

Flexible Furlough leave and what this means for employers

In March 2020 the UK Government announced extraordinary measures to help keep businesses afloat during the global COVID-19 pandemic. One of these measures is the 'Coronavirus Job Retention Scheme' which currently allows employers to claim up to 80% of an employees' wage for all employment costs up to a maximum of £2,500 per month.

This scheme is now being extended to 31st October 2020 but will change in how it operates from 1st July 2020.

What is the Coronavirus Job Retention Scheme?

The original scheme allows all employers in the UK regardless of size or sector to claim up to 80% of an employee's wage per month. It has been set up to help businesses manage during the pandemic and crucially keep employees who may otherwise be made redundant or be placed on unpaid layoff, in employment. These individuals are being 'furloughed' and HMRC will reimburse employers 80% of furlough workers' wage costs up to a maximum of £2,500 per month (plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage). More on what you can and can't claim for is below.

The scheme is now being varied from 1st July 2020 to allow more flexibility for staff to return to work part time but also gradually requires employers to take more of the responsibility for staff costs.

What do employers need to do?

Effectively the scheme is not now open to any new applicants as any staff who are to be furloughed from 1st July 2020 onwards must have completed at least 3 weeks of furlough leave before 1st July 2020.

We will not therefore cover the basic eligibility criteria further as your staff must have previously been eligible and have been on the scheme to continue to use it from 1st July 2020 onwards.

What period of time does the scheme cover?

The scheme was backdated to 1st March 2020 and will now run until October 2020. The indication is that it will not be extended further.

From 1st July 2020 the scheme changes to a flexible furlough scheme with some slightly different rules from that which went before.

How does the employer select which employee to furlough?

Employees, workers and apprentices who work full time, part time on agency contracts or even zero hours contracts are all eligible for the scheme, provided they had previously been furloughed for at least three weeks prior to the 1st July 2020.

It is still the case that if an employee is able to work from home, then this should be encouraged. If an employee is unable to work from home or there is insufficient work for the employee to undertake, then the employer should adopt a fair selection process to identify its furloughed workers, even when considering which to remain on furlough, or which to place back on furlough or even operate a part-time job sharing return.

Particular diligence needs to be taken with selection in order to avoid allegations of discrimination during the selection process. Furloughed workers should not be carrying out any work for the employer during the period they are furloughed. However, they can work on the non-furloughed days/times.

How much does the employer have to pay under the new Flexible Furlough Scheme?

Under the new scheme the contributions of the employer will increase as time goes by. Below is an outline of the amount of government support available each month. However, you must remember, only hours **not** worked which would usually be worked can be claimed for. This means the amounts detailed below will be reduced proportionately by the amount an employee actually works.

Government contribution to furlough wages

- July – 80% up to £2,500
- August – 80% up to £2,500
- September – 70% up to £2,187.50
- October – 60% up to £1,875

Contribution: employer NICs and pension contributions

- July – Government
- August – Employer
- September – Employer
- October – Employer

Minimum Employer contribution to furlough wages (if not topping up)

- July – Nil
- August – Nil
- September – 10% up to £312.50
- October – 20% up to £625

Does the employer need to top-up the wage to 100% or pay more than gross monthly pack?

The employer can top-up pay to 100% or pay more than the above monthly capped gross per month however it does not have to. The employer should take a consistent approach amongst all staff. The employer should ensure it has a clear agreement from its staff to the scheme and that it is clear to the staff whether the 80% etc will be topped up. If there is no agreement to pay less than 100% and no clause in the employee's contract to permit a deduction from their wages they should be paid at 100%.

The employee will need to pay Income Tax, National Insurance and Auto Enrolment Pension Contributions on the furloughed payment in the usual way.

Which employees/workers are eligible under the scheme?

Employees to be furloughed under the flexible scheme from 1st July must have completed a minimum of 3 weeks furlough at any point under the original scheme prior to 1st July 2020 to be eligible to claim under the updated flexible furlough scheme.

Employees of more than one employer have an entitlement with each employer.

What about sickness and other leave entitlement during furloughing?

Employees will continue to accrue statutory and contractual annual leave during a furlough period. The usual rules regarding maternity and paternity leave should remain unchanged. The scheme can be used for enhanced maternity/paternity pay if the employer usually pays this in their policy.

An employee cannot be furloughed whilst eligible for statutory sick pay and as such would need to wait for the sick pay period to elapse before being placed back on furlough.

If an employee was to report sick (or needs to self isolate) during the furloughing period, then the usual statutory sick pay rules should apply. The rate of statutory sick pay may be lower than what is otherwise payable under the scheme. Employers should also check sick pay entitlement under the employment contract.

How to calculate what can be claimed for the employee?

For full time and part time employees the employer can claim the relevant proportion (detailed above) of the employee's actual salary before tax as of 19th March 2020. This figure includes past overtime, fees and compulsory contractual commission which does not vary due to performance, is not conditional on any matter, nor is a benefit of any kind. Any discretionary bonuses, non-contractual

commission or tips are excluded from the calculation and the payment is capped at the relevant proportions above.

You must have some form of legally binding agreement for the employee's salary, which may be from the contract of employment.

Any payments for benefits in kind or salary sacrifice schemes are excluded from the calculations. The government is treating COVID-19 as a life event for if an employee wants to opt out of a salary sacrifice scheme at this time.

If the employee has been employed for at least full twelve months prior to the claim and their pay fluctuates from time to time, their claim can be calculated as the higher of the same month's earnings the previous year or an average taken from the 2019-20 tax year.

If an employee's pay fluctuates but has not been working for 12 months the average for the time they have been employed can be used.

If the employee only started in February or March 2020, use a pro-rata calculation for their earnings so far to claim.

All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees. Employers can also claim the payments for employer national insurance and minimum automatic enrollment due on the grant payment on top until the end of July. Any shortfall must be met by the employer.

Even if the furloughed rate of pay would normally take an employee under the minimum or living wage the furloughed rate would still be payable as the employee is not actually working. One exception would be if they were completing online training course whilst furloughed. In that case the employee would need to be paid the national or living wage for the time spent training.

Is the grant payment under the scheme taxable?

The grant payment forms income and as such is taxable income under the Income Tax or Corporation Tax regime.

Can furloughed staff work for anyone else during furlough leave?

The latest guidance from the government does permit the claiming of payments under the furlough scheme whilst the staff member is working or volunteering for someone else in a new job. However, if you impose a contractual requirement on

the employee not to work for anyone else during furlough they would be in breach of their contract with you if they did so.

Can we rotate furlough leave and place a staff member on furlough leave more than once?

You are permitted to place an employee on furlough leave more than once, and from 1st July 2020 there is no minimum furlough period. This does mean that you can plan a rotational approach or job sharing to furlough leave within your organisation provided you adhere to the minimum requirements.

How to claim under the scheme

There is an HMRC online portal to make claims. The process includes making your claim using the amounts in your payroll.

You will need to provide your PAYE Employer Reference Number, the number of employees furloughed, National Insurance numbers of all furloughed employees, claim period start and end dates, amount to be claimed, bank details and contact details. If you are claiming for more than 100 staff this information will be input in a separate spreadsheet to be uploaded.

After 1 July 2020 employers cannot make furlough claims that bridge calendar months (i.e. the claim must start and end within the same calendar month). This means that Employers will need to make any final claims for the period up to 30 June under the previous scheme by 31 July 2020.

New claims from 1 July must not cross calendar months and a claim for flexible furlough must be for a minimum period of seven days (although, the employees do not have to have been on furlough leave for the full seven days and can have been working "flexibly"), If the period being claimed for includes either the first or last day of the calendar month (and the business has already claimed for the period ending immediately before it) the claim can be for less than seven days.

If a previously furloughed employee starts a new furlough period at any time before 1 July, this furlough period must still be for a minimum of three consecutive weeks. After that, the business would then be able to flexibly furlough them. Separate claims will need to be submitted to cover the days furloughed in June and the days furloughed in July (even where employees are furloughed continuously).

It is important to note that you cannot claim flexible furlough for more employees than you claimed for in any previous month. For example if you claimed for a maximum of 5 employees in a month during an initial furlough scheme you cannot claim for more than 5 at any time during flexible furlough, even if you had previously rotated the furlough of 10 staff during the initial furlough. This means you may need to be careful if introducing job sharing processes for the staged return that you are not trying to claim for too many people.



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Once you have submitted a claim HMRC will check it, and providing you are eligible HMRC will pay this as a BACS transfer to a UK bank account – they claim it will be 6 days later.

Employers must pay the employee all the grant you receive from HMRC for their gross pay. Employers are not allowed to charge fees to staff.

What paperwork must be completed with the staff member?

To be eligible for the grant employers must have an agreement between the employee and employer that the employee will not carry out any work for the employer during a period of furlough. That agreement must be in writing but can be via e-mail.

You should also obtain a new agreement whenever you make a new arrangement for flexible furlough. This should mean that you send a new arrangement out at the beginning of July even if the employee is remaining on full time furlough.

A record of the documents confirming the furlough leave must be kept for a minimum of five years and be available for inspection by HMRC. It is likely that more detailed checks of claims will happen in the future after the help has got out to those who need it now.

You should keep records of all the agreements with the staff, printouts of the HMRC calculator when you submitted your claim, copies of your claim and of the various payment records in case you are audited at a later date.

General Remarks

Employers should discuss furlough leave with their staff before implementation and may need to make changes to their employment contract by agreement.

If sufficient numbers of staff are involved in a furloughing decision it may be necessary to engage in collective consultation processes similar to a redundancy or any other mass change to contracts. Employers may therefore need to seek individual legal advice on the process.

The furlough scheme is very complicated and introduces several areas of employment law. As such it may be prudent to seek legal advice on the process and certainly if you have any quirky scenarios which do not fit into the guidance.



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If you require any further details then please do not hesitate to contact us or our advisors:

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