



Job Retention Scheme – Questions and Answers

The Job Retention Scheme is a grant from the Government. It is a promise by the Government to repay employers who don't dismiss employees, but instead retain them. It operates through the PAYE scheme. It is also called furlough leave and pay. On 17th April, the Government announced the Scheme was being extended from 31st May to the end of June. Payment will be made if qualifying factors are met. Many

Most employers aren't clear on what they can and cannot do. We have been busy with questions from employers and employees ever since the Government announced the Scheme. We thought it would be helpful if we summarised the ones that apply to nearly all employers – and some questions that you haven't even come up with yet (but should be asking). This information is correct as of 20th April 2020.

If you haven't yet started to put employees on furlough leave, we have a ready-made agreement and covering letter to keep you on the right side of the law – and its free – just send an email to philip@mccabeandco.com

SCOPE OF THE JOB RETENTION SCHEME

The scheme does not change any existing statutory rights such as the right not to be dismissed unfairly, the right to a redundancy payment, protection from discrimination or rights to paid annual leave. Nor does it change common law rights which might give rise to contractual claims.

What is the cut-off date under the Scheme?

Short answer: Employers can claim the grant for employees being furloughed who were employed on 19th March 2020 (previous 28th February).

Does it cover 'atypical' workers?

Short answer: Yes.

Long answer: The Scheme covers **agency workers** who are paid through PAYE by the agency – including umbrella companies. The body which has to take the decision to furlough is the one which pays via PAYE – either the agency or, where it operates furlough, the umbrella company.

What about those working in the **gig economy** and **contractor**. It depends on whether they are in fact paid through PAYE and not what is “really” their employment status.

The Revised guidance is clear that those engaged on **zero-hours** contracts are eligible for reimbursement under the Scheme provided they are “employees”. Their pay for the purpose of the Scheme is 80% of their average earnings, based on the previous year, the 2019-20 tax year.

Company directors potentially have two legal statuses. They are officers of the company and may have a contract of employment with the company and have a salary paid via PAYE. Where they are employees, their employer is eligible for support under the Scheme in common with any other employee. They cannot carry out work other than to fulfil the statutory obligations they owe the company.

Office holders including directors, club secretaries, and trade union officers are covered provided they are paid via PAYE.

Personal Service Companies exist to provide the labour of the individual to a third-party client. If they are paid via PAYE, they are eligible for furloughing.

Salaried members of LLPs will be eligible provided they were designated as employees for tax purposes.

Whilst the status of **apprentices** and **trainees** does not always mirror that of employees, they can be furloughed if they are paid via PAYE. Whereas “ordinary” employees cannot do any work while furloughed, apprentices can continue to train while furloughed.

Does the furloughed employee need to someone that would otherwise been made redundant?

Short answer: No. Different employers face different impacts from coronavirus.

Can we furlough and claim the grant for someone on a fixed-term contract that was due to expire – but we extend the contract?

Short answer: Yes

Long answer: The Guidance provides:

“Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee’s

contract ends because it is not extended or renewed you will no longer be able [to] claim [a] grant for them."

Can employees who are on sickness absence be furloughed?

Short answer: No

Long answer: The Guidance states:

"You cannot claim for employees while they're getting Statutory Sick Pay, but they can be furloughed and claimed for once they are no longer receiving Statutory Sick Pay."

Employees who are self-isolating are entitled to SSP.

What if the employee has exhausted their entitlement to SSP but is still absent?

On a plain reading of the Revised Guidance, it should be possible to furlough the employee because they are "no longer receiving SSP". Absent any other indication, they would seem to be entitled to receive 80% of their usual monthly pay or £2,500 a month (whichever is the lower).

What if the employee has exhausted his entitlement to SSP but is receiving contractual sick pay – can they be furloughed?

The answer is not obvious, but we think on balance that they can. The aim of the Scheme is to give an employer a measure of protection from ongoing employment costs and thereby to help prevent dismissals. Allowing those whose entitlement to SSP has been exhausted but who receive contractual sick pay to be furloughed is consistent with both the letter and the spirit of the Revised Guidance.

What if an employee is furloughed and then falls ill so that they become entitled to SSP?

The Revised Guidance does not appear to envisage this possibility. This needs to be clarified.

Can "shielding" employees be furloughed?

Short answer: Yes

Long answer: Government advice is that people who are at very high risk of severe illness from coronavirus because of an underlying health condition should stay at home and avoid any face to face contact. That is described as "shielding". The advice also covers people who live with people who need to shield:

"If you have someone else living with you, they are not required to adopt these protective shielding measures for themselves. They should do what they can to support you in shielding and they should stringently follow guidance on social distancing, reducing their contact outside the home."

Can employees with caring responsibilities be furloughed?

Short answer: Yes

Long answer: The Guidance states:

“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.”

IMPLEMENTING FURLOUGH

How can furlough be implemented?

Short answer: By agreement between employers and their employees or their representatives.

Long answer: The Scheme does not give employers a right to place an employee on furlough or a right to reduce their wages to 80%. Both contractual and statutory protections exist such as:

HMRC will only recognise furlough as valid *“if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment”*. That requires more than notification by the employer; it requires actual written agreement that the employee will cease all work. Agreement cannot be inferred from conduct, because it has to be in writing.

The guidance has changed to now suggests the employee’s written agreement must be received before furlough starts but as hundreds of thousands of employees have already been put on furlough leave and pay, we need clarity from HMRC on how they will deal with applications for the grant.

How do you reach agreement?

There is no short answer. Both parties should be open and frank and try to be cooperative. For the employer to explain the situation which the business is facing as a result of the pandemic, the loss of income that it is facing, the challenges ahead for the business and its aim to explain that it will want to return the employee to work as soon as the business reasonably can. The business should be clear as to how the furlough system will enable the business to weather the storm.

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Can an agreement be reached between an employer and employees’ representatives that applies to everyone at work?

Short answer: Yes, but only if there is a collective agreement which is incorporated into individuals’ terms and conditions.

Can a furlough be imposed by an employer on employees?

Short answer: No.

Long answer: An employee has a right to pay for being ready and willing to work. It may be possible where the contract of employment contains an unambiguous clause entitling an employer to unilaterally vary pay terms. However, it is doubtful as to whether the use of any variation clause in such circumstances would be reasonable and lawful.

Agreement is the only low risk way forward.

What if we cannot reach an agreement?

Short answer: The employee will retain their right to normal contractual pay.

Long answer: Putting an employee on 80% pay and instructing them to do no work without an agreement or without properly using a variation clause would be likely to open the employer up to several claims including unlawful deduction from wages and constructive dismissal. The employer might consider dismissing the employee for redundancy or another reason such as the need to save the business.

Can a person who has left their employment be re-employed and then be put on furlough?

Short answer: Yes, provided that they were on the employer's PAYE system on 19th March 2020.

If an employer re-employs and furloughs employees, can the employee receive backpay and can the employer reclaim it?

Short answer: Yes.

Long answer: The Chancellor suggested that it would be possible to re-employ dismissed employees and backdate the furlough when he first introduced the scheme. It appears, therefore, that backdated claims are possible.

However, the scheme is a "reimbursement" scheme so that you cannot reclaim sums that have not been paid. Nothing compels an employer to re-engage and backdate pay but they should bear in mind that the Scheme requires that a furlough should last for a minimum of three consecutive weeks. If, therefore, they re-engage employees on 11 May 2020 and don't backdate and the Scheme ends on 31 May 2020 as presently planned, none of the sums paid to the employees will be reimbursed.

Does the re-engaged employee have to re-pay any termination payment that they may have received?

Short answer: No

Long answer: Employees who have been dismissed for redundancy may have received statutory or contractual redundancy payments, pay in lieu of notice (a "PILON") and a payment to compensate

them for accrued but untaken holiday pay. Less commonly, they may have received payments pursuant to long term incentive plans or employee share ownership plans. Do they have to give the money back? The Scheme does not require them to do so. Nor, is there any obligation to do so under employment law more generally. The terms on which an employee is re-engaged is a matter for agreement between the employer and employee.

Can an employee compel a former employer to re-engage them?

Short answer: No.

Long answer: An employee cannot compel a former employer to re-engage them. However, employers should be aware that, like any recruitment decision, a refusal to do so may give rise to allegations of discrimination if some but not all former employees are taken back.

What should be in a re-engagement agreement?

There is no short answer. As suggested above, the agreement should deal with whether the furlough will be “backdated” and what account should be taken of any termination payments. Broadly, the contents of a re-engagement agreement should match those of a furlough agreement.

Parties should bear in mind that, once re-engaged, employment will continue beyond the end of the Scheme, unless the agreement provides otherwise. The employer may wish to consider, therefore, a clause which provides for the term of the employment to be fixed by reference to the continuation of the Scheme, though the employee will benefit from their normal legal rights, including those applicable to fixed-term employees. Similarly, if the employer proposes that employees move in and out of furlough, potentially to spread the burden or benefit of furlough where the entire workforce is not furloughed, express provision to this effect will have to be agreed.

If an employee is re-engaged will their continuity of employment cover both the original and the new period of engagement?

Short answer: Not necessarily. Continuity of employment will be lost if the gap is more than one week, unless one of the statutory exceptions applies.

Long answer: If more than a week has passed without there being a contract of employment, continuity is lost and it is not open to the employer and employee to preserve statutory continuity of employment by agreement. The statutory provisions on continuity are highly complex and in the event of specific questions arising about whether it has been preserved or broken, specialist advice should be sought.

OPERATING FURLOUGH

When does a claim start?

Short answer: When the worker starts furlough, although the claim may, if the worker has agreed and was not working or providing services at that point, be backdated to include pay from 1st March 2020.

A claim does not start until the employee finishes work. It does not start from the date that they were notified.

“Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they written to confirming their furloughed status.”

Whilst an employee can do no work for the employee who has furloughed them, they can do work for others.

Does the employee lose any employment rights by being put on furlough?

Short answer: No, the worker only loses the ability to work, and depending on the contents of the agreement, the right to receive full pay.

Long answer: The Revised Guidance is clear and says:

“Your rights as an employee are not affected by being on furlough, including redundancy rights.”

Can the employee do any work during furlough?

Short answer: No, the employee can do no work whatsoever for the employer who has put them on furlough save for training. The employee can work for others, can receive training or volunteer elsewhere.

Long answer: This is an anti-abuse measure. The Revised Guidance is clear:

“Once you are on furlough you will not be able to work for your employer...[including]

- *making money for your employer or a company linked or associated to your employer*
- *providing services to your employer or a company linked or associated to your employer*

Employees must not work or provide any services for the business while furloughed, even if they receive a top-up salary.”

There is no to excuse for trivial instances or actions which might, on a strict reading, constitute work. Further, HMRC has called for employees to report any abuse of the system by employers who make employees work.

How much pay is the employee entitled to?

Short answer: It depends on what you have agreed, or what you have varied the entitlement to if you have a variation clause. Remember, the Scheme does not change employment law, so the existing contractual rights remain. The Scheme sets a minimum of the lower 80% of their regular wage or £2,500.

Long answer: The agreement/variation to furlough is between the employer and the employee. The Government is agreeing to refund the employer up to 80% of qualifying wages up to a maximum of £2,500 per month.

Can the employer pay the full wage?

Short answer: Yes, and it may be required to do so as a matter of contract.

Long answer: The employer can pay full pay, but it will only receive a refund from the Government of up to a maximum of the lesser of 80% of wages or £2,500 per month. The employer will have to fund the difference.

Should the furlough agreement be in writing?

Short answer: Yes. This is a condition of the scheme.

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What can the employer re-claim?

Short answer: 80% of the employees' wages up to a maximum of £2,500. There is a method for addressing variable pay. The reimbursed sum includes the minimum automatic enrolment employer pension contributions on the subsidised wage and the employer's National Insurance contributions.

Long answer: The employer can claim these amounts, it cannot claim additional amounts such as the top up to 100% or any additional pension contributions it makes. If the employee's pay has varied in the previous pay periods then one looks, where the employee has been employed for 12 months or more, at the highest of:

- The same month's earnings in the previous year
- The average monthly earnings for the tax year 2019-2020.

If the employee has been employed for less than 12 months, then their pay is based on their average monthly earnings since they commenced work.

The average process will cover overtime, fees and what are described as compulsory commission payments. This appears to be contractually obligated commission. All of these are included if part of regular payments and the employer is obliged to pay them.

Discretionary payments such as bonuses (and discretionary commission) and, expressly, tips are not included in the calculation. The precise meaning of discretionary commission is unclear. Non-cash payments such as benefits which the employee receives such as free travel are not included, even though they are benefits the employee will be taxed on.

Both the Apprenticeship Levy and Student Loans should continue to be paid as usual. Grants from the Job Retention Scheme do not cover these.

Can an employer undertake training on furlough?

Short answer: Yes.

Long answer: Whilst an employee is training then they must be paid the statutory minimum wage NMW even if this means that the employer has, themselves to top up the wages above the 80% level. The Revised Guidance says that:

“If workers are required to, for example, complete training courses whilst they are furloughed, then they must be paid at least their appropriate minimum wage (NLW, NMW or AMW) for the time spent training, even if this is more than the 80% of their wage that will be subsidised.”

Records of the time the employees are required to undertake training will have to be kept. Note that providing training is likely to constitute work.

Can an employee volunteer to work elsewhere?

Short answer: Yes.

Can an employee work for another employer?

Short answer: Yes.

Long answer: The Guidance specifically allows for this:

“If contractually allowed, your employees are permitted to work for another employer whilst you have placed them on furlough.”

There is uncertainty over what “contractually allowed” means. This part of the Revised Guidance might mean that an employee can be better off once furloughed by earning a second wage. If “contractually allowed” is an anti-abuse measure this would suggest that there should be no prohibition against working for another employer in the contract of employment which should be in writing.

If “contractually allowed” is given its natural expression then, even if there is a prohibition against working for others in the written contract of employment then it would be capable of consensual variation by the employer. Clarification of needed,

Can an employee be rotated on and off furlough?

Short answer: Yes, if our view is correct as to a redundancy situation not being required and as long as each period of furlough is for a minimum of three weeks.

Long answer: The Revised Guidance says that:

"If your employer chooses to place you on furlough, you will need to remain on furlough for a minimum of 3 consecutive weeks. However, your employer can place you on furlough more than once, and one period can follow straight after an existing furlough period, while the scheme is open. The scheme will be open for at least 3 months."

It is open to an employer and employee to agree that some employees go on to furlough as others continue to work and that staff can rotate on and off furlough. All that is required is that each period of furlough be for a minimum period of 3 weeks.

What if the employee is on one of the forms of statutory leave?

Short answer: The normal rules for maternity and other forms of leave apply. Enhanced contractual payments to employees can be claimed under the scheme.

Long answer: The Revised Guidance expressly provides that the normal rules for maternity and other forms of parental leave and pay apply. You can claim through the scheme for enhanced (earnings related) contractual pay for employees who qualify for either:

- maternity pay
- adoption pay
- paternity pay
- shared parental pay

Does the Scheme apply to holiday pay?

Short answer: Yes.

Long answer: This was only updated on the evening of 17th April in the Employees' Guidance rather than that for employers.

The Employee's Guidance now states that it is possible to take annual leave while on furlough, with the employer having to 'top up' to 100% of normal pay.

It is silent on whether an employer can *compel* an employee to take annual leave while on furlough, thus depleting their holiday entitlement at the government's expense. Until there is more guidance, we can't be certain. We think employers *can* do that. Other lawyers think they cannot.

Slightly ominously, the Guidance concludes this section by saying: *"During this unprecedented time, we are keeping the policy on holiday pay during furlough under review."*

COLLECTIVE CONSULTATION

Is a duty to collectively consult where furlough is proposed.

Short answer: No, but the duty may be triggered so long as the employer is considering (“proposing”) making 20 or more employees redundant if furlough cannot be agreed.

TUPE and FURLOUGH

Can employees be TUPE’d into an employer and be placed on furlough after the 19th March?

Short answer: Nobody knows for sure. Guidance is on its way from the Government.

How can we help you?

We know how difficult it is balancing the needs of your business with your obligations to your employees. Getting it wrong can be time-consuming and very costly.

Many employers – especially new or small businesses find employment law and HR a minefield. It is one of the fastest moving areas of law. It’s important to get the basics right, which is why we offer all new clients a free audit of their employment contracts and policies. We will then let you know what changes you should make. Where possible, we will do work for a fixed fee and are always transparent and open about costs. Initial consultations are always free.

We’d like to see what we can do to help, so please either call us anytime on **08000 614 631** or email philip@mccabeandco.com

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