

Coronavirus Job Retention Scheme – The Details

Following the unprecedented closure of businesses and the restrictions on movement we have seen over recent weeks as a result of the coronavirus pandemic, many businesses are asking ‘what do we do now’?

As you will no doubt be aware, the Chancellor announced an unprecedented support package for businesses on Friday 20 March 2020. The press conference set out the headline points of the Coronavirus Job Retention Scheme, but since then, businesses have been waiting for the details so that they can understand how the scheme will work in practice and what this means for affected employees.

The Guidance was finally published late on 26 March 2020.

Whilst this provides some much needed clarity, there remain some key unanswered questions which will need detailed consideration as this situation progresses. This Q and A document sets out our understanding of the Scheme as it currently stands.

Which businesses can benefit from the Scheme?

The Scheme is open to all UK organisations (including businesses, charities, recruitment agencies (specifically those who engage agency workers paid through PAYE) and public authorities (although they are not expected to claim)) so long as they have created and started a PAYE payroll scheme on or before 28 February 2020 and so long as they also hold a UK bank account.

Which employees are covered by the Scheme?

Any employee who was on the organisation’s PAYE payroll on 28 February 2020 can benefit from the Scheme. This includes full time employees, part time employees and those on flexible or zero hour contracts.

The Guidance also specifically mentions agency workers, but is confusing on this point, referring to “employees on agency contracts” or those “engaged by an employment business”. Although unclear, the intention appears to be that agency staff who are paid via PAYE (and have either employee or worker status) are intended to be covered.

The Scheme also covers employees who were made redundant after 28 February 2020, so long as they have been “rehired” by their employer.

Those who commenced employment after 28 February 2020 cannot benefit from the Scheme. (We assume this is to prevent fraud.)

What does the Scheme mean for employers?

The Scheme allows eligible organisations to make a claim for wage costs. If successful, they will receive a grant for 80% of an employee’s regular wage, or £2,500 per month, whichever is lower. They will also receive the associated Employer National insurance Contributions and minimum automatic enrolment employer pension contributions on the subsidised wage. Payments such as fees, commission and bonuses cannot be claimed.

More guidance is expected in relation to how employers should calculate claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions.

What does the Scheme mean for employees?

Employees must be paid at least 80% of their usual pay (or £2,500 if lower). Employees have to account for tax and deductions from their pay in the normal way. Many employees will no doubt be disappointed that they will not be receiving the headline rates as a net amount in their hands (as this was certainly the impression given in the initial press conference.)

- For employees who receive a monthly salary, these sums are calculated based on their salary entitlement on 28 February 2020.
- Where an employee's wage varies, the calculation is obviously a bit trickier. The Guidance states that, in this case, if the employee has been employed for a full twelve months prior to the claim, the employer can claim for the higher of either:
 - The same month's earning from the equivalent month in the previous year; or
 - The average monthly earnings from the 2019-20 tax year.
- If the employee has been employed for less than a year, an employer can claim for an average of their monthly earnings since they started work.
- If the employee only started in February 2020, an employer should use a pro-rata for their earnings so far to claim.

Do employers have to top up the shortfall in earnings?

No they don't. Employers can choose to top up employee's wages but are under no obligation to do so. If they do, they cannot claim any further grants and this would need to be done at the employer's own expense.

Are Employer National Insurance and pension contributions still due?

Yes, employers remain liable for both Employer National Insurance contributions and minimum automatic enrolment pension employer contributions for furloughed employees. As explained above, employers can apply to the Scheme for a grant equal to these costs.

However, if an employer is choosing to top up the employees' wages to full pay, it is not possible to claim for the associated increase in NI and pension contributions. Nor will it be possible to claim for voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

What is furlough leave?

To fall within the Scheme, employers need to designate employees as being "furloughed". This means they have been put on special leave with no requirement that they work.

The Guidance confirms that employers need to write to their employees to confirm they have been furloughed. They are required to keep a record of this communication.

Importantly, the Guidance reiterates that existing employment law considerations continue to apply. As such, the Guidance suggests that employers should discuss this with staff and "make changes to the employment contract by agreement".

To avoid the risk of any potential claims, the best option is, as always, to obtain employee consent to being placed on furlough, especially if the employer won't be topping up the employee's pay.

The clearest way to secure agreement/consent from an employee is to use an express furlough agreement. However, in circumstances such as this, where any employees are already fearful and anxious, simply communicating by letter is likely to be sufficient. Either way, employers will want to

try and be clear with their employees (so far as possible given the fast moving nature of the current situation) regarding employee's entitlement and the duration of their furloughed status.

However, whether this is practical or not in light of the current situation remains to be seen; commercially many businesses may take a view to impose furloughed status on workers because the alternative is redundancy. In situations where the employer has an express lay off clause in their employment contracts that would enable them to send employees home with no pay, our view is that the risk of legal claims from imposing furlough will be small. Of course, employers will need to take specific advice on the particular circumstances and balance up the legal and commercial factors before deciding how to proceed.

Importantly, furlough leave must last for a minimum of 3 weeks. It is not permitted to have odd days or weeks in furlough.

Employees who are placed on furlough leave still have the same rights as they did previously, such as entitlement to sick pay, and protection from unfair dismissal and discrimination.

Can an employee carry out any work for the business whilst on furlough leave?

No, the employee cannot carry out any work at all on behalf of the employer whilst on furlough leave. This includes any sort of activities that provide services or generate revenue.

HMRC have reserved the right to audit and claw back grant payments at a future date, should they find that an employee was working in breach of these requirements.

The Guidance also appears to prevent employees from carrying out work for another associated entity with the employer.

However, furloughed employees can still undertake voluntary work or training as long as it does not provide services or generate revenue for the employer.

Do all employees have to be placed on furlough?

No, employers do not have to place all of their employees on furlough to qualify for the Scheme; the leave can be restricted to specific departments, sites or teams, or parts of departments or teams where there is no work available or where work has reduced.

Where employers are looking to furlough some, but not all, employees, they will need to think carefully about how they choose who is placed on furlough. Employers should, in the first instance, consider whether it is appropriate to seek volunteers for furlough.

If selecting from a pool, employers would be well advised to treat any "selection" for furlough in a manner akin to a redundancy selection process, making sure they have documented an objective and clear rationale for their decisions.

This is important because normal employment law considerations continue to apply when employers are deciding who should be furloughed, and the Guidance specifically states that "equality and discrimination laws will apply in the usual way". When considering selection for furlough, employers need to be particularly mindful of discrimination risks.

Is it possible to rotate those employees who are on furlough leave?

There is nothing in the guidance which prohibits rotating furlough leave amongst employees, provided each employee is off for a period of at least 3 weeks

Does an employee on unpaid leave qualify for the Scheme?

No, except in cases where the employee was placed on unpaid leave after 28 February 2020.

Does an employee who is currently in receipt of Statutory Sick Pay (SSP) qualify for the Scheme?

No. Employees who are absent due to sickness or are self-isolating should receive SSP. However, they can be placed on furlough leave when they are well enough to return to work.

Employees who are on long term sick leave are therefore unlikely to qualify for the Scheme, unless they become well enough to return to work.

Employees who are shielding due to being in a “high risk” group as set out in the Government guidance can be placed on furlough leave.

What about employees with more than one job, do they qualify under the Scheme?

Yes. Each job is treated separately. It is possible for an employee to be placed on furlough by one or both of their employers, and the grant applies to each employer separately.

What about employees on family-related leave?

Employees who are on family related leave will remain on family related leave, unless they bring that leave to an end and return to work, at which point they may be furloughed.

For example, an employee on maternity leave, or who is due to take maternity leave would be treated in exactly the same way as normal. Although any enhanced contractual maternity pay is included in the wage costs that an employer can claim through the Scheme.

Are employees who are already working on reduced pay or reduced hours eligible for the Scheme?

If an employee is still working, but on reduced hours, or for reduced pay, they will not be eligible for the Scheme. This is potentially problematic given that many employers may have already agreed wage cuts with staff in recent weeks. However, there is nothing in the Guidance which suggests that employers could not simply agree with their employees to reinstate the previous position, before immediately placing the employee on furlough.

What about National Minimum Wage?

Helpfully, the Guidance confirms that the National Minimum Wage rates don't apply to furlough pay. This is on the basis that time spent on furlough is not working time.

This means that employees can be paid at 80% of their usual wage, even if this falls below NMW.

However, if employees are required to carry out some work, such as mandatory online training, this time should be paid at a rate at least equal to NMW, even if this is more than the 80% that can be claimed.

Employers will need to be careful that any requirements for employees to work do not inadvertently void furlough leave or expose them to recoupment action by HMRC (as explained above)

How do I make a claim?

In terms of the practicalities for claiming, once employees have been placed on furlough, the employer will need to submit a claim via an online portal operated by HMRC. This is not currently live.

To claim, the following information is required:

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

The employer is responsible for calculating the amount claimed, however, HMRC will retain the right to retrospectively audit all aspects of the claim.

Only one claim can be submitted every 3 weeks, and claims can be back dated to 1 March 2020 if necessary.

The grant will then be paid directly into the employer's UK bank account.

Employers should make claims in accordance with actual payroll amounts at the point at which they run the payroll or in advance of an imminent payroll.

The employee must receive all of the grant received, employers cannot charge any fees from the payment.

What deductions are made to the furlough payment?

As explained above, while on furlough, the employee's wages will be subject to usual income tax and national insurance deductions. Employees will also pay pension contributions under the auto enrolment provisions on any qualifying earnings, unless they have chosen to opt-out.

Employers will be liable to pay Employer National Insurance contributions on wages paid, as well as auto enrolment contributions on qualifying earnings, again unless an employee has opted out.

Do employees continue to accrue annual leave entitlement during furlough leave?

This point is not directly dealt with in the new guidance, and has been a matter of some debate amongst employment lawyers. The current consensus is that employees will continue to accrue their statutory holiday entitlement whilst on furlough (but we await formal confirmation of this point).

There does not appear to be any reason why any additional contractual entitlement could not be waived, assuming employees agree to do this in the normal way.

In a further announcement, the Government has confirmed that some workers who are unable to take their statutory annual leave entitlement due to the coronavirus will be able to carry it forward over the next 2 leave years. This also suggests that holiday will continue to accrue during furlough.

Do collective consultation procedures apply where 20 or more employees are being placed on furlough?

Unhelpfully, there is no clear answer to this point and, worryingly for employers, the Guidance makes specific reference to engaging in "collective consultation processes to procure agreement to changes to terms of employment". The Guidance provides no further detail as to when this would apply.

Legally, employers have an obligation to go through a prescribed collective consultation process if they are proposing to dismiss 20 or more employees at a single establishment due to redundancy. This must last at least 30 days where 20 – 99 employees are affected and 45 days where 100 or more employees are affected. In this context, however, the definition of redundancy also includes dismissing employees to force through a change to their terms of employment. **This is important because if an employer fails to collectively consult when it should have done so, it is liable for protective award of 90 days' actual pay per affected employee.**

There is clearly an argument that this could apply to furlough.

From a technical legal perspective, it might be possible to argue that the collective consultation provisions are not triggered on the basis that there is no “proposal to dismiss” employees at the point when furlough is implemented, as the whole point of the furlough scheme is to avoid the need to consider mass redundancies/lay-offs.

If the obligations are triggered, there may also be a legal defence on the basis of “special circumstances”, given the unique and unprecedented circumstances.

Further, from a practical viewpoint, requiring businesses to collectively consult before placing employees on furlough is counterintuitive. It cannot be the intention of the Government to impose a waiting period of 30 or 45 days before furlough can be implemented (or to impose such a significant liability on employers for failing to do so).

In reality many employers are likely to need to push ahead anyway and deal with legal challenges as and when they arise in future. We can assist employers with trying to mitigate their risks as far as possible.

What do employers need to do now?

1. Identify who you need to furlough
2. Decide whether you will pay 80% of pay or whether you intend to top it up
3. Identify whether you will need to access the interest free business interruption loan to fund the wages until the grant is paid
4. Discuss with the affected employees and agree any changes to their contracts of employment
5. Write to the employees confirming that they have been furloughed and keep a record of this.
6. Calculate their pay and pay wages
7. Make a claim every 3 weeks' for grant payment
8. Consider re-furloughing employees every 3 weeks
9. At the end of the scheme decide whether employees are still required and if not then ensure fair termination of their employment

These are unprecedented times, and the legal situation is changing rapidly, sometimes on an hour by hour or daily basis; as such, we strongly recommend businesses take specific advice on these issues.

For assistance please call the Covid-19 helpline on 03330 433230 or contact your usual [Brabners Employment](#) team contact.

The contents of this document provides information that is of general nature and is subject to the eventual legislative and other possible changes. We do not accept liability for action taken on the basis of the above information alone and you should seek advice on your own individual circumstances.