXIBLE FURLOUGH LEAVE?

a) From 1 July 2020, employees who have previously been furloughed for at least 3 consecutive weeks can agree to return to work part time.

b) Employers need to keep a new written agreement that confirms the flexible furlough arrangement.

c) Flexible furlough agreements can last any amount of time but the minimum period that an employer can claim for is 7 days.

d) The amount an employer can claim under the scheme (subject to the cap, see below) will be calculated proportionately to the hours worked by the employee during flexible furlough.

6. WHAT HAPPENS DURING FURLOUGH LEAVE?

a) The employee remains employed by the employer, but they **cannot work** for the employer (except under a flexible furlough agreement). They should not attend the workplace or work remotely.

b) The employee can, however, act as a union or non-union representative for the purposes of individual or collective representation of employees or workers (this includes acting as a companion at disciplinary or grievance hearings). They can also volunteer or train provided that “*the employee does not provide services to, or generate revenue for, or on behalf of their organisation*”. The employer can require employees to undertake training from home. Where training is undertaken by furloughed employees, at the request of their employer, they are entitled to be paid at least their appropriate national minimum wage for this time.

c) Employees who already have more than one job can be furloughed by one employer and continue to work for the other.

d) The scheme does not prevent furloughed workers from taking on new employment while furloughed, provided that this is by agreement. If the contract prohibits additional employment, employers may be asked to vary this provision. Employers may wish to take steps to warn employees about working for competitors and remind employees of their contractual duties.

7. WHAT CAN THE EMPLOYER CLAIM BACK?

1 MARCH TO 31 JULY 2020	Employer can claim a grant of up to 80%, of an employee's regular wage costs (before tax) up to a cap of £2,500 per month as well as the associated Employer NICs and minimum (3%) automatic enrolment employer pension contributions on that subsidised wage.
1 TO 31 AUGUST 2020	Employer can claim a grant of up to 80%, of an employee's regular wage (before tax) up to a cap of £2,500 per month but will be required to pay the Employer NICs and minimum (3%) automatic enrolment employer pension contributions.
1 TO 30 SEPTEMBER 2020	Employer can claim a grant of up to 70%, and must pay the employee up to 10% of an employee's regular wage (before tax), subject to a total cap of £2,500 per month. The Employer is required to pay the Employer NICs and minimum (3%) automatic enrolment employer pension contributions.
1 TO 31 OCTOBER 2020	Employer can claim a grant of up to 60%, and must pay the employee up to 20% of an employee's regular wage (before tax), subject to a total cap of £2,500 per month. The Employer is required to pay the Employer NICs and minimum (3%) automatic enrolment employer pension contributions.

8. HOW DO YOU CALCULATE AN EMPLOYEE'S REGULAR WAGES?

a) The guidance states that this can include wages, past overtime, fees and compulsory commission payments. However, the Treasury has issued a Direction which clearly states that it does not include payments which are conditional on any matter or vary in accordance with business or employee performance. This means most commission payments will be excluded.

b) Discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. The cost of monetary and non-monetary benefits, including taxable Benefits in Kind and benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should also be excluded.

c) Claims should only be made in relation to the period **after the employee finishes work**, not when the decision to furlough is made, or the date of any correspondence.

d) No claim can be made if it is "abusive or is otherwise contrary to the exceptional purpose of the scheme" (see 1, above)

9. CAN THE EMPLOYER "TOP-UP?" The employer may seek to pay only at the rate recoverable from HMRC. The employer may opt to top up the employee's salary if the grant does not cover it in full, but this is not a requirement.

10. HOW ARE EMPLOYMENT COSTS CALCULATED FOR THOSE WITH IRREGULAR EARNINGS? The grant will be calculated by reference to the higher of: (1) earnings in the same month in the previous year; or (2) average monthly earnings in the 2019/2020 tax year. If the employee has worked for less than a year, the employer can claim for an average of their monthly earnings for the time that they have worked.

11. WHAT IF 80% OF SALARY IS AN AMOUNT WHICH FALLS BELOW NATIONAL LIVING WAGE/NATIONAL MINIMUM WAGE?

Furloughed employees are not working therefore NLW and NMW do not apply. If the employer agrees with the employee that they will undertake training during furlough leave, the employee is entitled to a minimum of their NMW for the training period.

12. WHAT HAPPENS WITH ANNUAL LEAVE AND CONTINUITY OF SERVICE?

Continuity of service will be unbroken. Annual leave will continue to accrue. Holidays can be taken during furlough leave but must be paid at 100% of normal salary.

13. WHAT HAPPENS WITH FAMILY LEAVE? Employees already on or due to go on any form of family leave (e.g. maternity leave) will remain on such leave. If they are furloughed during this leave, an employer can only submit a claim under the scheme for any enhanced pay elements. Employees who are unable to work because they have caring responsibilities or need to stay at home with someone who is shielding can be furloughed.

14. WHAT HAPPENS WITH SICK LEAVE? Those already on sick leave or self-isolating remain on sick leave until they are fit to work, out of isolation or designated as furlough by the employer. During sick leave or self-isolation, they are paid at the relevant rate (SSP or contractual sick pay). Aside from those on short term sick leave/self-isolation, employers can, for business reasons, furlough employees who are currently off sick. They can also furlough employees who are shielding in line with public health guidance.

15. WHAT ABOUT SPONSORED WORKERS UNDER TIERS 2 OR 5 OF THE POINTS BASED SYSTEM? Home Office guidance indicates that it is possible to furlough such workers and provides for temporary reductions in pay. However, it also requires that the reductions in pay are "*part of a company-wide policy to avoid redundancies and in which all workers are treated the same*". Further guidance is available [here](#).

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See www.constantinelaw.co.uk for further information or contact John Hayes (John.Hayes@constantinelaw.co.uk), Alan Lewis (Alan.Lewis@constantinelaw.co.uk) or Will Clayton (will.clayton@constantinelaw.co.uk).



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