



Covid-19 HR Information – Furlough Leave

Guidance:

These FAQs are based on the Guidance¹ issued by HM Revenue & Customs in relation to the Coronavirus Job Retention Scheme published on 26 March 2020. It is unclear if HMRC will rely solely on this Guidance or whether there will be subsequent legislation that will assist in the understanding of this Guidance.

Important Note:

This information is correct as at the time of production but may be superseded by legislation and further guidance. This information does not constitute legal advice and individual advice on issues should be taken before undertaking any action.

Furlough Leave

Furlough Leave is available for employees who are laying staff off and they do not undertake any work. It is currently not available for short time work (where employees reduce hours and salary below 50% of usual hours and salary).

Question		Response
1	How long will the scheme last?	A minimum of 3 months
2	When can I claim the payment?	Employers can only claim once every three weeks, i.e. they cannot get weekly reimbursement. Claims can be backdated to 1 March 2020.
3	Who can claim?	Any organisation with employees on a PAYE scheme, not any wider definition of workers. This includes: • Businesses • Charities • Recruitment agencies (agency workers paid through PAYE) • Public authorities

¹ <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>



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4	Which PAYE individuals can you claim for?	Anyone on a PAYE scheme on or before 28 February 2020 and has a UK bank account AND are not working (not even for one hour whilst Furloughed) including • Full time employees; • Part-time employees; • Employees on agency contracts; • Employees on flexible or zero hours contracts.
5	Are casual workers included?	Yes casual workers including zero hours workers that are PAYE will be included.
6	What if I receive public funding for staff and that funding continues?	You are expected to not Furlough and to redeploy staff where possible.
7	Can I Furlough an employee if I don't have a lay-off clause?	Not without their agreement. Most employees are readily agreeing to be Furloughed. You will need to get employees to agree through a Furlough Agreement. Please contact us for further details
8	Can I imply a lay-off clause?	Not unless you have a very clear precedent. The bar for showing this is very high. The custom must be: • reasonable; • certain; and • notorious (to the extent that all employees know about it)
9	How do I designate an employee as 'Furloughed'?	You need to write to employees informing them of them being Furloughed. Please contact us for a template.
10	How much notice must I give to place worker on Furlough Leave?	If you have a lay off clause then no notice. If you don't have a lay off clause then you can start immediately once the employee agrees.



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11	How does the 80% calculation and the £2,500 cap work?	Employers can reclaim up to 80% of wage costs up to a cap of £2,500 per month, plus (not including) the associated employer NICs and minimum auto-enrolment pension contributions on that wage. Fees, commissions and bonuses are not included. Further guidance will be issued before the portal is live as to how the calculation will be made.
12	How are the payments calculated for casual workers?	The employer can claim for the higher of - the same month's earning from the previous year (e.g. earnings from March 2019); or - average monthly earnings in 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.
13	How will Employer National Insurance and Pension contributions work?	All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees. You can claim a grant from HMRC to cover wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on paying those wages.



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14	What happens if I top up?	You can choose to provide top-up salary in addition to the grant. Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).
15	Is it unreasonable to dismiss for redundancy if Furlough is available?	Possibly, but not necessarily. The issue for some companies may be cashflow and maintaining the Furlough payments will be impossible due to the time it may take to reclaim the money.
16	When will the legislation be out?	There may be no subsequent legislation and the Guidance may be the only source for understanding the rules and limits of the scheme
17	The Chancellor's statement referred to the payment being made 'if their employer cannot afford to pay them'. Is this a means tested payment for employers?	This seems very unlikely and it assumed that the test will not include any provisions related to the solvency or otherwise of companies
18	Does the Furlough scheme apply to short-time working or only those fully laid-off? So, if an employee is working 50% of their normal time can the employer apply for 80% of the short-time 50% of wages?	No, it only applies to those not working at all.
19	Do employers have to pay the employees as normal for March, April 2020 etc. and claim the money back or can they/must they show non-payment?	We don't currently know however it would seem to defeat the purpose of the scheme if the payments cannot be deferred (by agreement with employees).



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20	Can you force an employee to take Furlough leave?	Yes if you have a lay-off clause No if you don't have a lay-off clause however it seems that employees are readily agreeing to be Furloughed in the majority of cases
21	How do you choose which employees to Furlough?	In the main the selection will normally be fairly obvious however in circumstances where you are laying off part of the workforce you should undertake a selection process akin to redundancy selection. You are unlikely to be required to undertake an extensive procedure and can use a fairly quick and basic selection criteria to make the assessment.
22	Can you prioritise elderly and vulnerable workers when deciding who gets Furloughed?	Probably yes. Prioritising elderly employees is direct age discrimination but is likely to be objectively justifiable as achieving a legitimate aim. Prioritising other vulnerable groups is likely to be seen as a reasonable adjustment However each circumstance will be unique and advice should be taken.
23	Can I Furlough an employee for a week?	No, Furlough must be for a minimum period of 3 weeks
25	Can you rotate Furlough amongst employees?	Provided that the leave is in minimum periods of 3 months there seems no reason that you can't rotate employees on Furlough Leave to evenly distribute the work.
26	What if a Furloughed employee has two jobs?	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.
27	Can an employer award a temporary 25% pay rise, so that 80% of the new salary matches the original salary?	Presumably the audit scheme to be introduced will stop this as it is likely to be seen as an abuse of the system and HMRC will be able to see the rise in the PAYE details.



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28	How do you deal with employees who object to their colleagues getting 80% of pay on furlough leave when they still have to work?	This is a very hard situation with no easy answer. You could consider: • Bonus payments; • A guarantee to be preferably treated in any future redundancy procedures; • Offering additional holiday or other benefits; • Rotating Furlough leave if the legislation allows it.
29	Does the 80% means an employee might get paid less than the national minimum wage?	Individuals are only entitled to the minimum wage for the hours they work. So if they are Furloughed and do not work, and 80% of their normal earnings would take them below the minimum wage based on their normal working hours, they still only receive 80% as they are not working. However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.
30	Can employers require employees to take holiday during Furlough, so the government ends up paying 80% of holiday and the employee uses it up?	Yes, there seems no reason to believe this will be stopped. Forcing an employee to take holiday requires the usual notice of twice the length of the leave enforced (i.e. two weeks' notice for one week's leave).
31	Can employees on long-term sick announce they want to return to work, to take advantage of the Furlough scheme?	No. The principle reason for the absence is the sick leave not the Furlough.
32	Is it a breach of trust and confidence if the employer does not 'top up' the extra 20%?	No, you either have the contractual right to enforce Furlough at 80% or you will have obtained the employee's agreement.
33	What if a Furloughed employee takes a new job with their (now) spare time?	Without your permission that is likely to be gross misconduct. If they have your permission it is unlikely you could maintain their Furlough payments.



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34	Can you continue with disciplinary or grievance proceedings when an employee is Furloughed?	It will depend on the wording of the legislation and whether the employment contract provisions relating to work includes all ancillary areas of the contract. This is unlikely so that other matters can continue.
35	Can employees currently on maternity, paternity, shared parental leave etc. cut their absence short in order to be automatically be Furloughed in order to increase their payments, funded by the Government?	Potentially yes, subject to the rules pertaining to the reason for the leave. Theoretically an employee can accept an immediate return of an employee where requested or can insist on the 8 weeks' notice. Otherwise SMP etc payments will continue as normal. Contractual SMP (and other related leave) can be claimed.
36	As the scheme may last for a maximum 3 months, can the employer give notice under a redundancy process during this period so that the Government in effect contributes under the Coronavirus Job Retention Scheme to the cost of the notice period?	Yes, there is no suggestion this is not allowed
37	Can new employees be Furloughed?	No, only those on the PAYE scheme on or before 28 February
38	Can employees be re-instated if they were made redundant?	If an employee was made redundant after the 28 February they can be re-instated and be paid Furlough Leave payments.
39	Can an employee on sick leave claim Furlough payments?	Only if the employer agrees to their return having assessed them as able to undertake work.
40	Is there a time limit on Furlough/ lay off periods?	There is no implied time limit other than the length of the Furlough scheme. Employees can request to made redundant after 4 weeks of lay off (or after 6 weeks in any 13-week period).
41	Can a pregnant employee insist on being Furloughed?	Potentially based on the risk assessment. If an employee is deemed unsafe to work under Health & Safety legislation then she should be suspended on full pay and therefore subject to Furlough payments.



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42	Can an employee isolating insist on Furlough payments?	If the principle reason for not being at work is not lay off (i.e. there is work available) then it seems unlikely that the payments could be reclaimed. (An FAQ on sick leave and pay will follow shortly)
43	Does an employee accrue annual leave while Furloughed?	Yes
44	Can an employee on unpaid leave/sabbatical claim?	Not if they were on unpaid leave/sabbatical as at 28 February 2020
45	Can an employee undertake training or volunteer to do some work?	A Furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue.
46	What information will I need to supply to make a claim?	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
47	Will the payments be audited?	HMRC will retain the right to retrospectively audit all aspects of your claim.
48	Can an employee off due to childcare be Furloughed?	This is not explicitly dealt with and should be used with discretion as the audit team may seek to reclaim monies paid where there is no lay off.

Queries and further information

Please contact us to discuss, we do not charge for initial consultations.

Furlough agreements and other template letters are available.

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