

## **FURLOUGHING EMPLOYEES - FAQs FOR EMPLOYERS ON THE CORONAVIRUS JOB RETENTION SCHEME**

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The Chancellor has given more details about the extension of the furlough scheme to 31 October and the changes that will take effect from July.

On 29 May 2020, the government elaborated on changes to the furlough scheme it had previously sketched out, including the option of a new “flexible furloughing scheme” starting from 1 July, under which employees can do some part-time work for normal pay, whilst remaining furloughed on other days. Accompanying the announcement was a factsheet, with more details.

The government published guidance for employers on the Coronavirus Job Retention Scheme (CJRS) when it was first introduced in March 2020 and separate guidance for employees. Both sets of guidance have been amended several times since then, and were updated on 29 May.

There is also a step-by-step guide for employers on how to claim through the scheme, guidance on how to work out 80% of wages, and information on claiming back Statutory Sick Pay (SSP). The Treasury Direction (TD) under the Coronavirus Act 2020 sets out the legal framework for the scheme and was updated on 22 May 2020. The updated TD does not detail the most recently announced changes.

Below we set out the key latest developments, including the changes to the CJRS from July and then answer some of the frequently asked questions about the scheme.

### **KEY LATEST DEVELOPMENTS**

The government announced that the CJRS will be extended until 31 October 2020 with some added flexibility for employers from 1 July 2020.

From 1 July 2020, employers will be able to bring employees previously on furlough back to work on a part-time basis (“flexible furloughing”). This is a month earlier than previously announced. When working, employees should be paid their “normal” wage, whilst they will receive furlough grant for the remainder of their usual working hours. The £2,500 cap on the furlough grant will be proportional to the hours not worked. Further guidance on flexible furloughing will be published on 12 June.

From 1 August, employers will be required to make a, gradually increasing, contribution towards the salaries of their furloughed staff. Employees will continue to receive the 80% of their current wages, up to £2,500 a month.

In August, the government contribution towards wages will remain 80% (subject to the cap). But employers will be required to contribute employer national insurance and pension contributions. In September, employers will also be required to contribute 10% of wages and the government will contribute 70%, for October the employer contribution increases to 20%. The scheme will close from the end of October.

The furlough scheme will be closed to new entrants from 30 June. This means that the last date for employees to be furloughed for the first time is 10 June, to enable them to complete the minimum 3-week furlough period by 30 June.

The government has released guidance on holiday entitlement and pay during coronavirus which includes the government's view on holidays and furlough.

The updated TD clarified certain issues and extended the CJRS to 30 June 2020 but does not deal with the chancellor's latest announcements about the scheme from July onwards.

## **HOW DOES THE LATEST ANNOUNCEMENT CHANGE MATTERS FOR US?**

### ***Can we continue to place employees on furlough?***

Yes, but the furlough scheme will close to new entrants from 30 June meaning that only employees who have spent a full 3 weeks on furlough before this date can continue to be furloughed or work under the new flexible furlough scheme.

### ***What if an employee refuses to consent to an extension of furlough?***

You will need to consider other options, depending on your workforce requirements - see our FAQs on restructuring the workplace post Covid-19 for further details.

### ***We agreed to top up salary to 100% -- do we need to continue this arrangement until the end of October?***

No, but you may need a new or extended furlough agreement (depending on how the terms of the existing agreement were framed).

### ***What contribution will we need to make when the scheme changes in August?***

The required employer contributions will be as follows:

- From 1 August: employer national insurance and pension contributions
- From 1 September: 10% of employee wages (up to £312.50) plus employer national insurance and pension contributions
- From 1 October: 20% of employee wages (up to £625) plus employer national insurance and pension contributions

The employee should continue to receive 80% of their regular wages, capped at £2,500 per month.

## **HOW WILL FLEXIBLE FURLOUGHING WORK?**

### ***When can furloughed employees start doing some work under the new flexible furlough arrangement?***

From 1 July, furloughed employees can be brought back to work on a flexible basis, which means that they can do some work for you whilst you still claim the government grant for the hours that they are not working.

***Must all furloughed employees do some work for us to continue to claim the grant?***

No, flexible furloughing is an option for you but if you are not in a position to provide any work then you don't need to do so. Employees can continue on full furlough (although you'll need to start contributing to the costs of this -see above).

***Is there a minimum or maximum number of working hours for employees on flexible furlough?***

No, you can agree any working arrangement with an employee on flexible furlough. It appears that this could change from week to week – because, when claiming the grant for furloughed hours, employers will be able to report and claim for a periods of just one week at a time. More guidance is expected on 12 June which may help clarify the extent to which your flexible furlough arrangements can be flexible.

***Can we put employees who are currently not furloughed onto a flexible furloughing arrangement?***

Yes, but if you've not furloughed them before then they will need to be put on furlough by 10 June, so that they have spent 3 weeks on full-time furlough by the time the furlough scheme closes to new entrants on 30 June.

***What do we pay an employee on flexible furlough for the hours they are working?***

For worked hours, you will need to pay whatever is due under the employee's contract, and you'll be responsible for all tax and NICs due on those amounts. It's unclear if you can agree pay cuts with employees before you bring them back to work (for example, in situations where you've implemented pay cuts amongst the staff who were not furloughed). We've seen nothing in the materials published so far to suggest that you must necessarily bring furloughed employees back on their pre-furlough pay, although we will need to wait for the guidance. If pay cuts are allowed, then it's not clear what impact this would have on the grant for hours not worked (which is currently based on pre-furlough pay).

***What can we claim for an employee on flexible furlough through the scheme?***

The factsheet says that you will be able to claim the grant for the hours your employees are not working calculated by reference to their usual hours worked in a claim period. The cap will be proportional to the hours not worked. You will need to report hours worked and the usual hours an employee would be expected to work in a claim period.

In practice, this means you are going to need a system for tracking hours worked and not worked. This may present challenges for salaried employees on furlough, whose hours you may not previously have tracked in this way. You will need a sensible system which does not make the process of making a claim unnecessarily difficult, but it seems that we will have to wait until the guidance is published on 12 June before we can be sure what that may entail

***Do we need a new furlough agreement with employees on a flexible furloughing arrangement?***

Yes. The latest factsheet says that, to be eligible for the grant, employers must agree with their employee any new flexible furloughing arrangement and confirm that agreement in writing.

**WHO CAN USE THE SCHEME?**

***Can we only use the scheme if redundancy was the alternative?***

The government previously indicated that the CJRS was an alternative to redundancy, lay-off or unemployment. Although the guidance for employees refers to furlough as applying when the employer is unable to operate or has no work for the employee to do, the guidance for employers says that all employers are eligible to claim under the scheme and that the government recognises that different businesses face different impacts from coronavirus.

However, the guidance makes clear that the scheme is “designed to help employers whose operations have been severely affected by coronavirus” and that employers that cannot maintain their current workforce because of this can make use of the scheme. The TD says that the scheme applies to employees who are furloughed, “by reason of circumstances arising as a result of coronavirus or coronavirus disease”.

Ultimately, it seems that employers may be allowed some discretion, but they should not be abusing the scheme. The guidance makes clear that the government will check claims made through the scheme and that claims based on dishonest or inaccurate information or found to be fraudulent will need to be repaid in full to HMRC. An online portal will be made available for employees and the public to report suspected fraud. The TD also says that no claim may be made if it is “abusive” or “otherwise contrary to the exceptional purpose” of the scheme.

***Which employers is the scheme open to?***

The scheme is available to all UK employers, including businesses, charities, recruitment agencies and public authorities, of any size and in any sector. To be eligible, employers must have created and started a PAYE payroll scheme on or before 19 March 2020, enrolled for PAYE online, and have a UK bank account.

## **HOW DO WE PUT SOMEONE ON FURLOUGH?**

### ***Do employees have to agree to being furloughed?***

Yes – you need to agree this with each employee. The guidance says that employers should discuss this with their employees and make any changes to the employment contract by agreement. This does not necessarily require a protracted procedure. In our experience so far, most employees will be willing to accept furlough on basis that the other options are worse, and to ensure they still have a job to return to when the crisis is over.

Assuming the employee agrees be put on furlough, you will need to designate them as furloughed. The guidance says that, to be eligible for the grant, employers must confirm in writing to their employee that they have been furloughed.

The amended TD resolves some concerns which arose from inconsistencies between the original TD and government guidance. It removes the explicit requirement that agreement to furlough must be in writing, stating that it must be in writing or confirmed in writing (which includes by electronic means such as email). It also provides that the agreement may be express or implied, reflecting the position in the guidance. This is helpful clarification for employers that implied agreement to furlough is sufficient - there needs to be a written record, but the employee does not need to provide a written response. In addition, it now reflects the position in the guidance that a collective agreement reached between an employer and trade union is acceptable for the purpose of a claim under the CJRS.

The amended TD also provides that the agreement must specify the main terms and conditions upon which the employee will cease all work in relation to their employment.

There is some inconsistency in various guidance documents on how long records need to be kept. The amended TD states that records of the agreement or confirmation of the agreement should be kept until at least 30 June 2025.

### ***Can employees put themselves on furlough?***

No. You, as the employer, need to designate them as furloughed.

## **PAY DURING FURLOUGH**

### ***Will payments to employees on furlough be taxable?***

Yes, payments you make to furloughed employees will be subject to PAYE and National Insurance contributions.

*Will employees continue to accrue continuous service during furlough?*

Yes, the underlying relationship continues if a worker is furloughed, so their period of continuous employment continues to accrue and will be recognised in full once the furlough comes to an end.

***Do we have to top up the subsidy?***

Not yet. You can top up the subsidy if you wish, but you do not have to do so. It is open to you to agree with your employees that they will only receive the amount of the grant during furlough.

For employers that are topping up, a key question is how to maintain a fair differential between furloughed employees and any employees who are still working.

**FROM 1 AUGUST, EMPLOYERS WILL BE REQUIRED TO CONTRIBUTE TOWARDS THE SUBSIDY. (SEE 'HOW MUCH IS THE SUBSIDY').**

***What if the subsidy is less than the minimum wage? Do we have to top it up then?***

No. Workers are only entitled to the National Minimum Wage/National Living Wage for the hours they are working. You do not need to ensure that they are receiving NMW/NLW rates while on furlough.

The position is different if you are asking workers to complete training – see below.

**ROTATING FURLOUGH AND OTHER OPTIONS WHERE THERE IS STILL WORK, BUT LESS OF IT**

***Can we rotate employees on furlough?***

Yes. Employees can be furloughed multiple times. Each separate instance must be for a minimum period of three consecutive weeks (one period can follow straight after an existing furlough period) and when employees return to work, they must be taken off furlough.

***Can we make some people redundant and furlough others?***

Yes. The guidance clearly says that you do not need to place all your employees on furlough.

***Can we do a partial furlough to put somebody on reduced hours?***

Not at the moment. An individual cannot work for you at all if they are furloughed. However, this will become possible from 1 July 2020 provided the employee in question has been furloughed for a minimum of 3 weeks at some point before 30 June (see Flexible Furlough section).

## **WHAT CAN WE CLAIM THROUGH THE SCHEME?**

### ***How much is the subsidy?***

Currently, HM Revenue & Customs (HMRC) will reimburse 80% of furloughed workers' regular wages, up to a cap of £2,500 (gross) per worker per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer contributions on that wage.

From 1 August, the Government will stop covering employer national insurance and pension contributions.

In September, the Government will reduce their contribution to 70% (up to a cap of £2,187.50) and from 1 October, the Government will again reduce their contribution to 60% (up to a cap of £1,875).

The employer is required to contribute the shortfall to ensure the employee continues to receive 80% of their regular wages (capped at £2,500) as well as the employer national insurance and pension contributions.

### ***How do we calculate regular wages?***

For salaried employees, you must use the actual salary before tax, as of 19 March 2020. If you have already placed employees on furlough based on their salary as of 28 February 2020, and this differs from their salary on 19 March, you can use the 28 February date instead for the first claim you make. For employees whose pay varies (for example because they work different hours each month), you must use and can claim for the higher of either:

- the same month's earnings from the previous year
- average monthly earnings from the 2019-20 year

If an employee with variable pay has been employed for less than a year, you can claim for an average of their monthly earnings since they started work.

If the employee has worked for less than a month, you should use a pro-rata approach.

An online calculator is available to help employers work out how much can be claimed as wages, national insurance contributions and pension contributions. The guidance provides a number of worked calculations based on a variety of scenarios reflecting the different ways employees could be paid.

The guidance makes clear that no grant will be declined or repayment sought based solely on the choice of pay calculation used by the employer – provided a reasonable choice of approach is taken.

***How do we calculate wages for employees who we will be flexibly furloughing from 1 July?***

Further guidance on how to calculate claims following the introduction of flexible furlough, will be released on 12 June.

***Is the wage calculation based on pre- or post-salary sacrifice wages?***

Post-salary sacrifice wages as of 19 March 2020 should be used. Benefits provided through salary sacrifice schemes (including pension contributions) that reduce taxable pay should not be included.

HMRC has confirmed that coronavirus can count as a life event that could warrant changes to salary sacrifice arrangements, provided this is reflected as a change in the employment contract.

***What about payments which we don't describe as salary or wages?***

The guidance says you can claim for any regular contractual payments, including wages, non-discretionary overtime, fees, commission payments, and piece-rate payments. However, any discretionary (non-contractual) payments cannot be included, such as tips (including those distributed through troncs), discretionary bonuses and discretionary commission payments. Non-cash payments, benefits in kind and salary sacrifice schemes are also excluded.

In relation to pay, the TD has been amended to bring it broadly in line with the guidance. The reference to “conditional payments” being excluded from regular pay has been removed (helpfully, as it was not clear to which sorts of payments this might apply).

The TD (as amended) clarifies that variable payments based on performance (of the business or individual) covers payments such as overtime, fees, commission or a piece rate, payments for additional responsibilities and payments made in recognition of the circumstances in which the employee undertakes his or her duties or the time when they are undertaken. These payments cannot be claimed for unless they arise from a legally enforceable agreement, understanding, scheme or transaction which prescribes the method of calculating the amount payable (whether or not that involves the exercise of discretion by the employer).

### ***What about payments to LLP members?***

Only payments which are not affected by the overall amount of the LLP's profits or losses, payments which are fixed, and payments which are variable (but are varied without reference to the overall amount of the profits or losses of the LLP) can be claimed.

### ***What about pension payments?***

Until the end of July, you can reclaim the minimum mandatory employer pension contribution. This claim can be made on top of the £2,500 cap.

The minimum contribution under the auto-enrolment regulations is 3% of an employee's income above £520 per month (from 6 April 2020). Pension contributions over and above this cannot be claimed through the scheme but you will need to maintain them, unless you agree something else with employees (and proposing a reduction in pension contributions could trigger pension consultation obligations).

### ***What about benefits such as health insurance, gym membership etc?***

The scheme does not include the cost of non-monetary benefits provided to employees, including taxable benefits in kind. Benefits will need to be maintained, however, unless you agree something different with furloughed employees. The guidance confirms that no part of the furlough grant should be used to pay for the provision of benefits or a salary sacrifice scheme.

Employers that offer permanent health insurance or death-in-service benefits should check with their scheme provider about what salary would be used in the event of a claim – would it be normal annual salary or pay during furlough?

### ***Can we keep some of the grant?***

The guidance makes clear that the entirety of the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money and that no part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme. The government will require all employers to agree to return any grants back to HMRC immediately should they become unable or unwilling to use it to pay the employee's salary and employer national insurance contributions and pension contributions.

## **WHICH EMPLOYEES CAN WE FURLOUGH?**

### ***When does someone need to have been on the payroll to be put on furlough?***

Employees must have been employed on 19 March 2020 and individually notified to HMRC on a Real Time Information (RTI) submission on or before 19 March 2020. (RTI is the PAYE notification to HMRC.) Employees hired after 19 March 2020 cannot be furloughed or claimed for, unless they were on the payroll on 28 February and are being rehired in order to be put on furlough.

### ***When does the furlough scheme close to new entrants?***

The furlough scheme closes to new entrants on 30 June. In practice, this means the last date an employee can be furloughed for the first time is 10 June.

### ***What if we've already made redundancies?***

If your employees were on your payroll and notified to HMRC on an RTI submission on or before 28 February, and they have been made redundant since then, it is possible to give those former employees the option of being rehired and then put straight on the scheme. This applies even if they were not rehired until after 19 March.

The guidance now confirms that employees who were made redundant on or after 19 March 2020 can also be rehired and put straight onto the scheme - so long as they were employed on 19 March and notified to HMRC on an RTI submission on or before 19 March.

### ***What if someone has resigned— can we re-hire them?***

Yes. The guidance confirms that this will be possible. This applies if they were on your payroll and notified to HMRC on an RTI submission on or before 28 February, and they have left since then. You can give those former employees the option of being rehired and then put straight on the scheme, and this applies even if they were not rehired until after 19 March. This is also possible for employees who resigned on or after 19 March, so long as they were employed on 19 March and notified to HMRC on an RTI submission on or before 19 March.

However, you are under no legal obligation to take anyone back. If you are considering re-hiring some workers but not others, there is a risk of claims, including discrimination claims. If you decide to re-hire any workers in order to put them onto the furlough scheme, we recommend that you take advice about the best way of doing this in order to reduce your exposure to risk.

If someone has resigned, but has not left yet, then it seems that you could allow them to rescind their notice (and this will be administratively easier than a re-hire) but you do not need to do so.

The guidance also confirms that if an employee has had multiple employers over the past year, has only worked for one of them at any one time, and is being furloughed by their current employer, their former employers should not re-employ them and put them on furlough.

***What if we have inherited employees following a TUPE transfer after 28 February or after 19 March?***

These employees can be furloughed, but it appears from the way in which the guidance and the TD are drafted that the scheme only applies where there is a “business transfer” under TUPE and not where there is a “service provision change”.

The guidance says that a new employer is eligible to claim under the scheme for employees of a previous business who have transferred to them after 28 February, if either the TUPE or PAYE business succession rules apply to the change in ownership.

The scheme can also be used if there has been a payroll consolidation after 19 March 2020.

***What about casual workers and workers on zero-hours contracts?***

The scheme will cover workers on the PAYE system, including any casual or zero-hours worker who are paid in that way.

***What about workers on fixed-term contracts?***

The updated guidance confirms that workers on fixed-term contracts can be furloughed. If the fixed term contract has not already expired, it can be extended or renewed and the worker can be furloughed – so long as an RTI payment was notified to HMRC on or before 19 March.

Workers on fixed term contracts which expired after 28 February or 19 March can also be re-employed and then put on furlough, if either:

- their contract expired after 28 February 2020 and an RTI payment was notified to HMRC on or before 28 February, or
- their contract expired after 19 March 2020 and an RTI payment was notified to HMRC on or before 19 March.

However, workers that started and ended the same contract between 28 February 2020 and 19 March 2020 do not qualify for the furlough scheme

### ***What about other types of workers?***

The grant can be claimed for the following types of workers, provided they are paid via PAYE and are not doing any work: office holders (including company directors); salaried members of limited liability partnerships (LLPs); “limb b” workers; and agency workers (including those employed by umbrella companies).

For directors and LLP members, furlough arrangements should be adopted formally as a decision of any relevant company or LLP.

### ***What about sick workers?***

The guidance says that employees who are currently off sick can be furloughed for business reasons. This applies to both short-term and long-term sick leave. The employee would then no longer receive sick pay and should be paid the same as other furloughed employees. However, the guidance also says that furlough is not intended for short-term absences from work due to sickness, and short-term illness or self-isolation should not be a consideration in deciding whether to furlough an employee.

The TD (as amended) says that an instruction which puts an employee who is receiving (or due to be paid) SSP on furlough does not take effect until this SSP period has ended, provided that “the time of the end of that period of incapacity for work is determined by an agreement between the employer and employee”. This suggests that an employee who is eligible for SSP can be put on furlough provided the employer and employee agree to end SSP and move to furlough.

If an employee becomes sick while on furlough, it is up to the employer to decide whether to move them onto SSP or to keep them on furlough. If the employee remains on furlough, the employer can continue to claim their salary through the furlough scheme. If the employee is moved onto SSP, the employer will have to pay this and can no longer claim their salary through the furlough scheme. However, employers with fewer than 250 employees can use the new Coronavirus Statutory Sick Pay Rebate Scheme which will repay up to two weeks’ SSP starting on or after 13 March 2020 for employees who are unable to work because they have coronavirus, cannot work because they are self-isolating at home or are shielding in line with public health guidance.

The guidance does not say anything further about the amount the employer can claim through the furlough scheme if it chooses to keep an employee on furlough rather than moving them onto SSP.

The wording of the original TD seemed to suggest that, even if the employee was not moved onto SSP, the furlough claim should be reduced by a notional amount to reflect the SSP that would have been paid. There was no obvious reason why the furlough grant should be reduced in this way and the guidance makes no mention of it. The TD has been amended to remove this wording, making it consistent with the guidance. It therefore seems that an employer can claim the full furlough grant in respect of an employee who is kept on furlough after falling ill.

The guidance clarifies the position on calculating furlough pay if an employee returns from sick leave after 19 March 2020. This should be calculated against their normal salary, not the pay they received while on sick leave. If the employee is on variable pay, this should be calculated using either the same month's earning from the previous year or average monthly earnings for the 2019-2020 tax year.

### ***What about workers who are shielding or have caring responsibilities?***

The guidance clearly says that employees who are unable to work because they have caring responsibilities or are shielding in line with public health guidance, or who need to stay home with someone who is shielding, can be furloughed. However, the position in relation furloughing employees who are shielding is less clear than the guidance suggests.

On 16 April 2020, new regulations extended the right to SSP to those who are shielding and who cannot work from home. The TD (as amended) indicates that no one can be put on furlough whilst they are receiving SSP and that the period of incapacity must be ended by agreement before someone is furloughed. The practical upshot seems to be as follows:

For employees who are shielding and had already been put on furlough before 16 April 2020, their furlough can continue (even though they are now potentially entitled to SSP) or they could be moved to SSP.

Employees who are shielding but had not yet been put on furlough on 16 April are now entitled to SSP. They can be put on SSP if they can't work from home, or they could be furloughed if the employer wishes and the employee agrees.

Shielders who can work from home can continue to do so and are not technically entitled to SSP.

### ***What about employees on maternity or other family leave?***

The guidance says that employers can claim for enhanced maternity pay through the furlough scheme. This suggests that employers can furlough employees on maternity leave.

If an employee on maternity leave agrees to be furloughed, then you will be able to reclaim their SMP in the normal way. You will then be able to claim for any enhanced contractual pay on top through the furlough scheme.

Currently, employers can reclaim 92% of SMP (or 103% if they qualify for Small Employers' Relief). Employers cannot claim the 8% balance of SMP through the furlough scheme, because the TD expressly excludes SMP (and other statutory payments for family related leave).

The same principles apply to other types of family leave.

From 25 April onwards, statutory pay for family leave (maternity leave, paternity leave, adoption leave, shared parental leave and parental bereavement leave) should be calculated based on the pay the employee would have received had they not been on furlough. This means that employees do not lose out if they are on a lower rate of furlough pay during the period for calculating statutory pay.

The guidance clarifies the position on calculating furlough pay if an employee returns from family leave. This should be calculated against their normal salary, not the pay they received while on leave. If the employee is on variable pay, this should be calculated using either the same month's earning from the previous year or average monthly earnings for the 2019-2020 tax year.

### ***What about employees on unpaid leave?***

The TD has been amended to clarify the situation regarding unpaid leave. Employees cannot be on unpaid leave and furloughed simultaneously. Where the unpaid leave started before 1 March 2020, furlough cannot begin before one of the following has happened:

- the unpaid leave has ended on a date agreed or contemplated at the start of the leave
- where the duration of the unpaid leave was uncertain when it began, because it was intended to end when something happened, that event has occurred
- the unpaid leave has expired on a date (or on the occurrence of an event) set out in an agreement or arrangement reached after the start of the leave and before 20 March 2020

This means that, if an employee started unpaid leave before 1 March and the envisaged end date is after the end of the CJRS, that employee must remain on unpaid leave and cannot be moved onto furlough.

The updated guidance clarifies the position on calculating furlough pay if an employee returns from unpaid leave. This should be calculated using the amount the employee would have been paid if they were on paid leave.

***Are foreign nationals with visas eligible for the furlough scheme?***

Yes, the guidance says foreign nationals are eligible. They would presumably have to be working in the UK and paying UK PAYE. There are potential sponsor compliance issues to consider for Tier 2 workers, and while foreign nationals with limited leave are in most cases not entitled to receive public funds, accessing funds through the furlough scheme is not currently prohibited. The guidance confirms that grants under the scheme are not counted as “access to public funds”, and you can furlough employees on all categories of visa.

Are self-employed individuals eligible for the furlough scheme?

No. A separate package of government support is available for self-employed individuals affected by coronavirus.

**HOLIDAYS AND FURLOUGH**

***Will workers continue to accrue holiday allowance while they are furloughed?***

Yes, because they remain employed. This is confirmed in specific government guidance on holiday entitlement and pay during coronavirus. You could agree to reduce any enhanced contractual holiday (beyond the statutory minimum of 5.6 weeks per year) to reflect the fact that an employee has been on furlough, but employees will retain their right to 5.6 weeks’ annual leave under the Working Time Regulations (WTR).

***Can people ask or be required to take their holiday allowance while furloughed?***

Yes. The holiday guidance confirms that furloughed employees can be on holiday during furlough. This means that, if employees have pre-booked holidays then they will be able to take them, and you do not need to allow rescheduling unless they would ordinarily have a right to reschedule. If you would like to require employees to take holiday during furlough, you would need to give twice as much notice as the length of the holiday you want them to take (e.g. ten days’ notice for five days’ holiday) unless the contract says something else. The holiday guidance does say that employers should consider whether any restrictions such as the need to socially distance or self-isolate would prevent the worker from resting, relaxing and enjoying leisure time, which is the purpose of holiday.

***Can we restrict employees taking holiday?***

The holiday guidance confirms that employers can cancel an employee’s holiday if they give the required amount of notice under the WTR (by giving notice of the same number of days as the holiday the employee wanted to take, e.g. five days’ notice to prevent or cancel five days of holiday). The new right to carry over holiday of up to four weeks into the next two holiday years may assist disgruntled employees who have not been permitted to take holiday during furlough due to the extra cost to the employer. The holiday guidance says that if the employer is unable to fund the difference due to the

impact of coronavirus, it is likely that this would make it not reasonably practicable for the worker to take their holiday and so they would be allowed to carry it forward.

### ***What about bank holidays during furlough?***

If employees normally work on bank holidays, they will simply be on furlough leave (not holiday) on the bank holiday unless you require them to take a holiday. If employees have the right to take bank holidays off as holidays, then the holiday guidance says that the employer has two options. You can agree with the employee to take the bank holiday as annual leave, or require them to take it by giving notice in accordance with the WTR, and pay correct holiday pay for that day. Or you can agree that the employee defers the holiday to another date and pay furlough pay only on that day.

### ***What should we pay employees who take holiday during furlough?***

The holiday guidance confirms that employees need to be paid their usual holiday pay rate for statutory minimum holiday (5.6 weeks), not reduced furlough pay. Employers will have to fund any top-up to full holiday pay themselves and will not be able to claim this back through the furlough grant.

However, employers are still free to agree a different rate of pay for contractual holiday over and above the statutory minimum holiday entitlement of 5.6 weeks. In addition, many employers have asked employees who are still working (i.e. not furloughed) to take cuts in hours and pay. In our view it could be open to employers in some circumstances to agree similar pay cuts with staff who are furloughed, particularly where colleagues in similar roles who remain at work have agreed to a pay cut, which could also impact on their holiday pay.

## **WHAT CAN EMPLOYEES DO AND NOT DO WHILE ON FURLOUGH?**

### ***Can employees do the odd bit of work for us while furloughed?***

Definitely not until 1 July. Employees cannot do anything that provides services to or makes money for an employer that has furloughed them, or for a linked or associated organisation. If they do any work for you or a linked/associated organisation, you may have to repay the grant.

We recommend drawing this to the attention of any furloughed employee who could otherwise be doing some work from home. It is important that they don't do anything that could jeopardise your ability to claim the grant.

From 1 July, employers have the option of placing staff who have been furloughed prior to 10 June on flexible furlough. (See flexible furlough section).

### ***Can directors perform statutory duties and pay employees?***

The guidance says that directors and owner-managers can be furloughed if on PAYE and will still be allowed to perform statutory duties in these roles, so long as this no more work than reasonably necessary for that purpose. They must not generate commercial revenue or provide services to or on behalf of their company. Importantly, the TD says only a limited range of duties are allowed – work done to fulfil a duty or obligation arising from an Act of Parliament, relating to the filing of company's accounts or provision of other information relating to the administration of the director's company.

The TD (as amended) has clarified that directors can also pay salaries to employees of their company and submit claims for furloughed employees to receive the government grant without this counting as work.

### ***Can we ask employees to do training while furloughed?***

Yes. A furloughed employee can do training in certain circumstances. In fact, the guidance says that furloughed employees should be encouraged to undertake training.

The TD (as amended) provides some further detail. Training will not count as work where the purpose of the training is to improve an employee's effectiveness or the performance of the employer's business.

Training could jeopardise the grant if it provides services to the employer or the employer's business activities and if it contributes to the employer's business activities or generates revenue.

In addition, the training should not contribute (to a significant degree) to the production of any goods the employer intends to supply (as part of the provision of goods or services) or to the supply of any services for which consideration is received.

Employees must be paid at least the National Living Wage/National Minimum Wage/Apprenticeship Minimum Wage (as increased on 1 April 2020) for 100% of the time spent training, even if this is more than the subsidy.

***Can an employee carry out their duties as manager or trustee of an occupational pension scheme while on furlough?***

Yes, provided the sole purpose of the employee's work is to fulfil their duties as a (legally recognised) trustee or manager of an occupational pension scheme.

The TD (as amended) clarifies that this exception will not apply where the employee is fulfilling their duties as an independent trustee and their employer's business activities include providing the services of trustees/managers or undertaking duties as an independent trustee.

***Can someone in the furlough scheme do work for other employers?***

Yes, if this is allowed under their contract with you.

This includes agency workers, but they must not do any work for, through or on behalf of the agency that has furloughed them while they are furloughed, including through or on behalf of the agency for the agency's clients.

You should be able to impose restrictions on employees working elsewhere, but you should think carefully about whether you want to do so. You will obviously want to stop furloughed employees from working for a competitor, and there will be no need to say this explicitly because the employee's underlying contract of employment will stay in place throughout the furlough. You might want to allow furloughed employees to take on extra work in, for example, the health and social care sector or essential services. However, the employee guidance helpfully points out that the employee needs to be able to return to work for you if you decide to recall them and must be able to undertake any training you require of them.

***Can furloughed employees do volunteer work?***

Yes, this is allowed (so long as it does not provide services to or generate revenue for the employer or a linked or associated organisation).

**BRINGING FURLOUGH TO AN END**

***How long can we keep workers on furlough?***

The scheme was open for an initial period of three months (1 March to 31 May 2020) but was then extended to the end of June. As explained above, it has now been extended to 31 October 2020, although there are significant changes to how the scheme operates from 1 July onwards. The minimum length of furlough is three weeks.

### ***Can we call employees back from furlough?***

Employers are likely to want to reserve the right to call employees back from furlough if trading conditions improve. We recommend including this in your agreement with employees.

### ***Can we give notice to an employee on furlough?***

As the guidance for employees says that employees can be made redundant while on furlough, it seems that employees can be given notice (or paid in lieu) while furloughed, although the guidance does not explicitly say this.

### ***Can we make employees redundant on furlough and carry out consultation about this?***

The employee guidance says that “your employer can still make you redundant while you’re on furlough or afterwards”.

Neither the guidance for employers nor for employees explicitly says that collective or individual redundancy consultation can be carried out during furlough or whether that would count as work – although, on the basis that it is not making money for the employer or providing services, we would hope that a sensible approach would be taken.

The guidance confirms that employees who are union or non-union representatives may still undertake duties and activities for the purpose of individual or collective representation of employees or other workers while they are on furlough – so long as this is not providing services to or generating revenue for the employer or a linked/associated organisation. This confirmation that representatives can take part in collective consultation strongly suggests that individuals must also be able to take part in consultation about redundancies during furlough.

The guidance is clear that the furlough grant cannot be used for redundancy pay.

### ***What happens at the end of the furlough?***

The idea is that employees will be able to come back to work. The scheme is designed so that employers don’t need to make redundancies and then recruit a new workforce once the crisis is over - their existing workforce will be ready and waiting to resume work.

However, if trading conditions have not improved sufficiently for you to take all the furloughed employees back when the scheme ends then you will be able to make them redundant, subject to the usual rules on redundancy.

This is significant because other European countries that have similar schemes in place are imposing restrictions on employers making redundancies. No such conditions are being imposed in the UK.

***What happens if furlough ends after, for example, two weeks?***

The guidance is silent as to what happens if a furlough period is shorter than the minimum period of three weeks, for example, if it ends after two weeks because the employee has been dismissed or resigns. We assume the employer can only claim for blocks of three weeks, as this is stated to be the minimum period, but this is not certain.

**HOW DO WE CLAIM THE SUBSIDY?**

***What is the process for claiming the payment?***

You need to submit information to HMRC about workers who have been furloughed and their earnings, via the online portal available from Monday 20 April. You should gather all the information needed to submit the claim before starting the application, although there is now the option to save your claim as a draft and return to it later. The required information is set out in the step-by-step guidance for employers. To access the system, you will need a government Gateway ID and password and an active PAYE enrolment.

It is currently up to the employer to decide on the length of each claim period, based on the frequency of payroll. Employers will need to make sure they include all of the employees they want to furlough for each claim period, because they will not be able to make another claim for the same period or one that overlaps with it. From 1 July, however, claim periods will no longer be able to overlap calendar months

You should receive payment under the scheme six working days after making the claim. If you need short-term cash flow support in the meantime, the government has said you may be eligible for a Coronavirus Business Interruption Loan.

***Is it a grant or a loan?***

It will be a grant, not a loan, so it will not need to be repaid. Payments received by a business under the scheme must, however, be included as income in its calculation of taxable profits for Income Tax and Corporation Tax purposes - although businesses can continue to deduct employment costs as normal.

### ***How does backdating work?***

Claims can be backdated to 1 March 2020 where employees have already been furloughed. However, the grant is only available from when an employee has finished work and started furlough.

Backdating could therefore apply to employees who were laid-off or sent home due to workplace closures prior to the announcement of the furlough scheme. The guidance is not clear on this point. The TD says an employee is furloughed if they “have been instructed by the employer to cease all work in relation to their employment”, and this is due to circumstances arising from coronavirus. This indicates that the grant may be payable for employees who were sent home with no work to do before the scheme was announced.