

CORONAVIRUS JOB RETENTION SCHEME – QUESTIONS ARE NOW ANSWERED (MOSTLY!)

The purpose of the Coronavirus Job Retention Scheme is to help employers who have been severely affected by coronavirus to pay employees' wages to try to avoid employers laying off staff or making staff redundant. Employers who are unable to operate or do not have any work for some or all their employees can choose to designate employees as furloughed.

Further to our previous article, we can now provide answers to the questions raised and provide additional information about this scheme.

How will the 80% of salary be calculated for staff whose earnings vary e.g. zero hours staff?

For full and part time salaried employees the employee's actual salary before tax as of 28 February 2020 should be used to calculate the 80%.

For employees whose pay varies and who have been employed for a full 12 months prior to the claim, the employer can claim the higher of:

1. the same month's earnings from the previous year; or
2. the average monthly earnings from the 2019/2020 tax year.

If an employee has been employed for less than 1 year, the employer can claim 80% of the average of the monthly earnings since they started work.

If an employee started work for the employer in February 2020, the employer should pro-rata the earnings from that month.

The employer will be able to claim for any regular payments they are obliged to pay the employee, including wages, past overtime, and compulsory commission payments.

The employer will not be able to claim for non-monetary benefits provided to employees, discretionary bonuses (including tips), commission payments and non-monetary benefits, for example, the value of health insurance or a company car.

Will the £2,500 reimbursement from HMRC include Employer's National Insurance contributions?

The grant from HMRC covers wages for those employees that have been designated as furloughed, limited to the lower of 80% of an employee's regular salary or £2,500 per month, plus Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on those employees' wages.

Please note, if the employer chooses to top up employees' salaries (i.e. to 100%), any Employer National Insurance contributions and minimum automatic enrolment employer pension contributions paid on the additional salaries will not be funded by HMRC. Any voluntary automatic enrolment contributions paid above the minimum mandatory employer contribution of 3% will also not be funded by HMRC.

The employee's tax, national insurance and employee's pension contributions will be deducted from the employee's wages in the normal way.

Can an employee be furloughed then brought back to work again and then furloughed for a second period?

Yes, employees can be furloughed and then asked to return to work again after a minimum period of 3 weeks. Once back to work, the employer can choose to furlough the same employee again for a second period while the scheme continues.

What information and evidence will employers need to provide to HMRC when they seek reimbursement under the scheme?

Employers will need to supply the following information to HMRC in order to seek reimbursement:

1. their ePAYE reference number;
2. the number of employees that have been furloughed;
3. the start and end date of the claim period;
4. the amount claimed;
5. the company's bank account and sort code;
6. a contact name; and
7. a contact number.

Before making a claim, the employer will need to calculate the amount that they are claiming which can be backdated to the date that the employee is furloughed. HMRC will check the claim and if it is successful, they will make a payment to the employer using BACS via a UK bank account. HMRC will retain the right to retrospectively audit all aspects of every claim.

An employer can submit a claim at least every 3 weeks.

How soon will employers receive payments under the scheme? Will certain businesses or sector be prioritised?

The government hopes that this scheme will be up and running by the end of the April. It is not clear how quickly payments will be made after the system has been set up. HMRC have stated that they will process all claims made prior to the scheme ending. The government has not announced that any businesses or sectors will be prioritised for payments first.

If an employer has already terminated the employment of staff for redundancy, can they rehire those staff and then furlough them? If so, can the employer clawback any termination payments that have been paid to the employees?

If an employer has made staff redundant or an employee left your employment on or after 28 February, the employer can agree to re-employ those members of staff and then place them on furlough. The employer can then receive the grant from HMRC to cover 80% of their monthly earnings, up to the monthly cap of £2,500.

The government has not mentioned whether any termination payments can be clawed back. In principle, it would be open to an employer to demand repayment of any termination payment as a condition of re-employing an employee.

Can an employee designated as furloughed work elsewhere thus potentially gaining a windfall?

An employee designated as furlough cannot undertake any work for their employer. Employees can take part in volunteer work or training, subject to public health guidance, as long as the employee does not provide any services to or make any money for their employer.

A furloughed employee who has a second job with another employer prior to being furloughed is not prevented from continuing to work for and receive pay from that other employer.

A furloughed employee is able to obtain alternative employment for the period that they are furloughed providing that their current employment contract allows them, or the employer has provided consent for the employee to do so.

How does pay under the scheme interact with the national minimum wage (NMW) rules for staff on NMW?

Staff are only entitled to NMW for the hours that they work. Workers that are furloughed do not carry out any work for their employer and must be paid the lower of 80% of their salary or £2,500 even if this would be below NMW based on the employee's usual working hours.

If employees are required to complete online training courses whilst furloughed, those individuals must be paid at least the NMW for their time spent completing the training course even if the employer will not be able to reclaim this money from HMRC.

If an employer dismisses for redundancy rather than furlough the employee, could it be liable for a later unfair dismissal?

The fact that the employer could have furloughed their staff rather than making them redundant will probably be taken into consideration when determining whether the dismissal was fair or unfair. However, other circumstances would also have to be taken into consideration such as the speed with which the business needed to make redundancies, the views of the people expressed in the consultation stage and the extent to which the Coronavirus Job Retention Scheme would have avoided the need to make redundancies.

Additional key information

- Employers who are eligible to claim under the scheme are businesses who have a UK bank account and have created and started a PAYE payroll scheme on or before 28 February 2020.
- Employees eligible for furloughing are ones who were on the employer's PAYE payroll on 28 February 2020.
- Employees who were placed on unpaid leave after 28 February 2020 are eligible to be furloughed.
- Employees on fixed term contracts may be furloughed.
- Employees must be notified of their furloughed status in writing and keep the written notification on file for five years.
- Directors can be furloughed. Directors cannot carry out any work for the Company except for their statutory duties as set out in the Companies Act 2006.

- Employees who are on sick leave or self-isolating should be paid Statutory Sick Pay but can be furloughed once they have recovered or come out of self-isolation.
- Employees who are shielding because they are extremely vulnerable and following public health guidance are eligible to be furloughed.

Potential issues with this scheme

Employees who are still working for their employer but have had their hours and pay reduced are not eligible to be furloughed. This could cause employers a few issues where the employee's pay has been reduced below 80% of normal pay, as such an employee would legitimately prefer to be furloughed and not have to work but still receive 80% of their wage under the CJRS. Ultimately, employees cannot designate themselves as furloughed because the employer has to agree to this. The employer should explain to the disgruntled employees that they need staff to continue working in order to keep the business running while bearing in mind the potential industrial relations consequences if they seek to maintain a situation in which those who are furloughed are better rewarded than those who are at work.

The system is potentially open to abuse by employers stating that they have furloughed employees but have allowed them to continue to undertake work. It is not clear what sanctions or methods of checking HMRC will implement but potentially they will ask for the payment to be reimbursed.

An employer can make an employee redundant after the employee's period of furlough has ended. Therefore, this scheme does not guarantee job security and employees both continuing to work or returning from furlough leave could be made redundant.

An issue that an employer could face is deciding which employees to furlough. If the employer has enough work for 10 staff but they employ 20, how would they decide on a fair selection process and the criteria by which to determine which 10 employees should be furloughed? Employers need to ensure that they do not discriminate when selecting and furloughing employees. One option for employers could be to rotate the staff who are on furlough leave, as long as each employee is furloughed for the minimum period of 3 weeks. This would ensure that different roles are covered at different times and that the business could still function.

Lastly, if 20 or more employees are furloughed within a 90-day period or less, it is arguable that an obligation to collectively consult may arise and that a HR1 form may need to be completed and filed. This would be particularly necessary if it is likely that after the period of furlough employees could be made redundant. Collective consultation could be tricky at the minute due to self-isolation and shielding but could be conducted by electronic means such as skype.

Contact Us

If you have any queries on the above please do not hesitate to contact the [Employment department](#).