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# Coronavirus (COVID-19): furlough guide

This guide outlines the key facts you need to know about furlough leave

As part of its response to the COVID-19 pandemic the government has introduced the Coronavirus Job Retention Scheme. This will allow all UK employers with employees on a PAYE scheme to designate those employees as 'furloughed workers'. The employer will have access to government support to continue paying part of these furloughed employees' salaries and protect the employees from redundancy.

This guide outlines the key facts (that have been announced so far) about designating employees as furloughed workers and gives advice on considering implementing this new type of leave.

**Watch the video for the answers to some key questions you may have.**

Play Video

## What is furlough?

The word 'furlough' generally means temporary leave of absence from work. This can be due to economic conditions affecting one company, or matters affecting the whole country. Until now the expression has not carried any meaning in UK employment law but has been temporarily introduced in response to the unprecedented situation presented by the COVID-19 pandemic. This does not mean that the fundamentals of employment law have changed, simply that this scheme adds to them.

Furlough leave has been temporarily introduced by the government to provide employers with an option to keep employees on the payroll without them working. As the furloughed staff are kept on the payroll, this is different to being laid off without pay or being made redundant. The ability to furlough employees is designed to support employers who are severely affected by coronavirus.

This provides employers with another option when reviewing the circumstances of their business (as an alternative to redundancies or being laid off without pay) and each

employer will need to review this option carefully (alongside legal advice) to pursue the best option for them.

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## Which employers are eligible?

Any employer (of any size) is eligible for the scheme. This includes:

- businesses
- charities
- recruitment agencies (if the agency workers are paid through PAYE)
- public authorities.

To be eligible the employer must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.

It has been confirmed that where a company is in administration, the administrator will be able to access the [Coronavirus Job Retention Scheme](#).

More information is available on the [government website](#) and further details are expected in due course. The situation is evolving rapidly and future regulations and guidance may resolve the remaining uncertainties.

## Public sector

The government does not expect much public sector use of the scheme because many public sector employees are continuing to work throughout the coronavirus outbreak.

Non-public sector employers who receive public funding for staff costs are expected to continue to pay staff and not to place them on furlough. However, where staff cannot be redeployed to assist with the coronavirus response, then the furlough scheme may be applicable.

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## Which employees are eligible?

The employees that can agree to being furloughed are those working for businesses that would otherwise have to be dismissed as redundant or laid off.

The furloughed employees must have been on the employer's PAYE payroll on 28 February 2020, including:

- full-time employees
- part-time employees
- agency employees on agency contracts (provided they are not working at all)

- zero-hour contract workers (provided that they are employees albeit on flexible contracts).

For new employees who were not on the employer's payroll on 28 February 2020 complexities arise - see our FAQs on placing new employees on furlough.

There are also complexities for employees who have been:

- on sabbatical or unpaid leave
- recently made redundant or laid-off
- are pregnant or on maternity leave or adoption/paternity/shared parental leave pay
- caring for children
- migrant workers.

See our FAQs for more information on these specific situations.

Employees who have been on sick leave can be placed on furlough leave after the period of sick leave has ended if there is no work for them to do and they would otherwise be laid off or made redundant. Employees who are shielding themselves in line with government advice can also be placed on furlough leave.

### **Employees who work elsewhere**

Employees with two or more employers can be furloughed for each job separately but the £2,500 cap applies to each employer individually. This means that an employee with two jobs can have 80% of their salary reimbursed with a cap of £5,000, or more, if the employers top the salary up above the grant level.

Consider this, if an employee works two days a week for Employer A and three days a week for Employer B they would receive their 80% of their actual salary for those two days if on furlough from Employer A. If their other role continues the employee could receive their normal salary from Employer B as well.

The guidance does not yet cover the position if the employee is then offered additional work from Employer B. It seems that this is may be an inadvertent benefit for the employee, however normal legal principles apply too, as outlined below.

### **Coronavirus Job Retention Scheme**

If furloughed employees work for another employer during the hours they would normally be working for the employer who has furloughed them, there is no government guidance but it does seem that the payments by HMRC will be paid even if the employee picks up other work. The government details only prevent the employee from doing any work for the employer that has furloughed them.

## General legal position on working elsewhere

Just because the scheme may pay a grant for the furloughed employee is a different legal issue to the relationship between the employer and employee. In many employment contracts there is either an express or implied term that the employee should loyally and faithfully work for that employer and not work elsewhere. It could technically be breach of contract with the employer if employees pick up work elsewhere. Ultimately what happens may be a question of negotiation between the employer and employee:

- Employees do have to agree to being furloughed, unless there are lay off provisions in their contract, so an informed employee may say they only agree to being furloughed and taking a 20% pay cut if the employer agrees to them working elsewhere during their normal working hours.
- Alternatively, employers may ask employees to agree new or reconfirmed restrictions on working elsewhere, especially if for a competitor. The employer may agree to furloughed employees working in limited sectors, for example, food, health and social care or other essential services. Special rules also govern volunteering.

## Business owners and partners

Owners of small businesses who pay themselves a PAYE salary are covered under the furlough scheme. The scheme does not apply to dividend payments so director-shareholders who are paid partly or mainly in dividends will only be covered to the extent that they receive PAYE earnings.

The [Coronavirus Self-employment Income Support Scheme](#) has been introduced to provide a similar sort of support to those not eligible under the job retention scheme. This means self-employed directors with taxable profits below a £50,000 annual threshold may be eligible to apply for support under the self-employment scheme.

Salaried partners who are paid through the PAYE payroll will be eligible under the furlough scheme. Partner owners and LLP members who are treated as self-employed (and not paid through the PAYE payroll) will not be covered. Like directors, self-employed partners with taxable profits below the annual threshold may be eligible to apply for support under the self-employment scheme.

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## How to agree which employees are furloughed

Employees must be consulted and have to agree to be furloughed.

Changing the status of employees always is subject to existing employment law so it's important to bear this in mind. Depending on the employment contract wording there

may be an ability to lay-off workers to impose a furlough period.

If there is no lay off provision in the existing contract the employer will need to agree with the employee that they going to become furloughed because no work is available. Most employees will agree to this as the alternative is dismissal by reason of redundancy (with the possibility of a delayed redundancy payment or no redundancy payment for employees who have worked for less than two years).

In some cases, the unions may join in a collective consultation process to agree the furlough change. As normal employment laws apply when furloughing employees, equality and discrimination laws will apply and so employers will need to be aware of certain risks, for example, choosing a disproportionate amount of men or women, which could lead to discrimination claims later.

In a minority of cases there may be some negotiation, as for some employers some staff may be needed and others not. Some employees may be resentful that they are having to work as they are classed as being essential whilst others are being furloughed on 80% of salary. Others may be resentful that they are classed as dispensable whilst others are working and receiving their full package.

It may help to select employees for furlough using a process like redundancy selection (for example, using objective criteria, such as a scores matrix based on skills, productivity, previous appraisals etc). Discuss all of the available options with employees and stay up to date with the latest on the [Government website](#).

If employees do not agree to be furloughed then employers can dismiss them by reason of redundancy (if the redundancy definitions are met and a proper process is followed).

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## How to apply to the scheme

The ability to furlough employees under the Coronavirus Job Retention Scheme will be operational from the end of April. The scheme is backdated and will apply from 1 March for at least three months until 31 May (unless extended).

Once employers have reached an agreement with employees about being furloughed, they should write to the affected employees confirming that they have been furloughed and should keep a record of this.

Employers access the scheme through an online portal, providing details of the affected furloughed employees and information about their earnings and any other information required (such as the employee's NI number).

Employers should:

- Decide whether to pay 80% of salary or to supplement it.
- Gain the employees' written consent unless contractual provisions already cover lay off.
- Stop the employees from working.
- Calculate the amounts they are claiming from HMRC.

To work out what amounts they are claiming employers will have to work out the employer NI and minimum automatic enrolment employer pension contributions for all employees.

When the portal is operational employers will apply with their ePAYE reference number, bank account number and sort code and specify the:

- number of employees being furloughed
- claim period (start and end date)
- amount claimed (the minimum length of furlough is three weeks)
- employer's contact name and telephone number.

## Timing

Employers are advised by the government to claim in advance of an imminent payroll or at the point when they run their payroll.

HMRC will retain the right to retrospectively investigate and audit employers' claims.

Once HMRC have the claim and agree the employer's eligibility a BACS payment will simply arrive directly into the bank account supplied.

Employers make a collective claim for the group of furloughed employees under the scheme (not for individual employees) but employers will probably need to make more than one claim throughout the period of furlough.

Employers will probably submit one claim at least every three weeks (as three weeks is the minimum length of time an employee can be furloughed for).

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## What happens during furlough?

### Length of furlough

The minimum furlough period is three weeks. The scheme is set to run for three months

(until 31 May) but may be extended.

## Working

People who get furloughed must not work for the employer during the period of furlough. They will usually return to their job afterwards (unless redundancies follow).

## Pay

Under the scheme furloughed workers will receive either 80% of their regular wage or £2,500 per month, whichever is lower. Employers can choose to top up the employee's salary above 80% but they are not obliged to. Fees, commission and bonuses should not be included when working out the 80% figure.

Employers who furlough employees can also claim employers' national insurance payments and minimum pension contributions.

For regular salaried employees, employers should base calculations on actual salary before tax, as at 28 February 2020. For employees with variable pay employers can claim the higher of either:

- the same month's earning from 2019; or
- average monthly earnings from the 2019-20 year.

If an employee with variable pay has been employed for under a year employer can claim for an average of monthly earnings since they started work. For workers who only started part way through February 2020, the wage will have to be taken pro-rata.

The furloughed employees are unlikely to receive £2,500 exactly. Employees who earn under £3,125 a month will receive less than £2,500. This is because for those earning £3,125 a month, 80% of salary would be £2,500:

- Employees who earn less than £3,125 a month normally, will get 80% of their salary for three months (or more).
- Employees earning in excess £3,125 a month will have the £2,500 cap applied. These employees will receive less than 80% of their salary for those three months (or more) unless the employer chooses to supplement it.
- The £2,500 a month figure has presumably been chosen as it is broadly £30,000 a year which is the national median net salary.

More detailed guidance around payment amounts is expected but some principles are already known; see the FAQs on national insurance and pensions for more information.

Employers will receive a grant to cover part of the salaries of any employees who would otherwise have been dismissed. Employers do not have to pay this grant back. Employers must pay over the entire grant received to the furloughed employees, plus any top up payment they are choosing to pay.

## Annual leave

If furloughed workers do not book any holiday time their statutory minimum holiday entitlement of 5.6 weeks per year will accrue while they are furloughed. The exact amount will vary depending on how much leave the employee has already taken. Employers can ask for employees to agree to any contractual holiday not to accrue during furlough. More information is available in the FAQs.

## Training

If employees are required to complete any job-related training while they are on furlough leave they should be paid at least the National Minimum Wage rate.

## Returning to work

The scheme is set to run until 31 May 2020 but may be extended. Employees can be moved in and out of furlough on a three week or longer basis.

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For more information check our FAQs on furlough or our [webinar series](#) which has sessions on furlough.

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