

XACT Frequently Asked Questions Regarding Furlough prepared by XACT Group - <https://www.xactgroup.co.uk/>

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Government Guidance on the Job Retention Scheme

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

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Updated here – 23 April 2020

Disclaimer:

IMPORTANT UPDATE

*****The new PAYE reference date is now 19 March 2020.**

'You can only claim for furloughed employees that were on your PAYE payroll on or before 19 March 2020 and which were notified to HMRC on an RTI submission on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020. Employees that were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough.'

These FAQ's should not be relied upon as legal advice as the landscape is changing on a daily basis. The Treasury has now issued a Directive which has a legal basis. This trumps previous guidance issued by the Government and the FAQ's have been updated taking this into account.

Summary

The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at **least three months** starting from 1 March 2020. **This has now been extended until the end of June.**

UPDATED: The HMRC portal for making claims under the scheme was open on 20 April and is now up and running. Payments are being processed 4-6 working days from the date the claim is made. You should still try to ensure that wages are paid at the relevant date to avoid any further issues such as an unlawful deduction of wages or breach of contract claim. If this is not possible due to cashflow reasons then you should communicate with your employees at the earliest date so that they can make the necessary arrangements with their financial obligations.

HMRC Guidance has been published below on how to make a claim through the portal and details the information required for each claim:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880099/Coronavirus_Job_Retention_Scheme_step_by_step_guide_for_employers.pdf

Please note, this FAQ is subject to being updated on a regular basis as the guidance and Government advice is constantly changing and therefore we do not accept any liability for the advice contained within this document and we recommend you seek specialist advice on any case you are unsure of.

Employers can use a portal to claim for 80% of furloughed employees' (employees on a leave of absence) usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers can use this scheme anytime during this period.

UPDATED: The scheme is open to all UK employers, including charities, recruitment agencies and public authorities that had created and started a PAYE payroll scheme on **19 March 2020**. **The scheme has now been extended to include employees on the PAYE systems as at 19 March 2020.**

UPDATED: The employer must be enrolled for PAYE online – this can take up to 10 days to register if you do not have an online account already set up

Key points:

- Eligible employees must have been on your payroll on 19th March 2020
- Employees must be furloughed for a minimum of three weeks
- **UPDATED:** Employees who are shielding in line with public health guidance (i.e. have been deemed very high risk and have received notification from the Govt that they fall into this category **can** be placed on furlough but those self-isolating will only be entitled to furlough once the period of self-isolation has completed (and there is no available work for them to do). **This has been confirmed by HMRC as at 9 April 2020.**
- The grant will cover the lower of 80% of usual salary or £2,500 plus National Insurance and minimum automatic enrolment employer pension contributions **the NI/pension contributions will be at the 80% rate (confirmed 9 April 2020);** and

UPDATED: How do you set up an employee to be on furlough?

- You require the agreement of the employee as you are essentially varying their employment status.
- It has now been updated by the Government to confirm that this Agreement **must** be in writing.
- **UPDATE (23/04/2020): It has now been clarified by HMRC that despite the wording in the Directive conflicting with the guidance given previously, that the employer does not need to have the employee's written consent to be furloughed however we would recommend that you do this in the event that HMRC does an audit on your business.**
- This written notification should be kept on record for five years.
- The employer should therefore write to the employee asking them to agree to be on furlough. We have a template letter which we recommend you use. This letter also allows for the employee to return to employment once the period of furlough has ended or if the employer requires them back because work becomes available

- You should ask the employee to sign this and return it however given the circumstances surrounding practical limitations because of lockdown then we suggest you ask the employee to respond to the email with the Agreement and to confirm, in writing, that they agree to all of its terms and date this or use a digital signature if possible.
- **UPDATED:** Grants will be prorated if your employee is only furloughed for part of a pay period.
- **UPDATED:** Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status.

Updated: Can you rotate employees on furlough?

- This has now been confirmed by the Government that yes you can. But only for up to 3 weeks at a time. For example, you can designate one employee to be furloughed for 3 weeks then designate another employee to be furloughed for a further 3 weeks and rotate them. However, each claim will need to be made separately in respect of each “block” of furlough leave (to a **minimum** of 3 weeks each time but maximum of 3 months). You cannot have one employee work half the week and another employee work the other half of the same week.

Updated: Can the employee start a new job when on furlough from their existing job?

- Yes, this has been clarified by the Government that they can start a new job when on furlough (meaning they might end up earning 80% of the old salary and 100% of a new one). This was not prohibited in the earlier guidance, but the new guidance expressly allows it. The guidance does not say it has to be allowed under the old employment contract, but presumably the old employer can waive that.
- Check the employment contract to see if there is a clause which requires employees to obtain consent from the employer to work for another company as the employer may be able to refuse consent in some circumstances

- If your employee has more than one employer they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

NEW * Updated: Do you accrue annual leave when on furlough?

- We understand that annual leave will continue to accrue during a period of annual leave **(to the best of our knowledge but this has not been confirmed by the Government in guidance).**
- Recent amendments by the Government also extended the Working Times Regulations (Amendment 2020) to allow employees to carry over 20 days paid annual leave for a further 2 year period if it was not reasonably practicable for them to use it in the same holiday year. Please note, this only applies to the first 20 days of annual leave. The remaining 8 days under UK law cannot be carried over.

***NEW Updated: Can you be on annual leave and furlough at the same time?**

- **UPDATED 23 April 2020:** There is nothing in the legislation regarding annual leave and furlough however there has been updated guidance issued (as at 17 April) confirming that you can take annual leave whilst on furlough however that payment must be made at the 100% salary rate and not the 80% rate. This also effectively means that they can be on annual leave and furlough at the same time meaning that the employer can reclaim 80% of the wages during annual leave and only top up the remaining 20% whilst the employee is on annual leave.
- We would also suggest that you should not expect your employees to use up a significant portion of their annual leave for this period and we would suggest a maximum of 5 days would be reasonable in the circumstances however this is not a legal requirement and is merely a recommendation for good practice.
- It is also important to remember that employees will need to retain annual leave to use for company shutdown periods including over the Christmas period.
- Please note, the employer should also give employees twice as much notice as the length of your annual leave to take it and this should be paid at the employee's full salary rate and not the 80%.

Updated: What if we have employees starting after 28 February that are currently employed?

- **UPDATED:** Employees employed after 28 February CAN be furloughed up to the relevant date of 19 March (subject to the employer having notified HMRC of the above points)
- You can only claim for furloughed employees that were on your PAYE payroll on or before 19 March 2020 and which were notified to HMRC on an RTI submission on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020. Employees that were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough.

2 new employees are due to start soon and the work they were going to be doing is no longer available to them, what can we do?

- If there is no work for them to be done **and** the start date is more than one week away then we would suggest withdrawing the offer of employment and give them notice under the contract (if no notice clause then the statutory minimum would apply of one week at full pay). There still could potentially be a breach of contract claim by doing this but any losses/damages suffered by the employee would likely to be minimal.
- If the employee is due to start within the next week then we would recommend you have an informal discussion with them to see if they would be willing to agree to a later start date. If they do not agree, then you could pay them the notice as above but may face a higher risk of breach of contract claim as there is less time for them to get an alternative job. This risk may be more attractive than the alternative

option which would be to let them start and then have to consider redundancy or laying them off as unpaid leave or short time working

Updated: What does the £2,500 maximum payment cover? What do we need to pay?

- The 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. Fees, commission and bonuses should **not** be included.
- At a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. An employer can also choose to top up an employee's salary beyond this but is not obliged to under this scheme.
- It has been clarified by the Government that an employer can reclaim 80% of compulsory (presumably meaning contractual) commission back from HMRC as well as basic salary. This would likely apply to the sales sector such as car salesmen and estate agents but may also apply to hairdressers if they were earning commission which was part of their *contractual* entitlement to pay. This can only be referring to the commission from *past* sales or commission as the furloughed employees cannot be completing new sales or earning commission when on furlough.
- It does **not** however include non-monetary benefits such as the value of health insurance or a car.
- Employers can also reclaim 80% of fees from HMRC (although there is no clarification on what this actually means).

UPDATED: If someone is self-isolating or on sick leave

- If your employee is on sick leave or self-isolating as a result of Coronavirus, they'll be able to get Statutory Sick Pay, subject to other eligibility conditions applying. The Coronavirus Job Retention Scheme is not intended for short-term absences from work due to sickness, and there is a 3 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 off on long-term sick leave. It is up to employers to decide whether to furlough these employees. You can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate scheme for the same employee but not for the same period of time.
- When an employee is on furlough, you can only reclaim expenditure through the Coronavirus Job Retention Scheme, and not the SSP rebate scheme. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, then you might qualify for the SSP rebate scheme, enabling you to claim up to two weeks of SSP per employee.

UPDATED: If your employee becomes sick while furloughed

- Furloughed employee retain their statutory rights, including their right to Statutory Sick Pay. This means that furloughed employees who become ill must be paid at least Statutory Sick Pay. **It is up to employers** to decide whether to move these employees onto Statutory Sick Pay 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 2 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.

UPDATED: Shielding Employees

- Employees who are unable to work because they are shielding in line with public health guidance (or need to stay home with someone who is shielding) can be furloughed.

Can directors be placed on furloughed?

There are two types of Directors:-

- Non-exec director – Will not be considered employee so cannot be placed on furlough as they don't fall into the "employee" category
- Exec director will usually be classed as employees provided they have a contract of employee and are paid through the PAYE system. If they draw additional dividends then they will not be entitled to this and only the 80% of basic pay.
- It has now been clarified by the Government that Company directors **can** be furloughed.

Can an employer carry out redundancy whilst furloughed?

Yes, however extra care should be taken if there is the option to furlough the employee and the downturn in work is directly related to COVID-19. Consider whether, after this period (the next 12 weeks), if the work is likely to pick up again before making the decision to begin the redundancy process. We would recommend you take specific advice on this due to the high risk nature of any potential claims being brought against you.

Updated: What about an employee who was made redundant before 28 February or after?

- They can be re-engaged and can be designated as furloughed however this is at the employer's discretion.
- We would advise that the employer exercises caution and take each employee on a case by case basis as re-hiring employees will then give

them the same employment rights they had previously and may cause difficulties in future when work becomes available again.

Can redundancy notice run alongside furlough leave?

It appears to be the case however we are still awaiting further guidance on this specific point from the Government. The employer would have to pay the full 100% notice pay and not 80% however.

***AGAIN UPDATED:** What if the business has been TUPE'd over and the employees of the newly TUPE'd company were not on the payroll as at 28 February?

- There was a previous loophole which meant that they would not be covered under the scheme however HMRC have now confirmed that they can be put on furlough (confirmed 9 April 2020)
- *"A new employer is eligible to claim under the CJRS in respect of the employees of a previous business transferred after 28 February if either the TUPE or PAYE business succession rules apply to the change in ownership."*
- **Again – now updated to refer to 19 March 2020 as the date.**

UPDATED: What if my employee has went back home and lives outwith the UK?

- As long as they were registered with HMRC and on the employers PAYE system then they are entitled to be furloughed
- Additionally, HMRC have also confirmed that those with certain work visas will not be regarded as breaching their visa conditions if they receive funds under the furlough scheme
- *"Grants under the scheme are not counted as 'access to public funds' and you can furlough employees on all categories of visa."*

How would furlough leave apply to agency workers and fixed term?

- This has now been clarified by the updated guidance which states:-

Furloughed employees must have been on your PAYE payroll on 28 February 2020, and can be on any type of contract, including:

- full-time employees
- part-time employees
- employees on agency contracts
- employees on flexible or zero-hour contracts
- foreign nationals are also eligible to be furloughed provided they meet the above criteria

This scheme is only for employees on agency contracts who are **not** working.

Those on fixed-term contracts would not normally be entitled to furlough if the end date of the contract is during this period however you can agree to extend this date with the employee should you wish. There is no guarantee you would be able to reclaim from HMRC in this event however so tread very carefully and seek specific advice if you have employees who fall into this category.

How do you work out how to pay employees whose hours vary?

- If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, you can claim for the **higher** of either:
 - the same month's earning from the previous year (i.e. March 2019)
 - average monthly earnings from the 2019-20 tax year
- If the employee has been employed for **less** than a year, you can claim for an average of their monthly earnings since they started work.
- If the employee only started in February 2020, use a pro-rata for their earnings so far to claim.

Once you've worked out how much of an employee's salary you can claim for, you must then work out the amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions you are entitled to claim.

UPDATED: Returning from statutory leave – how is pay for furlough calculated if returning from statutory leave such as maternity leave?

- Statutory leave includes maternity leave, paternity leave, shared parental leave, adoption leave, sick leave and parental bereavement leave.
- In line with other employees, claims for full or part time employees returning from statutory leave after 19 March 2020 should be calculated against their salary, before tax, not the pay they received whilst on statutory leave.
- Claims for those on variable pay, returning from statutory leave should be calculated using either the:
 - same month's earning from the previous year
 - average monthly earnings for the 2019-2020 tax year.

Can an employee on maternity leave come back early and get furloughed?

Yes, depending on the stage of maternity but the employer has to agree. The employee should normally give 8 weeks notice to return early but this can be agreed earlier. If there is no work to be done and the employee would otherwise be laid off then they can be furloughed.

UPDATED: Can an employee do work on furlough?

- No, the employee should not be doing any work but they can do some training as long as it does not generate any business for the company. If they are training then they should also be paid at NMW rates for the period they are doing the training (this means if furloughed and the 80% drops below NMW then it will need to be topped up to meet NMW for the specific period of training). We recommend you seek specialist advice on this point.
- **UPDATED:** An employer can still keep in touch with the employee on a regular basis but they should not be carrying out any work-related activities i.e. one to ones and performance reviews should not be carried out during this period

- **UPDATED:** Any employer in breach of this may be subject to criminal prosecution for fraud under the scheme and HMRC have set up a hotline for employees who are in this situation and they can call to report the employer
- **UPDATED:** HMRC have also stated that employees cannot work for organisations that are linked to the employer, as well as not working for the employer, when on furlough
- **UPDATED:** A furloughed employee can take part in volunteer work, if it does not provide services to or generate revenue for, or on behalf of your organisation or a linked or associated organisation. Your organisation can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance but they are not obliged to do so.

UPDATED: What is Emergency Volunteer Leave (“EVL”)?

- An employee can sign up to EVL but they must get a certificate to do so and they can only do it if the business employs more than 10 staff;
- There is other criteria set out in legislation and we would recommend you seek advice on this if you are in this situation
- EVL is a form of unpaid leave and all other employment rights apply during a period of EVL.

UPDATED: What about apprentices?

- The Government have provided guidance specifically for apprentices here:
- <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>

UPDATED: Can I be furloughed to look after my children?

- Under normal circumstances, if an employee requests time off to look after children then this can be dealt with under dependents leave which is unpaid.

- However, the government have now issued updated advice to say that employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed.
- This should be given careful consideration if the employee is still required to work i.e. in a care home as there is a concern that furloughing everyone who fall into these categories may then not leave enough staff available to cover work particularly as some may end up having to self-isolate if they develop symptoms.
- Remember, just because the guidance says that it can take place, this does not mean that it necessarily should and you will need to consider each case on a case by case basis.

For more information and guidance please visit:

<https://www.xactgroup.co.uk/>