

Flexible furloughing begins on 1 July 2020 – key points to note

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Flexible furloughing begins on 1 July 2020 – key points to note

The second phase of the COVID-19 Job Retention Scheme (Scheme) begins on 1 July 2020 and will allow employers to bring furloughed employees back to work on a part-time basis. The

Government contributions to the wage costs of furloughed employees will also gradually decrease until the Scheme closes on 31 October 2020.

A raft of new guidance has recently been published, together with a new Treasury Direction, which sets out the legal framework for the second phase of the scheme. This briefing highlights the key points for employers to note. Our full guidance note for employers covers the second phase of the Scheme in detail and is available [here](#).

What is flexible furlough?

- From 1 July 2020, an employer can agree with a furloughed employee that they will be furloughed on a part-time basis and carry out some work on a part-time basis. It is open to the employer and employee to agree whatever working pattern they wish, but it must be less than the employee's usual working hours.
- Alternatively, employees can continue to be fully furloughed. Employees can also be rotated between periods of full furlough and part furlough. Employees will be described as "flexibly furloughed" whether they are furloughed on full or part-time basis.
- From 1 July 2020, employees can be furloughed for any length of time – there will no longer be a minimum 3-week furlough period (although the minimum claim period will be 7 consecutive days).
- Whilst on furlough, it remains the case that the employee is unable to carry out any work for the employer. The rules on this area haven't changed.

Who can be flexibly furloughed?

- The rules governing which members of the workforce are eligible to be furloughed haven't changed. However, the last possible date to furlough new entrants to the Scheme was 10 June 2020 (in order for the minimum 3-week

furlough period to have been completed by 30 June 2020). The only exceptions to this rule are:

- employees returning from various forms of paid statutory parental leave after 10 June 2020; and
 - armed forces reservist employees returning from service after 10 June 2020.
- Where an employee has previously been furloughed for at least 3 weeks at any time between 1 March 2020 and 30 June 2020, they will still be eligible to be furloughed after 1 July 2020 (i.e. it's not necessary to have actually been on furlough on 30 June 2020). Where such an employee has been rotated between periods of furlough and work, and started a new period of furlough after 10 June 2020, then at least 3 weeks must elapse before they can be regarded as flexibly furloughed.
 - From 1 July 2020, the maximum number of employees that an employer can include in a claim must not exceed the highest number of employees that it had furloughed in any period before 30 June 2020 (save that those who were absent on from various forms of paid statutory parental leave and armed forces reservists absent on service may also be counted).

Will a new furlough agreement be needed?

- In most cases, a furlough agreement (or written confirmation confirming the agreement) will have been put in place to cover the pre-1 July 2020 furlough arrangements.
- Where an employee is to move on to a part furlough arrangement, such agreements will need to be varied to reflect that the employee agrees to be part-furloughed and to outline the proposed working pattern. Even where the employee is to remain fully furloughed, it's possible that agreements will need to be varied (e.g. to extend the period of time that the employee will be

furloughed or to reflect other changes such as the reduction or removal of benefits).

- The Treasury Direction confirms that furlough agreements must be in place before the relevant claim period but can be varied at a later date to reflect agreed variations. Accordingly, it should not be necessary to prepare brand new furlough agreements to cover the post-1 July 2020 arrangements. Instead, employers will need to agree any changes with the employee (this could be done by a way of a phone call) and then confirm the agreement by way of a letter or email which varies the original furlough agreement. However, this should be done prior to the relevant claim period.
- There remains no requirement for the employee to confirm their agree in writing, although this will typically be sought in practice. All written communications should be retained until 30 June 2025. In addition, where an employee is on a part furlough arrangement there are additional record-keeping obligations. The employer must retain details of the usual and actual hours worked for 6 years.

What must be paid to the employee?

- Employers must pay the employee their normal rate of pay (i.e. 100%) for any hours worked under a flexible furlough arrangement. The employer will not be able to recover any contribution towards this cost from the Government.
- Employees remain entitled to be paid 80% of their pay for any time spent on furlough (up to a maximum of £2,500 per month, although this cap will be pro-rated to reflect any periods of work).

What can employers claim from the Government?

- Employers can continue to claim under the Scheme for any hours that employees spend on furlough. If the employee

is part furloughed, this is calculated based on the employee's usual working hours minus the hours they have actually worked.

- However, the Government's contribution towards the furloughed employee's wage costs will reduce each month as follows:
 - **From 1 July 2020** employers will be able to recover 80% of the employee's pay for the furloughed hours (capped at £2,500 per month), together with the costs of the employer's NICs or employer's pension contributions associated with the furloughed hours.
 - **From 1 August 2020** employers will only be able to recover 80% of the employee's pay for the furloughed hours (capped at £2,500 per month). They will no longer be able to recover the costs of the employer's NICs or employer's pension contributions associated with the furloughed hours.
 - **From 1 September 2020** employers will only be able to recover 70% of the employee's pay for the furloughed hours (capped at £2,187.50 per month). The employer must pay the other 10% (meaning the employee still receives 80%).
 - **From 1 October 2020** employers will only be able to recover 60% of the employee's pay for furloughed hours (capped at £1,875 per month). The employer must pay the other 20% (meaning the employee still receives 80%).
 - **The Scheme will close on 31 October 2020** and no claims will be possible for wage costs incurred after this date.
- The cap on the maximum amount that can be claimed will be pro-rated so that it is proportional to the number of hours spent on furlough.

- When claiming for part furlough periods, employers are advised to wait until they have certainty over the actual hours the employee will work before they submit a claim (to avoid over or under payments).
- No claim can be made in respect of any period of unpaid leave taken between 1 July 2020 and 31 October 2020.

Can an employee be furloughed during a redundancy consultation and/or their notice period?

- The Scheme guidance suggest that employers may furlough employees who will ultimately be made redundant.
- However, the Treasury Direction states (at paragraph 2.2) that it is “integral” to the purpose of the Scheme that the amounts are used by the employer to “continue the employment of employees in respect of whom the CJRS claim is made”. One reading of this is that claims cannot be made for employees who are to be made redundant or who are serving notice, because their employment is not going to continue. Clarification has been sought from HMRC as to the intended meaning of this wording. In the meantime, employers should seek specific legal advice on this point where relevant.

BDBF is currently advising many employers and employees on the challenges presented by the coronavirus. If you or your business needs advice on furlough or other coronavirus-related matter please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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