

Furlough Leave: *Frequently asked questions*

Last updated 6 April 2020

FOR THE MOST UP TO DATE POSITION, PLEASE READ THE GOVERNMENT GUIDANCE. THIS CAN BE FOUND AT:

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

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Background

Please remember that this is a guide, based upon some of the frequently asked questions we have seen over the last couple of weeks. It does not constitute legal advice. There is no substitute for taking specific legal advice. We urge people to take professional advice based on their individual circumstances.

Q: What is furlough leave?

A: This was announced on 20 March 2020 by the government. It allows all employers in the UK to get a grant from HMRC for 80% of employees' wages, up to a cap of £2,500. HMRC will only provide the grant in respect of those furloughed for at least 3 consecutive weeks'.

Q: Who is eligible for furlough leave?

A: You can be on any type of contract including full time and part time employees, employees on agency contracts, or employees on flexible or zero-hour contracts. To be able to claim, your employer must have:

- created and started a PAYE payroll scheme on or before 28 February 2020
- enrolled for PAYE online - this can take up to 10 days
- a UK bank account

Any entity with a UK payroll can apply, including businesses, charities, recruitment agencies and public authorities.

Q: Are there any other individuals eligible for this scheme who are not employees?

A: Yes some can, if they satisfy the other criteria such as:

- Office holders (including company directors)
- salaried members of Limited Liability Partnerships (LLPs)
- agency workers (including those employed by umbrella companies)

For access to the full list, please visit the current government guidance. The link is available at the top of this document.

Q: Can Company Directors be furloughed?

A: If they satisfy the eligibility criteria. Company Directors owe duties to their company. For more information on this visit the government guidance at the top of this document.

Q: What about Salaried Members of Limited Liability Partnerships?

A: It appears that those who are designated as employees for tax purposes are eligible. For more information on this visit the government guidance at the top of this document.

Q: Are foreign nationals eligible to be furloughed?

A: According to the government guidance, yes, they are.

Q: Would someone placed on unpaid leave be eligible for furlough?

A: Yes, if they started unpaid leave after 28 February 2020.

Q: I was hired after 28 February. Am I eligible for this scheme?

A: Unfortunately, it does not appear so. You may need to apply for another type of government support, such as Universal Credit. Alternatively, you could ask a former employer, if you were on their PAYE payroll on 28 February 2020 to rehire you. If they agree they could place you on furlough leave. However, they may also tell you to come in to work or to work from home. There is no obligation on your former employer to do this.

Q: If I left employment for any reason since 28 February, is there any way I am eligible for furlough leave?

A: Although the guidance says that only those made redundant after 28 February 2020 are eligible for being rehired and put on furlough, the updated guidance has set out that anyone who leaves employment after 28 February and is subsequently rehired will be eligible for furlough leave, if they satisfied the criteria at the time. However, it is up to the employer whether or not they take you back, and whether or not to place you on furlough leave. They may expect you to work instead.

Q: If an employee is shielding in line with the public health guidance (or need to stay at home with someone who is shielding) will they be eligible to be furloughed if they cannot work from home?

A: Yes, if you would otherwise have to make them redundant. For more information on the public health guidance please visit:

<https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#what-is-shielding>

Q: Can an employee with caring responsibility, such as looking after children, be furloughed if they are unable to work?

A: Yes they can be.

Q: Are fixed term employees eligible for this scheme?

A: Yes, provided they fit the criteria. If a fixed term contract is due to expire the employer could choose to extend the contract during furlough leave, or renew it. If they did this they could continue to access the scheme for that employee. If the fixed term contract ends and is not extended or renewed an employer will no longer be able to claim under this scheme for the employee.

Q: Are agency employees eligible for furlough leave?

A: If they were on PAYE payroll on 28 February they should be. However, if you want more information please visit the government guidance (link at the top of this document) on this.

Q: Can an eligible employee be furloughed more than once?

A: Yes they can.

Q: What about the self-employed?

A: They are not covered by furlough leave, but there is a separate scheme from HMRC for the self-employed. If you want more information please visit the government guidance on this:

<https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>

Employees

Q: When would pay for furlough leave start?

A: The Chancellor has set out that payment will be backdated from 1 March 2020 and will remain open for at least 3 months.

Q: Will I get my full salary on furlough leave?

A: The HMRC grant will only cover 80% of your salary, up to a cap of £2,500 a month. An employer could choose to top up your salary so you receive 100% of your salary, but this is at their discretion.

Q: Do I have to accept getting only 80% of my salary, subject to the cap?

A: It depends on what is in your contract of employment. A claim for unlawful deduction of wages would probably be an option for most if they are not paid in full and their contract does not allow for a lay off or for the employer to unilaterally change your amount of pay.

However, making such a claim may not be that sensible. It is something to look at on a case by case basis, but a large number of businesses would probably not survive without the support from the government. Simply put, many probably cannot afford to pay the difference and your employer may need some liquidity in their business for when things start to return to normal. A claim for unlawful deduction of wages may result in a business entering liquidation, administration or winding itself up. If that happens, it is unlikely you will recover wages you are owed in reality. You may also find that an insistence that you are not paid at 80% (subject to the cap), but receive your full wage, simply results in you being made redundant.

Q: I was put on reduced hours, or reduced pay. Am I eligible for this scheme?

A: If you are working you will not be eligible for this scheme. Your employer will need to pay your salary subject to the terms of the employment contract you agreed.

Q: Is the furlough pay subject to income tax or National Insurance?

A: Wages of furloughed leave will be subject to Income Tax and National Insurance as usual.

Q: Is the £2,500 cap in regards to the basic salary or would it cover other things, such as pension contributions?

A: Your employer will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage.

An employer can claim for any regular payments they are obliged to pay you. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

Q: Can I put myself on furlough leave?

A: No. Your employer needs to fill out the HMRC online portal setting out who is on furlough leave. You can request to be put on furlough leave, but your employer does not have to agree to such a request.

Q: If I am placed on furlough leave, do I have to work at home, or still attend my place of work?

A: No. If you are on furlough leave you must not be working. However, please see our answers in respect of volunteering and training.

Q: So, can my employer make me work, whilst putting me on furlough leave?

A: No they cannot and should not do this. However, please see our answers in respect of volunteering and training.

Q: So I cannot work for my employer when I am on furlough leave?

A: That is correct. However, please see our answers in respect of volunteering and training.

Q: Can my employer make me volunteer to work for them?

A: Yes, so long as the voluntary work does not provide services to or generate revenue for, or on behalf of the employer.

Q: Can my employer make me take part in training?

A: Yes, so long as the training does not provide services to or generate revenue for, or on behalf of the employer. Those in training must be paid at least the national living wage/national minimum wage for the time spent training.

Q: I was made redundant, rather than put on furlough leave. Is there anything I can do?

A: It may be you would have some form of claim against your employer, but it depends on the facts of each case. It is up to an employer whether or not to put you on furlough leave. They could choose redundancy instead, or do something else if the contract of employment allows that. All you can really do is ask them to re-consider and perhaps make them aware of a risk of a possible claim against them. Please see our example letter for what this might look like.

Q: I'm on unpaid maternity leave. Can I come back early to be put on furlough leave?

A: We cannot say as the guidance appears to be silent on this point. We think this may be an option (although we need to see what the legislation will say as it may prevent this). If it is an option, you would need to be sure that your role is furloughed, as you would have to go back to work if not. You would need to give 8 weeks' notice of an intention to return to work, unless you and your employer agreed to waive that time period.

Q: I think I may get paid better if I end my maternity leave and go on furlough. Can I do that?

A: This should be assessed on a case by case basis and we suggest you seek specific advice before making a decision.

You could end your maternity leave, but you would need to consider this carefully. You should firstly make sure you are happy it will pay you more. It may also be sensible to change onto shared parental leave, rather than to just end maternity leave. There is also a risk you are

simply asked to return to work and not put on furlough leave. Once any furlough leave allowed is over, you will not be able to return to a maternity leave once if you have ended it. The same does not apply if you are on shared parental leave. Where you can take the leave in blocks separated by periods of work. However, you need to share the leave within the first year after your child is born.

Q: I am an employee on an agency contract. They have some work for me. Am I eligible for furlough leave?

A: If you are working then you are not eligible for this scheme.

Q: Should I be paid my full wage if I am on annual leave?

A: It is expected that annual leave will be paid in full.

Q: How should I be paid if I am under the shielding guidance?

A: You can be put on furlough. If your employer has not done so you can write and ask them to do this. You should explain to your employer that you are following the shielding guidance. Please see our example letter.

Q: Will holiday days continue to accrue during furlough leave?

A: That is our understanding on the point.

Q: I have a holiday coming up and I no longer wish to use it. Can I cancel those days as being my holiday days?

A: The employer has no obligation to do this by law. You may want to check your employer's holiday policy to see if they provide this right. There is, however, little to lose by nicely asking your employer if they would agree to do this.

Q: Can a furloughed employee go find themselves another temporary job with a different employer while furloughed (such as working in a supermarket)?

A: If contractually allowed, you can work for a new employer whilst you have placed on furlough at your original employer. Make sure you have properly read and understood the terms of your contract.

Employers

Q: *I don't know how to put people on furlough leave. What should I do first of all?*

A: You will need to find out who is eligible and tell those individuals that you intend to put them on furlough leave. It may be worth considering whether to rehire any employee made redundant after 28 February 2020, as they will be eligible for this scheme. You would need the agreement to do this from your former employee.

Q: *Is there a checklist of things I should do as a business?*

A: 1. Decide who is eligible for furlough leave, including anyone made redundant after 28 February 2020;

2. Update current employees in writing of your intention to place them on furlough leave. If you made redundancies after 28 February 2020 and wanted to offer furlough leave at this point, you would need to ask them to agree to be re-hired first;

3. Do you need to change the terms of employment for more than 20 employees? If you are you may need to collectively consult and should take advice on this process. Similarly, if more than 20 reject being placed on furlough leave it may trigger an obligation to collectively consult in relation to any subsequent redundancy process;

4. Check if the contracts of employment (for those eligible for furlough leave) allows you to provide them with no work, reduce their pay and change their employment status unilaterally. If it does not, then you will want to have each staff member agree to go on furlough leave. Given the alternative for staff would likely be worse than going on furlough leave, it is likely most will agree to go on furlough leave;

5. If agreement is reached, confirm the agreement in writing. It may be sensible to set out in writing when you will next review this situation;

6. Put the relevant information in to the HMRC online portal; and

7. Remember your staff cannot carry out work for you whilst on furlough leave.

Q: *What will I need to make a claim?*

A: To claim, you will need:

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

You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim.

Q: I made staff redundant as a result of COVID -19, but did not realise I could have put them on furlough leave. Can I do anything at this point?

A: If you made them redundant after 28 February 2020 this scheme can still apply. You would need to rehire them to be able to then put them onto this scheme. It is best to do this in writing and the employee would need to agree to being re-hired.

Q: Can I just put PAYE employees on furlough without amending the contract?

A: It depends on whether the contract you have with your PAYE employees allows you to do this. If it does not, then you should discuss and make any required changes to the employment contract by agreement. Please contact us separately if you want to make an enquiry as to what this contract variation may look like.

Q: Can I just furlough who I want to?

A: You choose which eligible employees to place on furlough leave. However, take notes of your decision process and make sure the decisions you reach are justifiable. Equality and discrimination laws will apply in the usual way.

Q: How do I tell PAYE employees that they are furloughed? Can I just call them?

A: You can call them to explain and provide an opportunity for them to ask questions and air any concerns. However, you must confirm this in writing to your employees (an email should be fine) to say they have been furloughed and keep a record of that communication.

Q: Can I furlough staff that I have just hired?

A: It depends when you hired them and whether they were on your PAYE payroll on 28 February 2020. Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme.

Q: Can I furlough employees on unpaid leave?

A: Only if they were put on unpaid leave after 28 February.

Q: Can I furlough employees on sick leave?

A: If an employee is on sick leave or self-isolating, they should get Statutory Sick Pay, but can be put on furlough once they are fit or able to return to work.

Q: Some of my employees have other jobs as well as working for us. Can I furlough them?

A: Yes. Those employees can be furloughed for each job. The cap will apply to each employer individually, so you would furlough them in the same way as any other employee on the scheme.

Q: Can my furloughed employees volunteer to work for me?

A: Yes, so long as the voluntary work does not provide services to or generate revenue for, or on behalf of your organisation.

Q: Can my furloughed employees take part in training?

A: Yes, so long as the training does not provide services to or generate revenue for, or on behalf of your organisation. Those in training must be paid at least the national living wage/national minimum wage for the time spent training.

Q: Who works out how much we can claim?

A: Employers need to make a claim for wage costs through the scheme. For more information on pay visit:

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

Q: Am I still liable for National Insurance and the minimum automatic employer Pension Contributions in respect of furloughed employees?

A: Yes. You can claim for this as part of a grant from HMRC to cover wages for a furloughed employee which is in addition to the £2500 cap.

Q: Can I furlough an apprentice?

A: Yes, but if they are training then you need to pay your apprentice at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage as appropriate. For more information visit:

<https://www.gov.uk/government/publications/coronavirus-covid-19-apprenticeship-programme-response/coronavirus-covid-19-guidance-for-apprentices-employers-training-providers-end-point-assessment-organisations-and-external-quality-assurance-pro>