

## The Coronavirus Job Retention Scheme from 1 November 2020 onwards – a guide for employers

This is BDBF’s guide to how the third phase of the Coronavirus Job Retention Scheme (i.e. furlough) will operate between 1 November 2020 and 31 January 2021. This guide was last updated on 26 November 2020.

### **A. BACKGROUND:**

#### **What is the Coronavirus Job Retention Scheme (Scheme) and how long will it be available?**

The Scheme was introduced to encourage employers to retain their workforce throughout the coronavirus pandemic. Under the Scheme, the Government contributes towards the wage costs of employees who are placed on temporary leave by their employer. This type of leave is known as “furlough”. The Scheme began on 1 March 2020 and is due to close on 31 March 2021.

To date there have been three phases of the Scheme, each involving slightly different rules:

- The first phase of the Scheme ran between 1 March 2020 and 30 June 2020 (you can view our guide to the first phase of the Scheme [here](#)).
- The second phase of the Scheme ran between 1 July 2020 and 31 October 2020 (you can view our guide to the second phase of the Scheme [here](#)).
- The third phase of the Scheme will run between 1 November 2020 and 31 January 2021. **This is the guide to the third phase of the Scheme.**
- The fourth phase of the Scheme will run between 1 February 2021 and 31 March 2021.

The Scheme covers employees and those with other employment statuses. For ease of reference, in this guide the term “employees” is used to cover all eligible individuals. We highlight any special rules applying to those with particular employment statuses

#### **What are the rules of the Scheme?**

The legal framework of the Scheme is set out in a number of different Treasury Directions.

- The first phase of the Scheme was governed by two Treasury Directions covering claims submitted between 1 March 2020 and 21 May 2020 ([First Direction](#)) and between 22 May 2020 and 30 June 2020 ([Second Direction](#)).
- The second phase of the Scheme was governed by a Treasury Direction covering claims submitted between 1 July 2020 and 31 October 2020 ([Third Direction](#)).
- The third phase of the Scheme is governed by a new Treasury Direction covering claims submitted between 1 November 2020 and 31 January 2021 ([Fourth Direction](#)).
- The fourth phase of the Scheme will be governed by a further Treasury Direction governing claims submitted between 1 February 2021 and 31 March 2021. This has not yet been published.

The Fourth Direction is supplemented by eleven pieces of non-binding HMRC guidance (together, the **Guidance**):

	Guidance	What does it cover?
1.	<a href="#">Check if you can claim for your employees' wages (31<sup>st</sup> version dated 19 November 2020).</a>	<ol style="list-style-type: none"> <li>Who can claim?</li> <li>Employees you can claim for.</li> <li>Agreeing to furlough employees.</li> <li>When your employees are on furlough.</li> <li>Before you claim.</li> <li>Employer claim information HMRC will make public.</li> <li>Contacting HMRC.</li> </ol>
2.	<a href="#">Check which employees you can put on furlough (27<sup>th</sup> version dated 19 November 2020).</a>	<ol style="list-style-type: none"> <li>Check how different employment conditions affect eligibility.</li> <li>If your employee has more than one job or other duties.</li> <li>If you've made your employees redundant.</li> <li>If your employee's health has been affected by coronavirus or any other conditions.</li> <li>If your employee is on or has recently returned from leave.</li> <li>Other types of employees you can claim for.</li> <li>After you've checked which employees you can claim for.</li> </ol>
3.	<a href="#">Individuals you can claim for who are not employees (4<sup>th</sup> version dated 10 November 2020).</a>	<ol style="list-style-type: none"> <li>Office holders.</li> <li>Company directors.</li> <li>Company directors with an annual pay period.</li> <li>Salaried members of LLPs.</li> <li>Agency workers (including those employed by umbrella companies).</li> <li>Limb (b) workers.</li> <li>Contingent workers in the public sector.</li> <li>Contractors with public sector engagements within the scope of IR35.</li> </ol>
4.	<a href="#">Steps to take before calculating your claim (14<sup>th</sup> version dated 26 November 2020).</a>	<ol style="list-style-type: none"> <li>Deciding the length of your claim period.</li> <li>What to include when calculating wages.</li> <li>Work out your employee's usual hours and furloughed hours.</li> <li>What to do next.</li> </ol>
5.	<a href="#">Calculate how much you can claim (19<sup>th</sup> version dated 26 November 2020).</a>	<ol style="list-style-type: none"> <li>Changes to the grant contributions from July 2020.</li> <li>Record-keeping requirements.</li> <li>Use the calculator.</li> <li>Work out the maximum wage amount.</li> <li>Work out 80% of your employee's usual wage.</li> <li>Work out how much you can claim for employer NICs for periods up to and including 31 July 2020.</li> <li>Work out how much you can claim for employer pension contributions for periods up to and including 31 July 2020.</li> <li>How to claim.</li> <li>Contacting HMRC.</li> </ol>
6.	<a href="#">Claim for wages (33<sup>rd</sup> version dated 19 November 2020).</a>	<ol style="list-style-type: none"> <li>What you'll need.</li> <li>How to claim.</li> <li>After you've claimed.</li> <li>If you have not claimed enough.</li> <li>Contacting HMRC.</li> </ol>
7.	<a href="#">Reporting employees' wages to HMRC when you've claimed (15<sup>th</sup> version dated 10 November 2020).</a>	<ol style="list-style-type: none"> <li>If you're using the grant to pay wages.</li> <li>If you're using the grant to reimburse wages already paid.</li> <li>If you have not paid your employees' wages yet.</li> </ol>
8.	<a href="#">Pay grants back (4<sup>th</sup> version dated 10 November 2020).</a>	<ol style="list-style-type: none"> <li>How to pay.</li> <li>If you've overclaimed.</li> </ol>
10.	<a href="#">Penalties for not telling HMRC about overpayments (1<sup>st</sup> version dated 28 July 2020).</a>	<ol style="list-style-type: none"> <li>Notification of overpaid grant amount.</li> <li>Assessment of income tax charge.</li> <li>Provisions specific to companies that become insolvent.</li> <li>Penalty for a failure to notify HMRC about the income tax charge.</li> <li>Publishing details of deliberate defaulters.</li> <li>Provisions specific to partnerships.</li> </ol>
11.	<a href="#">Employee Guidance (28<sup>th</sup> version dated 19 November 2020).</a>	<ol style="list-style-type: none"> <li>Check if you're eligible.</li> <li>How much you'll get.</li> <li>While you're on furlough.</li> </ol>

	Guidance	What does it cover?
		4. Report fraud to HMRC. 5. If you do not want to go on furlough. 6. Guidance for specific customers. 7. Contacting HMRC.

In addition, separate guidance has been published on [holiday entitlement and pay \(1<sup>st</sup> version dated 13<sup>th</sup> May 2020\)](#) and [discipline and grievance procedures during the pandemic](#). While not forming part of the framework governing the Scheme, this separate guidance will be relevant and should be consulted where appropriate.

**B. KEY POINTS ON THE THIRD PHASE OF THE SCHEME:**

**What is changing?**

The Scheme will change between 1 November 2020 and 31 January 2021. There are four key changes to note:

- The Scheme has been reopened to new entrants (both new employers and employees).
- There is no longer a limit on the number of employees that can be claimed for.
- Employers no longer have to contribute towards the wages of furloughed employees for any unworked hours (this may change in the fourth phase of the Scheme).
- HMRC will publish the names of employers who have made claims.

**What is staying the same?**

Many aspects of the Scheme remain unchanged from the second phase. In particular:

- Employees may still be fully furloughed or “flexibly furloughed” (see below).
- Employees will still receive 80% of their usual pay for unworked hours, up to a maximum of £2,500 per month.
- Employers must continue to pay employer’s National Insurance Contributions (NICs) and employer’s pension contributions in full. They must also pay the employee in full for any time spent working.

**What is flexible furloughing?**

Flexible furloughing was introduced in the second phase of the Scheme and will continue in the third phase. Flexible furloughing allows employers to bring furloughed employees back to work on a part-time basis, meaning that they can be furloughed for part of the week or month and work for part of the week or month.

There is no restriction on the amount of time or working pattern that the employee works, save that the new arrangement must have been agreed with the employee and confirmed in writing. Employees can also be moved between full-time furlough and part-time furlough as required (subject to the employee’s agreement), or simply kept on full-time furlough.

Employers are wholly responsible for paying the employee for any time spent working. For example, if an employer wishes to bring a furloughed employee back to work for 3 days per week the employer

must pay the employee her normal pay (as per her employment contract) for the 3-day period, and pay the associated employer’s NICs, employer’s pension contributions and any other contractual benefits. The employer can then make a claim under the Scheme for 80% of the employee’s pay for the remaining 2-day period.

**C. ELIGIBILITY FOR FUNDING:**

**Which employers can 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, the employer must have:

- a UK PAYE scheme;
- submitted a report under the Real Time Information (RTI) reporting system for the employee/s between 20 March 2020 and 30 October 2020; and
- a UK bank account.

Employers who receive public funding for staff costs, or to provide services necessary to the response to coronavirus, are not usually expected to apply for funding under the Scheme. However, organisations which are not fully funded by public grants may be able to use the Scheme.

**Which members of the workforce are eligible?**

Not all members of the workforce are eligible for funding under the Scheme. Four criteria have to be met in order for a claim to be made:

- the employee must have been employed and on the PAYE payroll on 30 October 2020;
- an RTI submission notifying payment in respect of the employee must have been made to HMRC between 20 March 2020 and 30 October 2020;
- the employee must not undertake any work for the employer (or any linked or associated organisation) when on a period of furlough; and
- the employee must have one of the eligible statuses listed in the table below.

Employees who have more than one employer could be furloughed by one employer and continue to work for the other employer. 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.

<i>Employment status</i>		<i>Eligible?</i>
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).	✓

<i>Employment status</i>		<i>Eligible?</i>
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 <a href="#">support scheme</a> is available for them).	✗

### What happens if an employee’s fixed-term contract is close to expiry?

Where a fixed-term contract would expire during the proposed furlough period, the employer is allowed to renew or extend the contract without breaching the terms of the Scheme provided that:

- this is done **before** the contract expires;
- the employee was employed by the employer on or before 30 October 2020; and
- an RTI payment submission was notified to HMRC between 20 March 2020 and 30 October 2020.

If this is not done, then the employer will only be able to make a claim for that employee up to the date the contract expires. However, if the contract expired on or after 23 September 2020, the employer may be able to rehire the employee and furlough them (there is a discrepancy in the Employee Guidance note which states that rehiring is only possible where the contract expired after 23 October 2020 – we believe this is a drafting error and have sought clarification on this point from HMRC).

### Are absent and former members of the workforce able to be furloughed?

Some absent and former members of the workforce are eligible for funding under the Scheme. The following groups **are** able to be furloughed under the Scheme:

- those absent from work because they have caring responsibilities resulting from coronavirus (e.g. looking after children or caring for a vulnerable person);
- those absent from work due to sickness or a period of self-isolation (see: “*Are sick and self-isolating employees able to be furloughed?*” below);
- those absent from work because they are clinically extremely vulnerable and following public health [guidance](#); and
- those who stopped working for the employer on or after 23 September 2020 and who are then re-hired (provided they were on the employer’s PAYE payroll on or before 23 September 2020 and an RTI submission notifying payment in respect of the employee was made to HMRC between 20 March 2020 and 23 September 2020).

However, claims may **not** be made in respect of any days where employees are absent on unpaid leave or unpaid sabbatical between 1 November 2020 and 31 January 2021.

## **Are sick and self-isolating employees able to be furloughed?**

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 wishing 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 (for example, on the Government’s [Fit for Work](#) website).

### *Short-term sickness / self-isolation*

An employee who is absent due to short-term sickness, or because they are self-isolating, should not be furloughed simply because of that absence (e.g. as a means of covering their wages). Instead, they should be treated as absent on sick leave and be paid SSP, plus any contractual sick pay which is due. The downside for the employer is that it will have to cover the wage costs itself, save that it may be entitled to a rebate of SSP if it meets certain qualifying criteria.

However, an employee who is absent due to short-term sickness, or because they are self-isolating, may be furloughed “*for business reasons*”. In other words, if the sickness or self-isolation is incidental to a wider business decision to furlough then it is permissible to furlough the employee. If the employer decides to furlough, then they should cease to pay sick pay and reclassify the employee as a furloughed employee and pay furlough pay. Where the employee is entitled to full contractual sick pay, they may well be reluctant to agree to be furloughed if this would result in a shortfall in their pay.

### *Long-term sickness*

An employee who is absent due to long-term sickness 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 the employer decides to furlough, then they should cease to pay sick pay and reclassify the employee as a furloughed employee and pay furlough pay.

## **What happens if a furloughed employee becomes sick whilst furloughed?**

The Guidance says that it is “*up to employers*” to decide whether to keep such an employee on furlough or regard them as absent on sick leave. If the employer decides to treat a furloughed employee as absent on sick leave, then it must cease paying furlough pay and begin paying Statutory Sick Pay (**SSP**) (and any contractual sick pay which is due). Usually, it will make sense to keep such an employee on furlough. However, if the employee is entitled to full contractual sick pay, they may prefer to be treated as sick rather than receive the reduced furlough rate of pay.

## **What happens to employees absent on some form of paid family leave?**

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

Employees are also entitled to be paid their statutory payment (e.g. statutory maternity pay) in the normal way. However, if the employee was furloughed and then started their family leave on, or after,

25 April 2020, the employer may need to calculate the employee's average weekly earnings differently (in essence, the calculation must be based on the pay the employee would have received had they not been furloughed). If the 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 each month.

An employee who wishes to end her maternity leave early in order to be furloughed must give the employer at least 8 weeks' notice to end her maternity leave (unless a shorter period of notice is agreed). Once those 8 weeks (or agreed shorter period) have lapsed, she can be furloughed, and paid furlough pay. An employee might wish to do this where she is only entitled to receive statutory maternity pay, meaning she would be financially better off if furloughed.

If the employee is receiving maternity allowance payments directly from Jobcentre Plus (instead of statutory maternity pay from the employer), she cannot be furloughed. An employee in this position who wishes to be furloughed must give 8 weeks' notice to end her maternity leave. Once those 8 weeks have lapsed, she can be furloughed, and paid furlough pay.

#### **Are employees who transfer to a new employer under TUPE able to be furloughed?**

Employees transferring to a new employer under TUPE are eligible to be furloughed by the new employer. The employee being claimed for should have transferred to the new employer on or after 1 September 2020 *and* have been employed by the old or new employer on 30 October 2020. Further, an RTI submission to HMRC, by either the old or new employer, notifying a payment of earnings for that employee.

The old employer may be able to make a claim under the Scheme in respect of periods of pre-transfer furlough.

#### **What happens if a group of companies consolidates separate PAYE schemes?**

Where a group of companies has multiple PAYE schemes and consolidates them into a single PAYE scheme, it will still be possible to furlough the employees and claim funding under the Scheme.

### **D. WHAT DOES THE SCHEME COVER?**

#### **What can employers claim under the Scheme and what must they contribute?**

If eligible, employers can apply for a grant from HMRC to cover the "wage costs" of furloughed employees for their unworked hours. Employers cannot claim a grant for any time the employee spends working.

From 1 November 2020 until 31 January 2021, "wage costs" covers the lower of 80% of the employee's gross monthly salary or £2,500 per month in a particular "reference period". The Government will review the Scheme in January 2021 and may change the grant available in February and March 2021.

The reference period is the last pay period ending on or before:

- 19 March 2020 (this should be used where the employee was on the payroll on this date or where they were furloughed before 31 October 2020); or
- 30 October 2020.

Employers will be responsible for paying the associated employer's NICs and, if the employee has a pension, the minimum automatic enrolment employer pension contributions (currently 3% of income above the lower limit of qualifying earnings). Employers must also pay the employee's wages in full for any time spent working.

### **What counts as the reference salary?**

The reference salary includes only regular payments which the employer is legally obliged to pay to the employee. "Regular" excludes any payments which vary according to the:

- performance of the business or employee;
- contribution made by the employee to the performance of the business; and/or
- discretion of the employer,

unless the variation is non-discretionary and 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 below).

For a salaried LLP member, the reference salary should only include payments that are either: fixed; variable without reference to the overall profit and loss of the LLP; and/or not affected by the overall profit and loss of the LLP.

### **Which payments and benefits are excluded from the Scheme?**

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

- conditional payments;
- some performance-related payments;
- discretionary bonus payments;
- discretionary commission payments;
- non-cash payments;
- tips, including those distributed through troncs;
- the cost of non-cash benefits (including taxable benefits in kind e.g. company car); and
- the cost of benefits provided through salary sacrifice schemes (including pension contributions).

If an employer wishes to continue providing 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 any such payments or benefits.

If the employer wishes to suspend such payments or benefits, then it should obtain the employee's 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.



Employers must continue to make Apprenticeship Levy and Student Loan payments. Grants under the Scheme do not cover these payments.

### **What happens where employees have variable pay?**

Where pay varies, employers need to take a slightly different approach. For employees who were either on the payroll on 19 March 2020 or furloughed before 31 October 2020, the employer should calculate 80% of the higher of:

- the wages earned in the corresponding calendar period in the 2019/2020 tax year; or
- the average wages payable in the 2019/2020 tax year.

For all other employees, the employer should calculate 80% of the average wages payable between 6 April 2020 (or, if later, the date the employment started) and the day before they are furloughed on or after 1 November 2020.

### **What is the reference salary for an employee who has returned (or will return) from statutory leave or unpaid leave?**

Where an employer wishes to furlough an employee who has returned to work from statutory leave, the reference salary is based on the amount they would have received if they had been on paid annual leave and not on the actual pay they received whilst on statutory leave (even if this was enhanced). The same principle also applies if the employee takes a period of additional leave on reduced pay immediately after the end of a period of statutory leave. In this context, “statutory leave” means: sick leave; maternity leave; paternity leave; adoption leave; shared parental leave (whether paid or unpaid); unpaid parental leave and parental bereavement leave.

If an employee returning from statutory leave has variable pay, then the reference salary should be calculated using either the same month’s earnings from the previous year or the average monthly earnings for the 2019/2020 tax year.

Where an employer wishes to furlough an employee who has returned to work from any other form of unpaid leave the reference salary is also based on the amount they would have received if they had been on paid annual leave.

### **Working out how many furloughed hours to claim**

If the employee is fully furloughed for the whole claim period, the employer will not need to work out their usual and furloughed hours and can proceed to claim for the full wage costs (subject to the cap).

However, if the employee is on part furlough for some, or all, of a claim period, the employer will also need to work out the employee’s usual working hours and, when claiming, state those usual hours, the actual hours worked, and the hours spent on furlough. The calculations for working out the employee’s usual hours will depend on whether the employee works fixed or variable hours. The [Steps to take before calculating your claim](#) guide sets out the approach to be followed in each case and detailed worked examples are provided [here](#) and [here](#). HMRC will not decline payment (or seek repayment) of a grant based solely on the particular choice between the fixed or variable approach to calculating usual hours, as long as a reasonable choice is made.

### What will the furloughed employee receive?

The furloughed employee will receive 80% of their pay for any time spent on furlough, subject to the maximum cap. This will be the case until the Scheme closes on 31 March 2021.

Where the employee is fully furloughed, the 80% of pay is capped at £2,500 per month.

Where the employee is part furloughed, they will receive:

- the 80% furlough rate of pay for any time spent on furlough. The cap of £2,500 per month will be adjusted to reflect the amount of time spent on furlough (e.g. if they were furloughed for half the week, then the cap would also be reduced by half to £1,250 per month); and
- their normal rate of pay for any hours worked. The pay for any working hours must be delivered in full by the employer and is not recoverable under the Scheme.

The employer should deduct income tax and employee NICs and other deductions in the normal way and then pay the whole of the net amount to the employee. No monies should be deducted 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 a fully furloughed employee earning up to £37,500 per annum (gross) would receive 80% of their actual pay. Anyone earning over £37,500 per annum (gross) will experience a shortfall over and above the 20% due to the application of the cap.

Worked example 1: Employee earning £24,000 per annum who is fully furloughed in November 2020	Worked example 2: Employee earning £60,000 gross per annum who is fully furloughed in November 2020
<p>Annual salary is £24,000 per annum (gross).</p> <p>Monthly salary is £2,000 per annum (gross).</p> <p><math>£2,000 \times 0.80 = £1,600</math> paid to the employer (plus additional sum for employer NICs and pension contributions if applicable).</p> <p>Employer deducts income tax and employee NICs (and any other deductions) from £1,600.</p> <p>Employee receives net amount of approximately £1,428 (compared to usual net amount of approximately £1,655).</p>	<p>Annual salary is £60,000 per annum (gross).</p> <p>Monthly salary is £5,000 per annum (gross).</p> <p><math>£5,000 \times 0.80 = £4,000</math> meaning the cap of £2,500 is applied.</p> <p>£2,500 is paid to the employer (plus additional sum for employer NICs and pension contributions if applicable).</p> <p>Employer deducts income tax and employee NICs (and any other deductions) from £2,500.</p> <p>Employee receives net amount of approximately £1,995 (compared to usual net amount of approximately £3,611).</p>

### Do employers have to cover the shortfall in pay?

Ordinarily, unless the employer has a contractual right to lay an employee off without pay, it must maintain normal pay for employees who are laid off temporarily. This would mean that the employer would be obliged to cover the shortfall in pay, namely the 20% not covered by the Scheme and any shortfall suffered by those earning in excess of £37,500 per annum.

The Guidance states that employers may choose to pay any shortfall, but they are not obliged to under this Scheme. Although employers are not obliged to top up any shortfall under the rules governing the Scheme, they will often be under a contractual obligation to top up to normal pay.

Before placing an employee on furlough, the Guidance provides that the employer should discuss the Scheme with their staff and make any changes to the employment contract by agreement. In practice, therefore, an employer who does *not* wish to top up the shortfall should obtain the agreement of employees to receive only the reduced pay under the Scheme. This agreement should be documented in writing. Where an employee refuses to agree to this change, the employer may decide not to furlough the employee and, instead, make them redundant.

#### **E. PLACING AN EMPLOYEE ON FURLOUGH:**

##### **Do employees need to consent to being furloughed?**

The Guidance provides that employers should discuss and agree the furlough arrangement with their employees. This means that employers need to discuss a proposal to furlough with employees and seek their agreement.

In many cases, a furlough agreement (or written confirmation confirming the agreement) will have already been put in place to cover the pre-1 November 2020 furlough arrangements. Where an employee is to move on to a part furlough arrangement, the agreement will need to be updated to reflect the employee's agreement to be part furloughed and to outline the proposed working pattern. Even where an employee is to remain fully furloughed, the agreement will need to be varied to extend the length of the furlough arrangement (up to no later than 31 March 2021) or reflect any other changes agreed between the parties (e.g. the reduction or removal of benefits).

The Guidance does not dictate any particular form of consultation process. We suggest a letter or email explaining the proposal and a follow-up conversation (or vice versa). Alternatively, where the employer recognises a trade union, it may be possible to reach collective agreement.

An employer who does not wish to top up the shortfall in pay will also need the agreement of employees to receive only the reduced pay available under the Scheme. Once agreed, the new terms should be set out in writing (see below).

Where an employee refuses to agree to be furloughed at all, or to be furloughed on reduced pay, then their wages cannot be claimed under the Scheme and the employer may decide, instead, to make them redundant.

##### **Will employers need to engage in collective consultation with employees before placing them on furlough?**

Employers may be subject to other, more onerous, obligations to consult with employees and/or elected representatives or trade union representatives.

Where 20 or more employees are to be furloughed, the duty to notify the Secretary of State using the HR1 form and to collectively consult the workforce may be engaged. This could be triggered where the proposed furloughing arises in the context of a wider proposal to make 20 or more employees

redundant within a 90-day period. It could also be triggered where the employer proposes changes to terms and conditions of employment (e.g. as to pay), which, if not accepted, would lead to the dismissal of 20 or more employees (or, possibly, dismissal and an offer to be re-engaged on new terms).

A key question will be whether there is a sufficiently well-advanced proposal to make 20+ employees redundant at a single establishment within a 90-day period. Arguably, an employer who is asking employees to agree to be furloughed is at the stage of merely contemplating redundancies and won't have a proposal sufficient to trigger collective consultation at that stage. However, each case will be slightly different, and employers should seek legal advice on whether the duty is triggered in their case.

Even where collective consultation is triggered, it is possible that employers will be able to rely on the "special circumstances" defence to justify some streamlining of the process. Employers within the collective consultation regime should take legal advice on how to approach the consultation process in their specific circumstances.

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 between the employer and a trade union.

Employers will need to consider which, if any, consultation obligations apply and the extent to which it will be able to comply with them.

### **How should employers record the furlough agreement?**

A written record of the furlough agreement must be in place *before* the relevant claim period. Furlough agreements could be made retrospectively to have effect from 1 November 2020 provided that they were in place by 13 November 2020 (i.e. both the agreement and the written record of the agreement).

Where an employee has been furloughed under an early phase of the Scheme, the employer and employee should agree the changes that will apply for the next phase of the Scheme and the employer should then record this updated position in writing. However, all of this should still be done *prior* to the relevant claim period.

Whilst it's not necessary for the employee to confirm their agreement writing, it would usually be sensible to ask for this. As a minimum, the employee should confirm their agreement in writing to:

- cease all work in relation to their employment until the extended date (up to no later than 31 March 2021);
- if relevant, move from a full-time furlough arrangement to a part-time furlough arrangement;
- where the employee is to be part furloughed, to work the number of required hours according to the required working pattern;
- any changes in respect of their pay and benefits;

- carry out any training required by the employer; and
- return to work upon reasonable notice.

Employers are required to keep a record of these communications for 5 years (although other furlough records must be kept for 6 years and, therefore, it would be sensible to retain copies of these communications for the same period). The employer must also keep records of how many hours the employee works (if any) and how many hours they are on furlough.

### **Do employers have to furlough employees instead of making them redundant?**

As part of a fair process, employers are obliged to consider ways to avoid redundancy. A potentially redundant employee might reasonably argue that a failure to consider furloughing means the process is unfair (since the employer's position may have improved by the end of the furlough period meaning redundancy is not needed). Therefore, it's probably necessary for employers to at least consider furloughing as an alternative. However, if the employer concludes that redundancy will still be the ultimate outcome, then it may proceed with a redundancy dismissal.

### **Are there any special considerations for company directors?**

Provided it is acting in compliance with its statutory duties, the board of directors of a company may decide to furlough a salaried company director. This includes directors who are paid annually, provided they meet the other eligibility criteria. Where a board decides to furlough a director, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director concerned.

Where a company director has been furloughed, he or she is allowed to carry out particular duties to fulfil the statutory obligations they owe to the company, to the extent that it is reasonable and necessary to do so. This has a narrow meaning and only covers work undertaken to fulfil a duty or other obligation arising under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the company.

Furloughed directors are also able to undertake activities related to making claims under the Scheme in respect of company employees and making salary payments to company employees.

Aside from these limited exceptions, directors are not allowed to carry out normal duties designed to generate revenue or provide services to, or on behalf of, the company.

### **Are there any special considerations for members of LLPs?**

To furlough a salaried member of an LLP, it may be necessary to vary the terms of the LLP agreement (and any agreement between the LLP and the member) to reflect the fact that the LLP member will not be working whilst furloughed and what this means for their remuneration. In addition, the furlough arrangements should be adopted formally as a decision of the LLP.

### **Are there any special considerations for agency workers?**

Where the agency worker is employed by the agency, the agency will be responsible for taking the decision to furlough. Where the agency supplies workers who are employed by an umbrella company that operates PAYE, the umbrella company will be responsible for taking the decision to furlough.

The Guidance advises that the agency should discuss the need to furlough with the relevant end user client. Once furloughed, an agency worker is not allowed to perform any work for, through, or on behalf of, the agency, including for the agency's clients.

## **F. HOW TO MAKE A CLAIM:**

### **What help is available for employers when preparing their claims?**

The [Coronavirus Job Retention Scheme calculator](#) is available to help employers work out how much to claim. It can be used for most employees who are paid either regular or variable amounts in each pay period. In complex cases, the calculator cannot be used. Instead, employers will need to work out what to claim using the guidance (or by seeking professional advice from an accountant or tax adviser). The [Steps to take before calculating your claim](#) and [Calculate how much you can claim](#) guides will be of assistance. In addition, detailed worked examples are provided [here](#) and [here](#). HMRC also offers advice via live [webinars](#).

### **What information is needed to make a claim?**

To make a claim, the employer will need to be registered for PAYE online and will need to submit the following information to HMRC's online portal:

- the employer's PAYE scheme reference number;
- the employer's Self-Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number or Employer Name (as appropriate);
- the number of employees being furloughed;
- the National Insurance Numbers for all the employees being furloughed (in the event that an employee does not have one the employer should contact HMRC);
- the payroll/employee numbers for all the employees being furloughed (optional);
- the claim period (start and end date);
- if the employee is part furloughed, the employee's: (i) usual hours of work; (ii) actual hours of work; and (iii) hours on furlough, for the claim period;
- the full amount claimed;
- the employer's bank account number, sort code and billing address on the bank account; and
- a contact name and phone number.

Where fewer than 100 employees are to be furloughed, the employer must input this information directly onto the online portal for each individual employee. Where 100+ employees are to be furloughed, the employer should compile a file containing this information and upload that to the online portal (and there are strict rules around how the information should be organised within that file). HMRC has produced a [file upload template](#) that can be used for this purpose.

### **Can an agent make the claim on the employer's behalf?**

Only certain types of agents are able to make claims on behalf of the employer. Agents who are authorised to act for PAYE purposes are able to make claims under the Scheme. However, file-only agents are not authorised to submit claims and the employer will need to make the claim itself.

Where an agent does make a claim on behalf of an employer, the employer must tell the agent which bank account they would like the grant to be paid into.

### **How long can furlough last?**

The minimum furlough claim period was previously set at 3 consecutive weeks. However, from 1 July 2020, furlough claim periods are no longer restricted to a minimum 3-week period. They can run for any length of time (although the minimum claim period is 7 days in most cases). Claim periods must start and end within the same calendar month.

### **How should claims be submitted?**

There are a number of important rules for employers to follow when compiling and submitting claims:

- separate claims must be made for each PAYE scheme;
- claims must reflect the employee's pay period (i.e. weekly claims must be made for employees who are paid weekly and monthly claims must be made for employees who are paid monthly);
- when claiming for employees who are part furloughed the employer should not claim until they are sure of the exact number of hours the employee will have worked in the claim period (and if an employee ends up working more hours than stated, the employer will have to repay some of the grant to HMRC);
- only one claim can be made for each pay period and there should be no overlapping of claim periods;
- claims for periods starting on or after 1 November 2020 can be made from 11 November 2020;
- claims cannot cross calendar months even if the pay period includes days in more than one month – these claims have to be calculated separately;
- claims for all employees in each pay period must be submitted at the same time (even if they are paid at different times);
- claims must be submitted shortly before, during or after the running of payroll but cannot be submitted: (i) earlier than 14 days before the claim period end date; and (ii) later than 14 calendar days after the month claimed for (e.g. a claim for furlough days falling in November 2020 must be submitted by 11.59pm on 14 December 2020). Late claims will only be accepted where the employer has a reasonable excuse for failing to make the claim in time;
- any claim must contain all of the furloughed days that the claim relates to within the calendar month;
- claim periods must last at least 7 calendar days;
- claims should follow one after another, with no gaps in between;
- claims can be started and saved in draft, but must be submitted within 7 days of starting; and
- changes cannot be made to claims once they have been submitted (although they can be deleted altogether within 72 hours of submission).

When submitting claims, employers are asked to rely on online support and avoid contacting HMRC unless more than 10 working days have elapsed since the claim was submitted and funding has not been received. Employers are also asked to tell their employees not to contact HMRC to ask questions about the employer's claim.

### **What records do employers need to keep and for how long?**

Employers must keep copies of all records relating to their claim for 6 years, including

- their calculations of the amount claimed;
- the amount claimed and the claim period for each employee;
- the claim reference number (this is issued once a claim has been submitted online);
- the usual and actual hours worked (including any calculations that were required) for employees who have been part furloughed.

Employers are also required to keep a record of communications with the employee relating to the furlough agreement. Strictly speaking, these need only be kept for 5 years, but it would be sensible to keep them for the same period as the other records (i.e. 6 years).

### **What if a mistake is made when submitting a claim?**

If a mistake is made, the employer is able to delete the whole claim within 72 hours of submission and start again.

If this is not done in time and the mistaken claim results in an overpayment, the employer must notify HMRC by the **latest** of either:

- 90 days after the date the employer received the grant to which it was not entitled; or
- 90 days after the date the employer received the grant that it was no longer entitled to keep because its circumstances had changed.

If it fails to do this, the employer may be liable to pay a penalty.

The employer must also repay the overpayment to HMRC. This can be done by notifying HMRC about the overpayment when it makes a further claim under the Scheme and offsetting the overpaid amount against the new claim (meaning the new claim will be reduced). Where this occurs, the employer must keep a record of the adjustment for 6 years. Alternatively, if the employer has been overpaid and does not intend to submit any further claims, the amount must be repaid within 30 days. Further information about this can be found [here](#).

If a mistake results in an underclaimed amount, the employer should contact HMRC to amend their claim. Employers will only be able to increase the amount claimed where they amend the claim within 28 calendar days after the month the claim relates to (unless it falls on a weekend and then it will be the next working day). For example, to amend a claim for furlough days falling in November 2020, the claim must be amended by 11.59pm on 29 December 2020.

### **How and when will payments be made?**

Payments will usually be made within 6 working days of submission of a claim. However, HMRC will assess certain “high-risk” claims and stop payments being made before they have been fully checked.

Where a claim is accepted, the funding will be paid via a BACS payment into the employer’s UK bank account.



## **Public record of employers who make claims**

From December 2020, HMRC will publish the names of all employers who have made claims under the Scheme for the month of December onwards, together with an indication of the value of the claim. They will also publish the company registration numbers of all companies and LLPs.

An exception may be made for employers who can show that the publication of this information would result in a serious risk of violence or intimidation to certain individuals, or any individual living with them. To fall within this exception, the employer will need to provide evidence of the risk, such as a police incident number or documentary evidence of a threat or attack or other evidence of possible disruption or targeting.

## **G. WHAT HAPPENS TO EMPLOYEES ON FURLOUGH?**

### **Do furloughed employees retain all their usual employment rights?**

Furloughed employees will still be employed and will retain all their normal employment rights, such as the right to SSP, to take various forms of family leave and to a statutory redundancy payment.

### **Do furloughed employees accrue annual leave and can they take it during furlough?**

In addition to the Guidance, BEIS has also published additional guidance specifically addressing [holiday entitlement and pay during coronavirus](#).

The Guidance provides that employees continue to accrue annual leave in the usual way whilst furloughed. Where an employer offers additional annual leave over and above the statutory minimum 5.6 weeks per year, they could ask the employee to agree to reduce this additional entitlement whilst furloughed.

It also provides that employees can elect to take annual leave whilst furloughed and that employers can require employees to take a day's paid annual leave on a Bank Holiday (provided that appropriate notice is given to the employee). However, the Guidance is silent on whether an employer is able to require a furloughed employee 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 will be unable to enjoy a period of relaxation and leisure in the usual way due to the constraints of the lockdown rules. The BEIS guidance (linked above) suggests that, in principle, employers *can* require furloughed employees to take annual leave provided appropriate notice is given. However, employers are urged to consider whether the lockdown restrictions would prevent the worker from resting, relaxing and enjoying leisure time "*which is the fundamental purpose of holiday*". We would recommend that employers seek legal advice before requiring furloughed employees to take annual leave.

Where an employee is flexibly furloughed, *any* hours taken as holiday during the "claim period" should be counted as furloughed hours rather than working hours (meaning the employer may claim a grant for such hours). This is the case even where the holiday hours fall on what would have been a working day rather than a furlough day. For example, an employee is furloughed on Monday and Friday and works Tuesday to Thursday. The claim period is Monday to Sunday. If the employee takes Tuesday to Thursday as holiday, this represents hours taken as holiday during the claim period and should be

recorded as furloughed hours (even though had the employee not been on holiday, those hours would have been working hours for which no claim could be made).

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

The Government has also passed emergency regulations relaxing the usual rules on the carry-over of unused annual leave. These regulations permit the carry-over of up to 4 weeks' annual leave for 2 years, where it cannot be taken in the leave year for coronavirus-related reasons.

### **Can furloughed employees do any work or training?**

Employees are not permitted to undertake any work for, or on behalf, of the employer (or any linked or associated organisations) during time spent on furlough. In this context, "work" means providing services or generating revenue. However, furloughed employees may undertake:

- work for the sole purpose of fulfilling their duties as a trustee or manager of an occupational pension scheme (excluding work as an independent trustee);
- duties and activities for the purpose of individual or collective representation of employees or other workers (whether as a union or non-union representative);
- voluntary work for another employer or organisation (but they cannot carry out volunteer work for the employer);
- training (subject to some restrictions); and/or
- work for a second employer if the first employer permits this.

Furloughed company directors are also allowed to carry out particular duties to fulfil certain statutory obligations they owe to the company and to make claims under the Scheme and/or make salary payments to employees (see "*Are there are special considerations for company directors?*" above). Furloughed agency workers are not allowed to perform any work for, through or on behalf of the agency, including for the agency's clients.

Where a furloughed employee is asked to undertake any training (e.g. online courses), then they 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 the employer will need to top up the payment to the applicable rate. This could be a particular issue for apprentices that are continuing their training whilst furloughed. Separate [guidance](#) is available for changes in the apprenticeship learning arrangements because of coronavirus.

HMRC has 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.

### **Can furloughed employees participate in disciplinary and grievance processes and/or attend Tribunal or Court hearings?**

The Guidance is silent on whether furloughed employees can participate in such processes. However, Acas has published [guidance on disciplinary and grievances procedures during the coronavirus pandemic](#). The Acas guidance advises that such processes may proceed despite the restrictions imposed by the pandemic, provided they can be operated in a fair and reasonable way. It is said that furloughed employees are able to participate in such processes. Such participation could include:

- being interviewed as part of an investigation;
- giving evidence as a witness at a hearing;
- acting as a note-taker at an investigation meeting or hearing;
- chairing hearings; and/or
- acting as an employee's companion at a hearing,

In the case of *Fottles and Bourne Leisure*, the Nottingham County Court decided that furloughed employees were able to: (i) speak to their employer's lawyer to arrange attendance at a Court or Tribunal hearing; (ii) attend a Court or Tribunal hearing to give evidence on their employer's behalf, without breaching the Scheme.

However, employers should remember that neither the Acas guidance, nor the decision of the County Court, is binding on HMRC and it is possible that HMRC may take the view that at least some of these forms of participation amount to "providing services" to their employer. If so, this could invalidate the claim for that employee under the Scheme.

#### **Can furloughed employees be made redundant? If so, can a claim be made under the Scheme for their notice pay and/or redundancy pay?**

Employers may make furloughed employees redundant, rather than keep them on furlough until the end of the Scheme. If this is done, the Guidance provides that for claim periods between 1 November 2020 and 30 November 2020, employers are entitled to make a claim under the Scheme for wages paid to an employee who is serving a **statutory** notice period. Any statutory notice pay must be calculated by reference to the employee's normal pay and not by reference to their reduced furlough rate of pay. This means that the employer will have to top up the employee's furlough pay in respect of any statutory notice period.

The Guidance is unclear whether an employer is entitled to claim for wages paid to an employee who is serving a longer **contractual** notice period – the employer-facing guidance is silent on the issue but the employee-facing guidance says that claims *can* be made for employees serving contractual notice periods (until 30 November 2020).

However, both the Guidance and the Fourth Direction are clear that for claim periods starting on or after 1 December 2020, employers may not claim for any days during which the furloughed employee was serving *either* statutory or contractual notice (including where the employee has resigned or is serving notice of retirement).

Claims may not be made under the Scheme to cover payments in lieu of notice and/or redundancy payments. Where an employee is made redundant, statutory redundancy payments must be calculated by reference to the employee's normal pay, not the reduced furlough rate of pay.

**What happens to the furloughed employees when the Scheme ends?**

Once the Scheme ends, the employer will need to decide whether employees who are still furloughed can return to work (either on their normal hours or on reduced hours). If there is no work for them to do, then the employer will probably have no choice but to proceed with redundancies.

Employers should also be aware that HMRC will retain the right to retrospectively audit all aspects of claims made under the Scheme. The Guidance provides that payments will need to be repaid in full to HMRC if it is found that a claim was based on dishonest or inaccurate information. Ultimately, HMRC has said that fraudulent claims could result in criminal action.

**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](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF contact.**