

Information for employees on the COVID-19 Job Retention Scheme

The COVID-19 Job Retention Scheme has been introduced to encourage employers to retain staff during the coronavirus crisis and avoid having to make redundancies. In this briefing, we explain what the Scheme means for affected employees. This briefing was last updated on 6 May 2020.

1. What is the COVID-19 Job Retention Scheme (Scheme)?

Under the Scheme, the Government will pay 80% of the wage costs of employees who are placed on temporary leave as a result of the coronavirus pandemic (known as **furlough**). The payments will be capped at £2,500 per month. Initially, the Scheme was intended to cover payments for a three-month period between 1 March 2020 and 31 May 2020. On 17 April 2020, it was announced that the Scheme would be extended to 30 June 2020 and may be extended again if necessary. The Scheme covers employees and those with other employment statuses. For ease of reference, in this note the term “employees” is used to cover all eligible individuals.

The Scheme is governed by a [Treasury Direction \(Direction\)](#) published on 15 April 2020, which sets out the legal framework, and the following six pieces of non-binding HMRC guidance (together, the **Guidance**):

1. [Employer Guidance on how to check if you can claim \(9th version dated 1st May 2020\)](#)
2. [Employer Guidance on claiming for wages \(4th version dated 30th April 2020\)](#)
3. [Employer Guidance on how to calculate the wages costs claim \(5th version dated 30th April 2020\)](#)
4. [Employer Guidance on reporting payments in PAYE Real Time Information from the Coronavirus Job Retention Scheme \(1st version dated 23 April 2020\)](#)
5. [Employer Step-by-Step Guide to making a claim \(3rd version dated 29th April 2020\)](#)
6. [Employee Guidance \(8th version dated 1st May 2020\)](#)

2. Is my employer able to apply for funding under the Scheme?

The Scheme is open to any UK employer, regardless of their size or sector. This includes individual employers, who are able to furlough employees such as nannies, provided they meet the other eligibility criteria.

To qualify, your employer must have:

- created and started a PAYE payroll scheme on, or before, 19 March 2020 (this has changed from the original cut-off date of 28 February 2020);
- enrolled for PAYE online; and
- a UK bank account.

If your employer receives public funding for staff costs, or to provide services necessary to the response to coronavirus, then they are not expected to apply for funding under the Scheme.

3. Will my employer be able to claim funding for me?

Not all members of the workforce are covered by the Scheme. Four criteria must be met in order for a claim to be made:

- you must have been on the PAYE payroll on, or before, 19 March 2020;
- a Real Time Information (**RTI**) submission notifying payment in respect of you must have been made to HMRC on, or before, 19 March 2020;
- you must not undertake any work for your employer (or any linked or associated organisation) once furloughed. Currently, the Guidance provides that if you carry out any work, even on reduced hours, you will not be eligible; and
- you must have one of the eligible statuses listed in Table A below.

If you have more than one employer, you can be furloughed by one employer and continue to work for the other. Each job is treated separately, and the cap applies to each separately.

Foreign nationals and employees on all categories of visa are eligible to be furloughed.

TABLE A		
EMPLOYMENT STATUS		ELIGIBLE?
1.	Employees engaged under any type of employment contract (e.g. full-time, part-time, permanent, fixed-term, flexible or zero hours)	✓
2.	Apprentices (who may continue to undertake training whilst furloughed)	✓
3.	Workers	✓
4.	Office holders, including company directors (this includes salaried individuals who are directors of their own personal service company)	✓
5.	Salaried members of LLPs (i.e. those who are designated as employees for tax purposes under the Income Tax (Trading and Other Income) Act 2005)	✓
6.	Agency workers (including those employed by umbrella companies)	✓
7.	Contractors with public sector engagements who fall within the scope of the IR35 off-payroll working rules	✓
8.	Self-employed contractors (a separate support scheme is available for them)	✗

4. Can I be furloughed if I am absent from work or have left my employment?

Only some absent and former members of the workforce are eligible for funding under the Scheme.

You **will** be covered if you:

- are absent from work on unpaid leave which started after 28 February 2020;
- are absent from work because you have caring responsibilities resulting from coronavirus (e.g. looking after children or caring for a vulnerable person);
- are absent from work because you are shielding in line with Public Health Guidance or because you need to stay at home with someone who is [shielding](#) (however, see question 5 below);

- left employment after 28 February 2020 (i.e. you were on the PAYE payroll on 28 February 2020) and are then re-hired (save that if you have already been furloughed by a new employer then you cannot also be furloughed by your former employer); and
- left employment after 19 March 2020 (i.e. you were on the PAYE payroll on 19 March 2020) and are then re-hired (save that if you have already been furloughed by a new employer then you cannot also be furloughed by your former employer).

You **will not** be covered if you:

- are absent on unpaid leave which started on, or prior to, 28 February 2020 (you may be covered once you have returned to work, however, your employer cannot agree to bring the original return date forward in order to allow you to access to the Scheme); and
- have left your employment and you do not fall into one of the two exceptions listed above.

5. Can I be furloughed if I am absent from work because I am sick or self-isolating?

The employee-facing version of the guidance over-simplifies the approach to this issue when it says that such employees can be furloughed “*at any time*”. In fact, the position for sick and self-isolating employees is complex.

First, the Direction stipulates that where Statutory Sick Pay (**SSP**) is payable, or liable to be payable, to an employee at the time the employer wishes to furlough, the furlough cannot begin until that original SSP period has ended. For example, if an employee contracts coronavirus and is signed off sick for 2 weeks, that employee becomes entitled to be paid SSP. The employer will only be able to furlough this employee once that 2-week SSP period is over. Once it is over, the employer is potentially able to furlough the employee regardless of whether they subsequently fall ill or need to self-isolate.

On the face of it, this rule appears to restrict the ability of employers to furlough shielding employees. Shielding employees are entitled to SSP. Therefore, if an employee is advised to shield for 12 weeks, they will be entitled to SSP for that initial 12-week period. Under the wording of the Direction, this initial SSP period would have to lapse before the furlough period could begin. We think this must be an unintended consequence of the Direction, since it is directly contrary to the Guidance. We hope this will be rectified soon.

Second, the question of whether an employer is entitled to furlough a sick employee depends on the length of the sickness absence and the reason for wanting to furlough them. The Guidance differentiates between “short-term” and “long-term” sickness absence. Short-term sickness absence is not defined but is usually understood to mean absences lasting up to 4 weeks.

Short-term sickness / self-isolation

If you are absent due to short-term sickness, or because you are self-isolating, the Guidance says that you should not be furloughed simply because of that absence (e.g. as a means of covering your wages). Instead, you should be treated as absent on sick leave and be paid SSP, plus any contractual sick pay which is due. However, you may be furloughed “*for business reasons*”. In other words, if the sickness or self-isolation is incidental to your employer’s wider business decision to furlough then it is permissible to furlough you (once the original SSP period has ended). If your employer decides to

furlough you, then they should cease to pay sick pay to you, reclassify you as a furloughed employee and pay furlough pay to you. If you are entitled to receive full contractual sick pay, it may be preferable to remain on sick leave, rather than be furloughed on a reduced rate of pay.

Long-term sickness

If you are absent due to long-term sickness, then you may be furloughed. The Guidance simply says, “it is up to the employer to decide whether to furlough these employees”. There appears to be no requirement that the decision be motivated by business reasons. If your employer decides to furlough you, then they should cease to pay sick pay to you, reclassify you as a furloughed employee and pay furlough pay to you. Again, if you are entitled to receive full contractual sick pay, it may be preferable to remain on sick leave, rather than be furloughed on a reduced rate of pay.

6. What happens if I become sick whilst furloughed?

The Guidance says that it would be up to your employer to decide whether to keep you on furlough or treat you as absent on sick leave. If your employer decides to treat you as absent on sick leave, then it must cease paying furlough pay and begin paying SSP (and any contractual sick pay which is due). Usually, it will make sense to keep an employee in this situation on furlough. However, if you are entitled to full contractual sick pay, you may prefer to be treated as sick rather than receive the reduced furlough rate of pay.

7. What happens if I am taking (or about to take) a form of paid family leave?

If you are taking, or planning to take, a form of paid family leave during the proposed furlough period you are entitled to take that leave in the normal way. This covers maternity, paternity, adoption, shared parental leave and parental bereavement leave.

You are also entitled to be paid your statutory payment (e.g. statutory maternity pay) in the normal way. If you were furloughed and then started your family leave on, or after, 25 April 2020, your employer must calculate your average weekly earnings based on the pay you would have received had you not been furloughed. If your employer offers enhanced pay, then this will count as “wage costs” for the purposes of the Scheme and can be reclaimed, subject to the upper limit of £2,500 per month.

However, if you are being paid maternity allowance payments directly by Jobcentre Plus (instead of statutory maternity pay by your employer), you cannot be furloughed at the same time. If you are in this position and wish to be furloughed (because it is financially beneficial to do so), then you can give 8 weeks’ notice to end your maternity leave and, once that has lapsed, you can be furloughed. If you do this, you should be aware that you will not be able to resume your maternity leave at the end of the furlough period.

8. What can my employer claim under the Scheme?

If eligible, your employers can apply for a grant to cover your wage costs. This covers the following:

- the lower of 80% of your gross monthly pay in the last pay period prior to 19 March 2020 (the **reference salary**) or £2,500 per month (note that different rules for calculating pay will apply if you have variable pay);

- the associated employer National Insurance Contributions (**NICs**); and
- if you have a pension, the minimum automatic enrolment employer pension contributions (currently 3% of income above the lower limit of qualifying earnings) on the subsidised wage only (the pension scheme does not have to be an auto-enrolment pension scheme).

For these purposes, the reference salary includes only regular payments which your employer is legally obliged to pay to you. In this context, “regular” **excludes** any payments which are conditional and/or variable according to: your performance or that of the business; your contribution to the performance of the business; and/or the discretion of the employer (unless the variable payment arises from a legally binding agreement or similar).

Therefore, the reference salary will include basic pay and any other non-discretionary payments such as overtime, fees and contractual commission payments. However, many types of pay are excluded from the Scheme, as are non-cash benefits (see 9 below).

If you recently returned from statutory leave (e.g. sick leave or any form of family leave) your reference salary will be your normal gross salary, not the pay you received whilst on statutory leave. Similar rules apply for those who returned from any form of unpaid leave.

9. Are any payments or benefits excluded from the Scheme?

Certain types of payments and benefits **cannot** be recovered under the Scheme. These include:

- conditional payments;
- some performance-related payments;
- some discretionary bonus payments;
- some discretionary commission payments;
- tips, including those distributed through troncs;
- non-cash payments;
- the cost of non-cash benefits (including taxable benefits in kind e.g. company car);
- the cost of benefits provided through salary sacrifice schemes (including pension contributions); and
- employer pension contributions relating to the 80% of salary (or £2,500 if lower) which are over and above the minimum automatic enrolment employer pension contributions.

If your employer continues to provide excluded payments or benefits, then it will bear the cost of doing so itself. It is not permitted to set off any part of the grant made under the Scheme towards the cost of providing such payments or benefits.

If your employer wishes to suspend such payments or benefits, then it will need your agreement to do so. As far as benefits by way of salary sacrifice are concerned, the Guidance confirms that HMRC agrees that coronavirus counts as a “life event” which could warrant changes to a salary sacrifice arrangement.

10. What will I be paid?

The maximum funding your employer can claim under the Scheme is £2,500 per month, or 80% of pay if this is lower. Your employer must deduct income tax, employee NICs and any other deductions

(such as your pension contributions) in the normal way. You will then be paid the net amount. Your employer must not deduct any monies to cover the costs of continuing to provide benefits or for any other reason (e.g. an administration charge).

What this means in practice is that if you earn up to £37,500 per annum (gross) you will receive 80% of your actual pay. There will be a shortfall in your pay of 20%. If you earn over £37,500 per annum (gross) you will experience a shortfall in the 80% of pay due to the application of the cap of £2,500. There will also be a shortfall in your pay of 20%.

In addition, if your employer has claimed for employer pension contributions under the Scheme, then the whole amount claimed must be paid into your pension scheme as an employer pension contribution.

11. Does my employer have to cover the shortfall in pay?

If your employer has a contractual right to lay you off from work temporarily without pay then it is not obliged to top up the shortfall in your pay. If your employer doesn't have a contractual right to lay you off from work temporarily without pay, then it is obliged to cover the shortfall in your pay. However, your employer may ask you to agree to be paid the reduced pay under the Scheme only. If you don't agree then they could decide to make you redundant instead.

12. How and when will payments be made?

The funding will be paid into your employer's bank account. Your employer will then pay you through payroll in the normal way, after the deduction of income tax, employee NICs and other usual deductions, such as your pension contributions.

The first payments under the Scheme were made on 30 April 2020 and will usually be paid within six working days of a claim being made. Some employers may be unable to pay wages until they have received the Government funding. If your employer is in this position, it will need your agreement to receive delayed wage payments.

13. Does my employer need my consent to put me on furlough?

Yes, your employer needs your agreement to put you on furlough.

Your employer cannot force you to go on furlough, however, if you don't agree then they may decide to make you redundant instead. Equally, you cannot demand to be furloughed, although your employer should give reasonable consideration to any such request.

In practice, this means that your employer will need to discuss the proposal with you, with a view to reaching an agreement. If your employer is not going to top up the shortfall in your pay (or continue other benefits) then they will ask for your agreement to this before putting you on furlough.

14. Will my employer need to consult with the wider workforce?

Your employer may be subject to other obligations to consult with employees and/or elected representatives or trade union representatives.

Where 20 or more employees are to be furloughed this may trigger the need to collectively consult with appropriate representatives of the workforce. In addition, employers may be subject to consultation obligations arising under:

- a European Works Council Agreement;
- an Information and Consultation Agreement; and/or
- a Collective Agreement with a trade union.

Your employer will need to consider which, if any, additional consultation obligations apply to them.

15. What else does my employer need to do before putting me on furlough?

Once it has been agreed that you will be furloughed, your employer should write to you to tell you:

- that you must cease all work in relation to your job role;
- that you have been designated as a furloughed employee;
- the date on which the furlough will start (and end, if known);
- whether you will be required to undertake any training whilst furloughed;
- when the furlough will be reviewed;
- how to keep in touch during the furlough period; and
- how much notice will be given of an instruction to return to work.

Your employer may also wish to record any agreement reached relating to your pay (e.g. receiving reduced pay and benefits and/or late payments). Your employer will probably ask you to sign a copy of this letter and return it to them before the furlough starts.

16. My employer says it is going to make me redundant – can I request they furlough me instead?

You cannot demand to be furloughed. However, you can ask to be furloughed and your employer should give reasonable consideration to your request. As part of a fair redundancy process, employers are obliged to consider ways to avoid redundancy. Therefore, it's probably necessary for your employer to at least consider furloughing as an alternative to redundancy.

17. How long can the furlough last?

The Scheme will run from 1 March 2020 until 30 June 2020, although this may be extended. You could be placed on furlough for the whole or part of that period (and claims may be backdated if applicable). The minimum period of furlough is 3 weeks. Your employer could furlough you on a rolling 3-weekly basis if it wished.

18. If I am furloughed, will I retain my usual employment rights?

Yes, you will still be employed and will retain all your normal employment rights, such as the right to SSP, family leave rights and a statutory redundancy payment. In the same way, your contractual obligations will remain in force, for example, obligations not to disclose confidential information.

19. Will I still accrue holiday? Can I take holiday during furlough?

You will continue to accrue annual leave in the usual way whilst furloughed and you can choose to take annual leave whilst furloughed. Your employer can require you to take a day's paid annual leave on a Bank Holiday. However, the Guidance is silent on whether employers can require employees to take annual leave at times other than on Bank Holidays. Some legal commentators are of the view that employers cannot force furloughed employees to take annual leave because they are unable to enjoy a period of relaxation and leisure in the usual way (due to the constraints of the current lockdown rules). However, the position is uncertain and so it remains possible that your employer may ask you to do this.

Where annual leave is taken during furlough, you are entitled to be paid at your normal pre-furlough rate of pay (or on the basis of a 52-week average). This means that your employer will have to top up your furlough pay for any days of annual leave. For this reason, some employers may be unwilling to approve holiday requests or ask employees to take holiday during furlough.

If you are unable to use all of your holiday entitlement in this leave year due to being furloughed (and/or for other coronavirus-related reasons) you are entitled to carry over up to 4 weeks' annual leave for 2 years.

20. If I am furloughed, can I do any work?

Whilst furloughed, you cannot undertake any work for, or on behalf, of your employer (or any linked or associated organisations). In this context, "work" means providing services or generating revenue. If your employer asks you to carry out work whilst furloughed, you should refuse and explain why. HMRC has also created an online portal for employees and the public to report employers who they suspect are abusing the Scheme, for example, by requiring furloughed employees to carry out work.

Whilst furloughed you may carry out:

- activities for the purpose of individual or collective representation of employees or other workers (whether as a union or non-union representative);
- voluntary work; and
- training;

In addition, furloughed company directors are also allowed to carry out particular duties to fulfil certain statutory obligations they owe to the company, to the extent that it is reasonable and necessary to do so.

If you are asked to undertake any training (e.g. online courses), then you must be paid at least the applicable National Minimum/Living Wage rate for the time spent training. Usually, the funding delivered under the Scheme will provide sufficient monies to cover payment for any training hours, but, if not, then your employer will need to top up the payment to the applicable rate.

You are able to work for another employer and not lose your entitlement under the Scheme in relation to your first employer. However, you should always check your contract of employment to see whether there are any restrictions on you working for someone else whilst employed.

21. What will happen to me when the Scheme ends?

Currently, the Scheme is due to close on 30 June 2020, although the Government has said this may be extended if necessary. Once the Scheme ends, your employer will need to decide whether you can return to work. If there is no work for you to do, then your employer may decide to put you at risk of redundancy. Before making you redundant, it would need to follow a fair redundancy consultation process and consider whether there is any suitable alternative work that you could do.

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