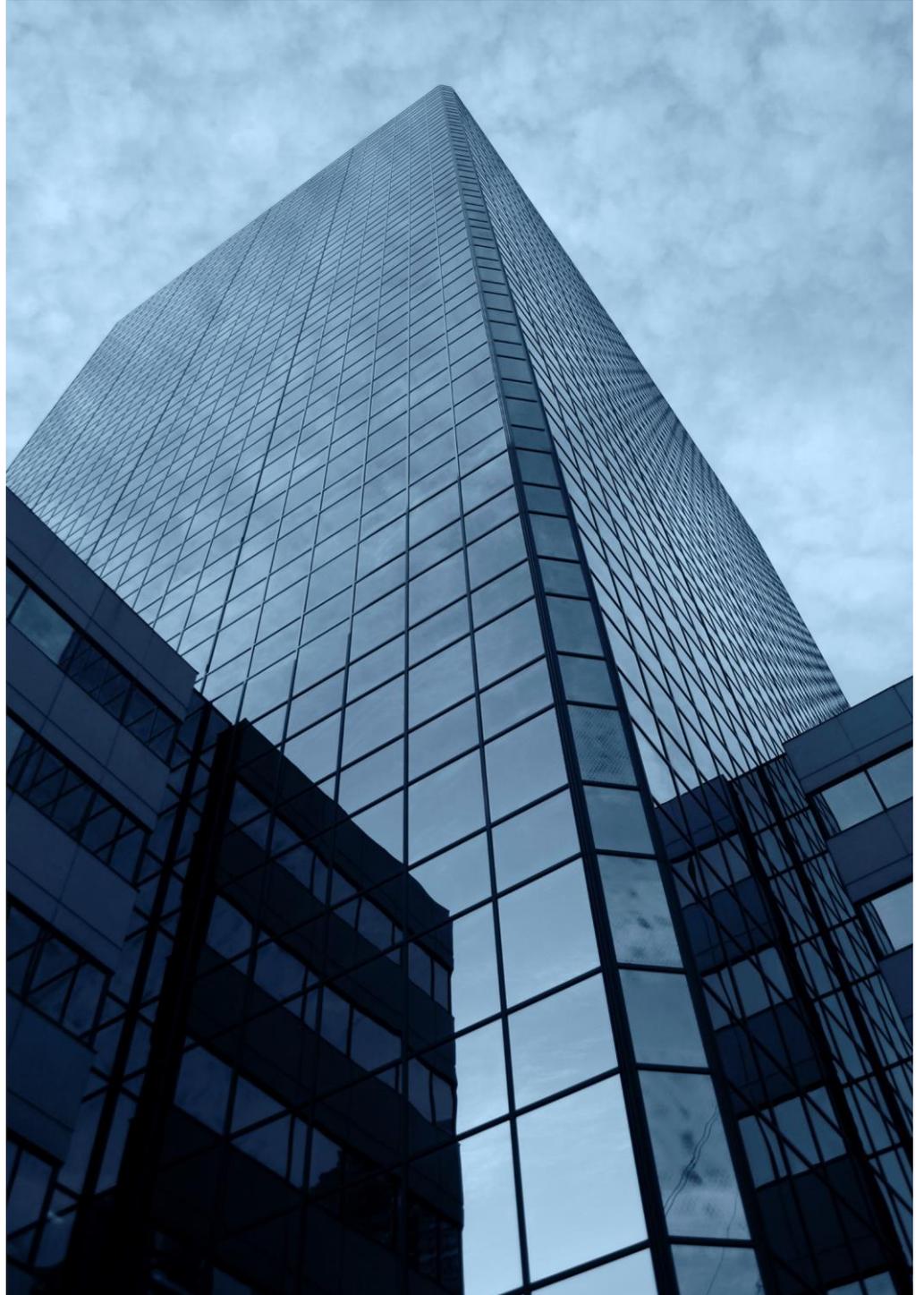

Coronavirus Job Retention Scheme – Government and HMRC guidance

27 March 2020



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Coronavirus Job Retention Scheme

The government and HMRC have published guidance on the new Coronavirus Job Retention Scheme.

The government and HMRC have published guidance on 26 March 2020 on how the new Coronavirus Job Retention Scheme is intended to work. The guidance answers many questions asked since the announcement was made last week. It is important to note that the guidance specifically states that the scheme is designed to support employers whose operations have been “severely affected” by coronavirus.

There are still a few outstanding issues but this is what we now know.

Clarification from the guidance:

- All UK businesses, including charities and not for profit organisations, will be eligible to apply for grants.
- The scheme is open to all UK employers that had created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.
- The scheme offers temporary contributions to the wages of workers for employers “severely affected” by the COVID-19 pandemic. It will operate for at least 3 months from 1 March 2020, but may be extended.
- To be considered furloughed, the employees must not be working at all for the organisation, but will remain ‘on the books’. To be eligible for the subsidy employers should write to their employees confirming that they have been furloughed and keep a record of this communication. However, to avoid constructive unfair and wrongful dismissal, it is important to consider how this is implemented first.
- The minimum length of time an employee can be furloughed for is 3 weeks. Although not specifically addressed in the guidance this suggests that it will be possible to rotate furloughed employees.
- Furloughed employees have the same employment rights as non-furloughed employees including in respect of unfair dismissal, redundancy payments and statutory payments such as statutory sick pay and maternity rights and other parental rights. The position on holiday is not addressed.
- Information about the furloughed workers and their earnings can then be submitted to HMRC through a new online portal, which is being urgently created.
- HMRC will reimburse 80% of a furloughed worker’s wages for all employment costs to employers directly, by way of a grant of up to a cap of £2,500 per month. This amount can be topped up by employers, if they choose to do so.

- Employers will be able to claim once every 3 weeks. HMRC expects the scheme to be up and running by the end of April 2020. Grants can be backdated to 1 March 2020.
- When the scheme ends, the employer will need to assess at that point whether to bring the employee back to work or, depending on the circumstances, make them redundant.
- HMRC states that it retains the right to retrospectively audit all aspects of any claim.

Risks and Issues:

Who can be furloughed?

- The scheme applies to employees who have been on PAYE payroll on 28 February 2020.
- Eligible employees can be on any type of contract including full-time employees, part-time employees, employees on agency contracts and employees on flexible or zero-hours contracts. The guidance does not clearly state that the scheme applies to a “worker” but our view is that if they are paid through PAYE they will come within the scheme and if not, they will fall under the self-employed scheme.
- Only employees who have been placed on unpaid leave after 28 February 2020 can be furloughed.
- It can apply those who have been made redundant since 28 February 2020, if they are re-hired by their employer.
- Employees who are shielding in line with public health guidance can be placed on furlough leave.

Who cannot be furloughed?

- Employees working on reduced hours or for reduced pay.
- Employees hired after 28 February 2020.
- Employees placed on unpaid leave **before** 28 February 2020.
- Employees on sick leave or self-isolating should get SSP but they can be furloughed after this.
- Employees on the two weeks compulsory maternity leave after birth.
- The self-employed (for whom a separate scheme will apply as announced on 26 March).
- Non-employees (including, for example, non-executive directors).

How 80% of wages costs is calculated?

- The guidance states that employers will be able to claim the **lower** of 80% of the employee’s “regular wage” or £2,500 **plus** the associated Employer National Insurance Contributions and minimum automatic enrolment employer contributions on that subsidised wage.
- For full-time and part-time salaried employees the employee’s actual gross salary (as at 28 February 2020) before tax is used. Fees,

commission and bonuses should not be included. Employees remain liable for their own tax and employee NICs.

- As furloughed employees are not working, it does not matter if the 80% calculation takes them below national minimum wage (NMW) based on their usual working hours. However, if they are required to complete training whilst furloughed, they must be paid at least NMW for time spent training, even if this is more than 80% of their wage that will be subsidised.
- For employees whose pay varies, the claim will be for the higher of:-
 - the same month's earnings from the previous year, or
 - average monthly earnings from 2019-2020 tax year.

If they have been employed for less than a year, the employer can claim for an average of their monthly earnings since they started work.

20% top-up:

Government guidance states that employers can “choose” to fund the difference between normal salary and value of the grant, but do not have to do so:

- The change to furloughed status remains subject to existing employment law and the contract of employment;
- Employers must reach and record agreement with furloughed employees to waive all or part of the excess over the value of the grant.
- If the employer chooses to top up, the employer NICs and auto-enrolment pension contributions in respect of the top-up amount will not be funded through the scheme.

Holiday

- There is no reference in the guidance to the status of holiday rights under the Working Time Regulations (WTR). However, the government has announced it is amending the WTR to allow the carry-over of up to 4 weeks' leave into the next 2 leave years where it is not reasonably practicable for employees to take some or all of their holiday entitlement due to coronavirus.
- It therefore appears that statutory (and any contractual) holiday continues to accrue. However, the position is unclear as to the interaction with furlough leave and whether a furloughed employee can take holiday and be paid for it in full. It is hoped that further clarification is forthcoming

Maternity rights

- An employee cannot be furloughed during the two week compulsory maternity leave
- Eligibility for SMP is unchanged. However, if the employee is on furlough leave prior to taking maternity leave their average weekly earnings may be affected for the purposes of calculating their SMP.
- If the employer offers enhanced contractual pay to women on maternity leave, the guidance states that this is included as wage

costs that can be claimed through the scheme. This implies that a woman on maternity leave may wish to be furloughed in order to claim an amount higher than the rate of SMP. It is unclear but the guidance appears to be saying that she can be on maternity leave and also be furloughed.

Employer pension contributions and NICs

- More guidance is due on how employers should calculate their claims for Employer National Insurance Contributions and minimum auto-enrolment employer pension contributions before the scheme becomes live.
- What is clear is that no payments above the minimum employer automatic enrolment contributions will be met by the scheme and therefore contractual variations may be required in the furlough agreement.

'Furloughed' status:

Changing the status of an employee remains subject to existing employment law and the ability to do so will therefore be dependent upon the terms of the employment contract:

- Few contracts contain an express right to change status or lay off employees for whom the employer has no work.
- Unless such a right exists, employers will need to agree the change, or introduce it on notice.
- Merely imposing the change will expose the employer to the risk of employees resigning to claim wrongful dismissal and (for those with 2 years' qualifying service) unfair dismissal. Alternatively, employees could refuse to accept the change, continue in employment under protest and later claim damages or an unlawful deduction of wages for the balance of their contractual salaries.
- In practice, many employees may consider it more attractive to accept the change to become furloughed than face redundancy.
- The employer needs to write to the employee confirming furlough status and keep a record of this communication to be eligible for the grant.
- One key issue which remains to be resolved is whether a designated employee will cease to qualify for the grant if the employer serves notice of dismissal. The guidance is silent.
- It is highly likely to be the case – otherwise employers will have been handed an incentive to dismiss. They can designate an employee with furlough status, claim the grant, serve notice and use the grant to subsidise dismissal.

Non-furloughed workers:

Only employers can apply for grants to pay the wages of furloughed workers:

- Employees cannot demand to be furloughed without their employer's agreement.

- Selection of furloughed, retained and redundant employees could cause resentment within the workplace e.g. from employees who are retained, while their colleagues are sent home and paid 80% of their wages for no work at all.
- The guidance does not refer to any requirement to adopt fair criteria to make those decisions, but does acknowledge that these decisions will be subject to existing equality and anti-discrimination law.
- No grant is available for employees continuing to work normal or reduced hours, for example, due to agreed short time working. As workers designated as 'furloughed' under the scheme cannot undertake *any* work for their employer, the grants cannot be used to top-up the wages of such workers.
- Employers may dislike rewarding, for example, half their workforce for no work at all when they would prefer to have all their staff on half-time working. One possible solution would be to rotate workers on furlough, in order to treat all workers equally. However, it may be that such complexity proves administratively prohibitive for some employers.

Abuse:

- Concerns have already been raised over businesses exploiting the scheme by claiming workers are furloughed when, in reality, they remain in work, particularly for owner-managed companies paying wages to the owner.
- However, the scheme only applies to those whose operations are severely affected by coronavirus and HMRC retains the right to retrospectively audit any claim. There is no guidance, however, on what "severely affected" means. The government have left themselves some leeway on what may or may not be covered.
- Employers are well advised to record the threats and operational risks faced by the business at the time the decision to furlough employees is made.

The government have been clear that the scheme will apply broadly, in an attempt to protect as many jobs as possible.

Aside from the rapidly evolving legal position, effective communication and transparency are key for all employers when implementing a period of furlough. Open discussion, pragmatic solutions and, preferably agreement will be critical in using the scheme to save businesses and reduce the risk of claims.

Contact

If you have any queries, please contact