Coronavirus Job Retention Scheme – The latest position (at 29 June 2020)

The Coronavirus Job Retention Scheme was unveiled by the Chancellor on 20 March 2020. It is a Scheme which assists employers to pay the wages and employment costs of workers with the intention of saving jobs and businesses who have suffered as a result of the pandemic.

HMRC issued guidance on how the Scheme was intended to operate which has been changed a number of times, the guidance last being updated on 26 June 2020. The Scheme went live on 20 April 2020 with the opening of HMRC's portal.

The Scheme will be in place in its current form until 31 July 2020 after which employers will be asked to pay a percentage towards the salaries of furloughed staff who will be able to carry out some part time work on behalf of the employer from 1 July 2020.

The Treasury also issued a Direction to HMRC under powers conferred by the Coronavirus Act 2020, containing authority and instructions for making payments under the Scheme. The Direction was amended on 22 May and a further direction was issued on 26 June 2020.

There is a large volume of detail both in the HMRC Guidance and in the Treasury Direction, some of remains unfortunately contradictory.

This Q and A document is designed to assist employers in understanding their obligations and is based on 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 and had submitted real time information payroll data to HMRC on or before 19 March 2020; and
- hold a UK bank account.

Where an employer operates more than one PAYE scheme, a separate claim must be submitted for each Scheme and any payment made will be calculated separately.

This change in date from 28 February 2020 brings into scope a large number of new starters who fell outside the Scheme. The 19 March date is just before the Chancellor announced details of the Scheme, meaning it is still effective to prevent fraudulent claims (by businesses hiring ghost employees to claim furlough payments in respect of, as those ghost employees will not have been on PAYE on 19 March).

The Scheme was originally to operate until 31 May 2020, however, this has now been extended to the end of October 2020. The Scheme will continue in its current form until 1 July 2020 when a series of gradual changes will be implemented. We deal with these planned changes later in this document.

Which employees are covered by the Scheme?

Any employee who was on the organisation's PAYE payroll on 19 March 2020 and who was notified to HMRC on an RTI submission on or before 19 March 2020 can benefit from the Scheme. This

includes full time employees, part time employees, directors, agency workers and those on flexible or zero hour contracts.

Foreign nationals are eligible to be furloughed. Grants under the Scheme are not counted as 'access to public funds', and you can furlough employees on all categories of visa.

The Scheme also covers employees employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February 2020) who were subsequently made redundant or stopped working for the employer after that but before 19 March 2020, so long as they have been "rehired" by their employer and placed on furlough.

Those who commenced employment after 19 March 2020 cannot benefit from the Scheme. We assume this is to prevent fraud.

The requirement of an RTI submission made on or before 19 March 2020 may have unintended consequences. For example, there may be no RTI submission for employees put onto payroll in late February 2020 if their pay was not processed for the first time until the March payroll. On the assumption the March payroll was processed at or around the end of the month, the RTI submission is likely to fall after the cut-off of 19 March. Similarly, new directors whose payroll is processed annually may have an RTI submission falling after 19 March. Whether further guidance is provided for employees in this situation remains to be seen.

Although the original guidance made reference to employees having to be otherwise at risk of redundancy in order to qualify for the Scheme, the Treasury Directive has taken a more relaxed approach and clarified any employees who are furloughed "by reason of circumstances as a result of coronavirus or coronavirus disease" can qualify for the Scheme.

The Scheme will close to all new entrants from 1 July 2020. This means that if employers wish to make use of the Scheme moving forward, they must have placed an employee on furlough leave by no later than 10 June 2020. This will ensure that the employee has completed at least three weeks of furlough leave before 1 July 2020 and can therefore continue to participate in the Scheme.

What does the Scheme mean for employers?

The Scheme allows eligible organisations to make a claim for wage costs. Up until 1 August 2020 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.

'Regular wage' has been clarified as being so much of the amount of salary/wage as:-

- does not vary due to the performance of the employer's business, the performance of the employee of any duties or any other payment made at the discretion of the employer such as a bonus;
- is not conditional on any matter;
- is not a benefit in kind; and
- the payment arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

The further guidance published on 17 April confirms that it is possible to claim for:-

- regular wages you pay to employees
- non-discretionary overtime
- non-discretionary fees

- non-discretionary commission payments
- piece rate payments.

It is not possible to claim for:-

- payments made at the discretion of the employer or a client - where the employer or client was under no contractual obligation to pay, including:
  - tips
  - discretionary bonuses
  - discretionary commission payments
- non-cash payments
- non-monetary benefits like benefits in kind (such as a company car) and salary sacrifice schemes (including pension contributions) that reduce an employees' taxable pay.

The amended Directive now provides that 'regular wage' means pay that 'cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment'

'Relevant matter' for this purpose includes business performance, the employee's contribution, the employee's performance of his or her duties, and any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).

As for 'variations arising from a non-discretionary payment', the Direction clarifies that this covers payments such as overtime, fees, commission or piece rates, payments made in recognition of the employee undertaking additional or exceptional responsibilities, payments made in recognition of the circumstances in which the employee undertakes his or her duties or the time when they are undertaken, and payments made in recognition of similar matters.

Such payments are only covered if a legally enforceable agreement, understanding, scheme, transaction or series of transactions prescribes the method of calculating the amount of wages or salary payable (whether or not that method involves an exercise of discretion).

This amendment has clarified that claims in relation to commission or overtime may in some circumstances be factored into the 80% wage calculation and reclaimed through the Scheme. However, it is not clear whether it will be possible to back date a claim under the Scheme in order to ensure that employees receive 80% of their regular wage.

More guidance has been provided in the HMRC step by step guidance to claiming under the Scheme in relation to how employers should calculate claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions.

The document clarifies that the pension contributions claimed must be the lower of:-

- The monthly lower level of qualifying earnings apportioned based on the number of days in the month that are qualifying furlough days; and
- The minimum level of auto-enrolment pension contributions for that period, being 3%.

A claim calculator is available to enable the employer to check their calculations are correct.

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.

- For employees who receive a monthly salary, these sums are calculated based on their salary entitlement on 19 March 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 12 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 March 2020, an employer should use a pro-rata for their earnings so far to claim.

If, based on previous guidance, the employer has calculated the payments to be claimed based on the employee's salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020) it can choose to still use this calculation for the first claim under the Scheme.

HMRC will check claims made through the Scheme. Payments may be withheld or need to be repaid in full to HMRC if the claim is based on dishonest or inaccurate information or found to be fraudulent. HMRC has put in place an online portal for employees and the public to report suspected fraud in the Scheme.

Do employers have to top up the shortfall in earnings?

No they don't. Employers can chose 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, this will change as of 1 August 2020 when this will no longer be possible.

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 2020 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 Government guidance was originally at odds with the Treasury Directive in terms of the steps that must be taken to furlough an employee.

The Guidance published on 17 April 2020 states that employers must confirm in writing to their employee that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the under the Scheme. There needs to be a written record, but the employee does not have to provide a written response providing express consent. Employers are required to retain record of this communication until 30 June 2025.

Originally, the Treasury Directive took this a step further and stated that the employee must be instructed by the employer to cease all work in relation to their employment. Further, the employee must have agreed to this cessation of work in writing or via an email.

The amended Directive published on 22 May dealt with this discrepancy between the Guidance and the Directive. The Directive now states that the agreement between the employee and the employer must specify 'the main terms and conditions upon which the employee will cease all work in relation to their employment', be incorporated (expressly or impliedly) into the employee's contract, and be made in writing 'or confirmed in writing' by the employer.

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

We recommend that employers use an express furlough agreement which will ensure that all parties are clear (so far as possible given the fast moving nature of the current situation) regarding the employee's entitlements 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 some businesses may take the view that it is impracticable to obtain written consent from each employee and may instead wish to rely on "implied consent".

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, the risk of successful legal claims from employees may be smaller. 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 three consecutive 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.

How will the Scheme change from 1 July 2020?

As the country takes steps to move out of lock down, the Government has announced a series of incremental changes that will be made to the Scheme.

The Scheme will close to new entrants on 30 June 2020, which means that the last date that employers may place employees on furlough under the Scheme will be 10 June 2020 (on the basis that employees need to be placed on furlough for a minimum period of three weeks). This cut-off date does not apply to those returning from family related leave, we expand upon this below.

From 1 July 2020 employers who are participating in the Scheme are able to ask furloughed employees to return to work on a part time basis for any amount of time and any shift pattern. This has become known as 'flexible furlough'.

Employers will need to determine how this will work in terms of how the employee's time is divided. For employees on 'flexible furlough', employers will be able to claim under the Scheme for their normal hours which are not worked, but they will have to pay these employee's in full for any hours worked, and will be responsible for tax and national insurance contributions in respect of those payments.

Further guidance on flexible furloughing and how employers should calculate claims was published on 12 June 2020.

Employers who are currently relying upon a 'fully furloughed' agreement will need to re-visit the terms to ensure that a new agreement is put in place to reflect the new position moving forward.

Employers must keep a record of these agreements confirming the new arrangement. Other records, such as documents illustrating amounts claimed, claim reference number, calculations, usual hours worked, actual hours worked and calculations must be kept for six years for HMRC purposes, so it is advisable that furlough agreements are retained for at least the same period of time to support the position if HMRC chooses to audit.

We recommend that, if possible, employers decide how many hours the employee will be working flexibly in advance of making any claims through the portal for two reasons:-

1. a new agreement reflecting the new flexible position is required. Being able to outline the hours to be worked is helpful and unambiguous; and
2. administratively it will be more challenging if multiple changes need to be made to calculations to be submitted via the HMRC portal.

If it is not possible to predict the number of working hours required, for example as it will depend on the market/economy etc, we recommend putting in place an agreement which allows for some degree of flexibility, whilst keeping the arrangement under frequent review.

It is now confirmed that from 1 July 2020 an employer will not be able to claim for a higher total number of employees in one period than the highest total it had previously claimed for in a claim period before 1 July.

There will be no minimum period an employee must be furloughed for from 1 July, however, an employer can only make a claim for one week at a time. This means that an employer could choose to furlough an employee flexibly two days in a working week but can only make a claim through the HMRC portal for that one week, not the two days individually i.e. the guidance states that the maximum number of times an employer can make a claim for one employee in one month is four times (four weeks), not for each day the employer decided to furlough the employee.

The first time an employee can make any claims for days in July will be 1 July, a claim cannot be pre-emptively submitted. This will be the same moving forward, so employers will need to make the claim for that calendar month in that same calendar month. Claims can no longer span different months although an employer can make multiple claims in that one month.

For any periods prior to 30 June that remain unclaimed, these much be submitted by 31 July 2020.

There is a new help sheet giving examples on how to calculate the flexible furlough which is here:

https://www.gov.uk/government/publications/find-examples-to-help-you-work-out-80-of-your-employees-wages/examples-of-how-to-work-out-80-of-your-employees-wages-national-insurance-contributions-and-pension-contributions

And the online calculator is here:

https://www.tax.service.gov.uk/job-retention-scheme-calculator

Many employees will be concerned about returning to work for many reasons, for example due to health and safety fears, difficulties with childcare or a need to travel on public transport. We touch upon these issues in our related articles Employers and employees face huge challenges to find solutions as schools reopen and Ending the lockdown and the "new normal" – Part 2.

When will employers be required to contribute towards furlough payments?

From 1 August 2020, employers are to start paying employer's national insurance contributions and pension contributions as they will no longer be reclaimable via the Scheme.

Subsequently from 1 September 2020, the Scheme shall only reimburse employers 70% of salary (up to a maximum of £2,187.50) in respect of furloughed employees. From this point in time, employers will be required to top-up furlough employees' salary to 80%, or more, depending on what is agreed between the employer and employee.

As of 1 October 2020, the Scheme shall only reimburse employers 60% of salary (up to a maximum of £1,875). From then on, employers will be required to top up furloughed employees' salary to 80%, or more, again subject to what has been agreed.

The Scheme shall then close on 31 October 2020.

Can an employer claim for notice pay through the Scheme?

There has been some confusion around the payment of notice to employees and whether statutory notice, contractual notice or neither can be claimed by employers via the CJRS portal.

However, the guidance has now been updated to confirm that both statutory and any enhanced notice payments can be claimed through the Scheme, however, grants cannot be used to substitute or subsidise redundancy payments. HMRC will continue to monitor businesses after the scheme has closed.

We have contacted HMRC with regard to whether employers can claim the grant towards an employee's payment in lieu of notice, and we were informed that this could not be claimed. The explanation provided by HMRC was that claims could only be made in respect of a period during which an employee was working for the employer and this would not be the case if a payment in lieu of notice was made. However, we understand that the position is unclear as there have been varying answers to this point from HMRC. Where termination of employment is being considered, employers should therefore consider maintaining the employment contract during the notice period, as an alternative to making a payment in lieu of notice.

What if an employee is on a fixed term contract?

Employees on fixed term contracts can be furloughed, however, the contract must be renewed or extended before it comes to an end in order to continue to qualify under the Scheme.

Contracts can be renewed or extended before their end date during the furlough period without breaking the terms of the Scheme. There is no minimum period which must be left to run on a fixed term contract to enable it to be renewed or extended, but it must not have ended.

Where a fixed term employee's contract ends because it is not extended or renewed before its natural conclusion an employer will no longer be able claim a grant for them once the contract ends. Fixed term contracts which ended, without extension or renewal, on or before 19 March 2020 will not qualify for the grant once they have ended.

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

Until 1 July 2020 an employee cannot carry out any work at all on behalf of the employer whilst on furlough leave. This includes the provision of any services or activities that generate revenue. From 1 July 2020 a new flexible furlough Scheme will commence. Please see the above for further information.

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 prevents employees from carrying out work for another linked or associated entity with the employer until 1 July 2020.

However, furloughed employees can still undertake voluntary work or training as long as it does not provide services or generate revenue for the employer. The employee can also carry out paid work for an unconnected employer during the furlough leave.

A salaried director who is furloughed can only undertake work to fulfil a duty or other obligation arising from an Act of Parliament relating to the filing of company's accounts or provision of other information relating to the administration of the director's company. The updated Directive expanded this permitting directors to submit a claim to the Scheme or run payroll whilst furloughed.

This is very narrow and does not open the door to any further work.

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 three 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.

The Treasury Directive, however, clarifies that where a period of unpaid leave that commenced before 28 February 2020 comes to an end due to the expiry of a pre-agreed period or circumstances, the returning employee can be placed on furlough leave as of the pre-agreed return date.

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

If an employee is on sick leave or self-isolating as a result of Coronavirus, they will be able to get Statutory Sick Pay, subject to other eligibility conditions applying. The Scheme is not intended for short-term absences from work due to sickness, and there is a three week minimum furlough period.

Short term illness/ self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.

Employers are also entitled to furlough employees who are being shielded or who are off on long-term sick leave. It is up to employers to decide whether to furlough these employees.

An employer can claim back from both the Scheme and the SSP rebate scheme for the same employee but not for the same period of time. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, then the employer may qualify for the SSP rebate scheme, enabling it to claim up to two weeks of SSP per employee.

Furloughed employees retain their statutory rights, including their right to SSP. This means that furloughed employees who become ill during the leave must be paid at least SSP. It is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate.

If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. Employers are required to pay SSP themselves, although may qualify for a rebate for up to two weeks of SSP. If employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for these costs through the furloughed Scheme.

The amended Directive clarifies that furlough cannot begin until immediately after the end of the 'period of incapacity for work' for which the SSP is being paid or due to be paid. It goes on to suggest that the timing of the end of the period of incapacity should be determined by agreement between the employer and employee.

This amendment suggests that moving an employee on to SSP breaks the period of furlough leave, which could result in employers not being able to claim under the Scheme where this period of sickness occurs in the first three weeks of the furlough leave. Given that the employers are given discretion as to whether the employee is moved on to SSP, the cautious approach would be to keep the employee on furlough leave (as opposed to sickness absence) for at least three weeks.

The Coronavirus Sick Pay Rebate Scheme launched for small to medium sized businesses (with fewer than 250 employees) on 26 May 2020. Employers will receive repayments at the relevant rate of SSP that they have paid to current or former employees for eligible periods of sickness starting on or after 13 March 2020.

The repayment will cover up to two weeks of SSP and is payable if an employee is unable to work because they:

- have coronavirus; or
- are self-isolating and unable to work from home; or
- are shielding because they've been advised that they're at high risk of severe illness from coronavirus.

Following the introduction of the new 'Track and Trace' system the Government has confirmed that those who have been contacted and told to self-isolate for a period of 14 days are also entitled to receive SSP, which can be reclaimed through the SSP rebate scheme.

What about employees with caring responsibilities?

Employees who are unable to work as they have caring responsibilities (such as children) 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. The Government has confirmed that an employee returning from family related leave can be placed on furlough leave even after the cut-off date on 10 June 2020, as long as the employer has placed at least one other employee on furlough leave for a three week period prior to this date.

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.

Furloughed workers planning to take paid parental or adoption leave will be entitled to pay calculated on their usual earnings rather than a furloughed pay rate.

Entitlement to Statutory Maternity Pay, as well as the other forms of Parental or Adoption Pay, are currently calculated through someone's average earnings over an eight-week assessment period. For Maternity Allowance, entitlement and the rate payable is also determined by looking at average earnings over a 13 week period.

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 clam via the online portal operated by HMRC.

To claim, the following information is required:

- employer PAYE reference number
- the number of employees being furloughed
- National Insurance Numbers for the furloughed employees
- Names of the furloughed employees
- Payroll/employee number for the furloughed employees (optional)

- employer Self-Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of three consecutive weeks)
- bank account number and sort code
- contact name
- phone number

In cases where less than 100 employees have been furloughed, the employer will be required to enter details of each employee being claimed for directly into the system.

If the number of furloughed employees exceeds 100 the employer asked to upload a file with the information rather than input it directly into the system. HMRC will accept the following file types: .xls .xlsx .csv .ods

The employer is responsible for calculating the amount claimed, however, HMRC will retain the right to retrospectively audit all aspects of the claim. It is therefore advisable to retain details of all calculations carried out.

Only one claim can be submitted every three weeks, and claims can be back dated to 1 March 2020 if necessary. The claim should be submitted shortly before or at the same time as running payroll as payment will be made within six working days of the claim.

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.

All claims for furlough periods up to 30 June 2020 must be submitted by no later than 31 July 2020.

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?

The updated guidance published on 13 May 2020 makes it clear that workers continue to accrue annual leave while on furlough, and that they are entitled to take leave during this time.

It goes on to state that holiday pay should be 'your usual holiday pay in accordance with the Working Time Regulations 1998', and that 'employers will be obliged to pay the additional amounts over the grant'. This suggests that where furlough pay is 80% of normal wages, the employer will be required to make this up to 100% of normal (i.e. pre-furlough) wages for any period of annual leave. The guidance goes on to note that employers have the flexibility to prevent or compel workers to take annual leave in line with the needs of the business.

The Government has also confirmed that all 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 two leave years.

We have prepared a separate guidance note which focuses on annual leave during furlough, a copy of which can be found here.

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.

Employers have an obligation to go through a prescribed collective consultation process if they are proposing to dismiss 20 or more employees at one 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 dismissals.

If the obligations are triggered, there may also be a legal defence on the basis of "special circumstances", given the unique and unprecedented circumstances. However this is very narrow and an employer would still be expected to take such steps as a reasonable to comply with the duty.

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.

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 our 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.