

Government and Acas guidance

The Government's response to the COVID-19 pandemic has been and is being developed within incredibly short time frames. It is therefore vital as the situation unfolds to keep a close watch on the guidance and advice published by the Government and ACAS.

Listed below is a series of links to guidance and advice emanating from various Government bodies as well as that produced by ACAS. We would urge you to revisit these sites every few days to check for further updates. Particular regard should be had to the "Direction" issued by HMRC yesterday under the powers delegated to it under the Coronavirus Act 2020 which effectively comprise the rules (rather than mere Guidance) relating to the Scheme

(**N.B.** ACAS's advice is based on their interpretation of Government Guidance and does not therefore have the same authority as actual Government Guidance.)

- [Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses](#)
- [BEIS guidance: Social distancing in the workplace during coronavirus \(COVID-19\): sector guidance *](#)
- [Guidance for Employees](#)
- [Guidance for Employers](#)
- [HMRC Guidance re Job Retention Scheme - Re 15 April](#)
- [The Coronavirus Act 2020](#)
- [Acas: Coronavirus: advice for employers and employees](#)
- [ACAS Guidance on working from home](#)

[*The workplace social distancing guidance provides advice on social distancing for the following sectors:

- Shops running a pick-up or delivery service.
- Tradespeople and working in people's homes.
- Construction.
- Manufacturing and processing businesses.
- Retail.
- Logistics businesses.
- Outdoor businesses.
- Farming: visiting farms for animal health and welfare.
- Fishing or other short-term offshore work.
- Cargo-shipping or other long-term offshore work.
- Transport businesses.
- Waste management businesses.

It advises that employers should also consider advice published by trade associations and similar groups on operating during the pandemic.]

COVID-19 and SSP

In order to qualify for Statutory Sick Pay (SSP) an employee must be absent from work due to incapacity. Section 151(4), *Social Security Contributions and Benefits Act 1992* defines a day's absence due to incapacity as being:

"A day on which the employee concerned is, or is *deemed in accordance with regulations to be*, incapable by reason of some specific disease or bodily or mental disablement of doing work which

he can reasonably be expected to do under that contract”.

Regulation 2, *The Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) (SSP Regulations)* provides for certain types of absence to be deemed days of incapacity. Under further regulations rushed out in response to COVID-19 a person is deemed to be incapable of work because they are self-isolating to prevent infection from COVID-19 where:

- They have symptoms of COVID-19, however mild, and are staying at home for seven days, beginning with the day on which the symptoms started (day 1).
- They live with someone who is self-isolating (as above) and are staying at home for 14 days, beginning with day 1.
- They are already self-isolating in accordance with the second bullet (above), develop the symptoms of COVID-19, however mild, and are staying at home for seven days, beginning with the day the symptoms started.
 - In such instances SSP will also be payable from the first (rather than the fourth) day of absence; and
 - On 3 April 2020, HMRC also published [Guidance: Claim back Statutory Sick Pay paid to employees due to coronavirus \(COVID-19\)](#) which explains that employers with fewer than 250 employees will be able to reclaim the SSP

Employees who fall within the categories considered “extremely vulnerable” from COVID-19 in the [Shielding guidance](#) will not be entitled to SSP where they are unable to carry out their role from home. In such instances it is open to the Employer to pay the employees full pay, or place them on furlough.

Coronavirus Job Retention Scheme

Who can you claim for?

- Employees that were on your PAYE payroll on or before 28 February 2020.
(Stop Press: 15 April – HMRC has just published updated guidance which extends the scheme to cover those employees who were also:

*“[on their] employer’s PAYE payroll before or on **19 March 2020** and notified to HMRC on an RTI submission on or before 19 March 2020. This means your employer must have made an RTI submission notifying payment in respect of you to HMRC on or before 19 March 2020.*

If you were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for your employer prior to 19 March 2020, you can also qualify for the scheme if your employer re-employs you and puts you on furlough”

- Employees can be on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts and can even include Office Holders such as Company Directors and Members of an LLP so long as they were paid on a PAYE basis.
- If you made employees redundant, or they stopped working for you on or after 28 February 2020 you can re-employ them, put them on furlough and claim for their wages through the scheme though the latest guidance now seems to suggest that this will only apply to employees who were made redundant or stopped working on or before 19th March.
- Employees working on reduced hours or for reduced pay will not be eligible for this scheme. (There is nothing in the Scheme to indicate whether and in what circumstances those initially put on reduced pay/hours cannot subsequently be furloughed).
- An employee cannot undertake work for, or on behalf, of the organisation or any linked or associated organisation but can undertake voluntary work and where their contract allows they may undertake employment with a third party.

Does the Employee have to be at risk of being laid off or made redundant?

When the Scheme was first announced it was described as being an alternative to firms having to lay off (on no pay) or make staff redundant. The initial Guidance was then tweaked to suggest that it extends beyond those more limited circumstances so that “*all employers are eligible to claim under*

the scheme and the government recognises different businesses will face different impacts from coronavirus”.

The fact that the Guidance also makes clear that categories of person whom you might not necessarily have laid off or made redundant can be furloughed also suggests a broader application of the Scheme e.g.:

- Employees who are unable to work because they are shielding in line with [public health guidance](#) (or need to stay home with someone who is shielding) can be furloughed;
- Employees who are unable to work because they have caring responsibilities (usually looking after children) resulting from coronavirus can be furloughed; and
- The fact that you can claim through the scheme for enhanced (earnings related) contractual pay for employees who qualify for either:
 - maternity pay
 - adoption pay
 - paternity pay
 - shared parental pay

The Direction issues yesterday (15th April) eliminates any remaining concern that the scheme only applies to employees who would otherwise have been laid off or redundant.

Paragraph 6.1 states that:

“An employee is a furloughed employee if-

(a) the employee has been instructed by the employer to cease all work in relation to their employment,

(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease”

Employers should check the terms of any Furlough Agreement reached with Employees to ensure that it includes reference to the requirement that the employee cease all work during the period of furlough

Paragraph 6.7 also makes clear that this instruction has been agreed in writing. Helpfully this paragraph states that this “may be in an electronic form such as an email”

Paragraph 6.8 reiterates that this does not apply to “training activities”

Other issues

If your employee has more than one job:

- If your employee has more than one employer they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.
- Employees can be furloughed in one job and receive a furloughed payment but continue working for another employer and receive their normal wages.

Employee transfers under TUPE and on a change in ownership:

- A new employer is eligible to claim under the Scheme in respect of the employees of a previous business transferred after 28th February 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.

How much you can claim?

You’ll need to claim for:

- 80% of your employees’ wages (even for employee’s on National Minimum Wage) - up to a maximum of £2,500 per month.
- Employer National Insurance contributions that are paid on the subsidised furlough pay

- Employer pension contributions that are paid on the subsidised furlough pay, up to the level of the minimum automatic enrolment employer contribution. Grants will be prorated if your employee is only furloughed for part of a pay period

Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they written to confirming their furloughed status.

The way you work out your employees' wages is different depending on what type of contract they're on, and when they started work:

1. Full or part time employees on a salary

Claim for the 80% of the employee's salary, as of 28 February 2020, before tax.

2. Employees whose pay varies

If the employee has been employed for 12 months or more, you can claim the highest of either the:

- same month's earning from the previous year
- average monthly earnings for the 2019-2020 tax year

If the employee has been employed for less than 12 months, claim for 80% of their average monthly earnings since they started work.

If the employee only started in February 2020, work out a pro-rata for their earnings so far, and claim for 80%.

Past Overtime, Fees, Commission, Bonuses and non-cash payments

You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

Minimum furlough periods

Any employees you place on furlough must be furloughed for a minimum period of 3 consecutive weeks. When they return to work, they must be taken off furlough. Employees can be furloughed multiple times, but each separate instance must be for a minimum period of 3 consecutive weeks

What steps must employers take to put employees on furlough leave?

The [Employers' CJRS guidance](#) states that employers should discuss the proposal with staff and make changes to the employment contract by agreement. It is a condition of eligibility for reimbursement that furlough leave is confirmed to the employee in writing.

Employers will need to:

- Decide which employees to designate as furloughed employees.
- Notify furloughed employees of the intended change.
- Consider whether it needs to consult with employee representatives or trade unions if they intend to put 20 or more employees from one establishment on furlough.
- Agree the change with the furloughed employees. Most employment contracts will not allow an employer to reduce an employee's pay, provide them with no work and change their employment status, without agreement.
- Confirm the employees' new status in writing. This is an eligibility requirement for accessing the subsidy, and a record must be kept of this correspondence for five years ([Employers' CJRS guidance](#)). Ideally, the employer should advise how long it expects furlough leave to continue, however, this may be difficult in the current climate. Employers may wish to put employees on furlough leave for an initial period, subject to review.

When will the scheme be operational?

According to statements made by senior officials from HMRC to a Parliamentary Select Committee on 8th April:

- The Coronavirus Job Retention Scheme (CJRS) is due to open on 20 April 2020, in time for HMRC to make the first payments by 30 April 2020.
- It is HMRC's aim for employers to be paid the first furlough payments four to six working days after submission of their claim.
- Employers will not necessarily have to make a monthly claim and will be able to claim 14 days before they are due to pay their employees.
- HMRC are expecting that most employers will attempt to put in their claim for reimbursement in the first couple of days after the scheme opens - the new online system has been stress-tested to deal with up to 450,000 claims an hour and HMRC are confident that it can deal with a large volume of claims.
- Additional HMRC staff will be redeployed to its helpline to assist employers.
- There are currently no plans to extend the scheme to those employees who have had their working hours reduced because of the pandemic, or to assist those who started a new job after 28 February 2020 if their previous employer does not agree to re-engage and furlough them.

Annual leave and Furlough

Will employees continue to accrue holiday during furlough leave?

It is likely that the 5.6 weeks' leave under the Working Time Regulations 1998 continues to accrue during furlough leave.

Can annual leave actually be taken during furlough?

Unfortunately the updated [Employers' CJRS guidance](#) does not deal with the interaction between furlough and annual leave which means that there are a number of issues to consider when deciding whether to allow or require workers to take annual leave during furlough including:

- Will Employers be able to recover the cost of Holiday pay for time taken as Holiday pay during the Furlough period ?
- If the answer is Yes will the Employer be entitled to limit Holiday pay to that payable on Furlough and if not how should holiday pay be calculated?
- Will time taken as Holiday break the period of Furlough;
 - leave needs to be taken in blocks of three weeks so it arguably cannot be interrupted by annual leave
 - Does the Employer have to write to the Employee after each period of Holiday Leave to redesignate the Employee's status as being a Furloughed worker?

[The Acas: Coronavirus: advice for employers and employees](#) states that if a worker is furloughed then the worker can still request and take their holiday in the usual way. It also states that holiday should be paid at full pay. However, HMRC are not obliged to follow Acas guidance in this respect so employers should exercise caution in relying on this statement as representing HMRC's position on the effect of taking annual leave during furlough on reimbursement through the CJRS.

The Direction published by HMRC on 15 April contains some references which could be taken as an indication that Leave can be taken and that the Scheme will contribute to the cost of that Holiday:

The opening paragraphs which set out the "Purpose of the Scheme" state that it is to provide payments to employers in respects of them incurring "costs of employment" in respect of furloughed workers. Costs of employment can include any enhanced rates payable to those on statutory leave such as Maternity so why not holiday ? Para 7.1 deals with Qualifying costs but the opening paragraph simply refers to the payment of earnings to an employee during a period in which they are furloughed. In general terms Holiday pay would normally count as earnings.

Having regard to the line of cases on Holiday Pay it is possible that where an Employer purports to compel an employee to take holiday during furlough the Employee could challenge in an Employment Tribunal whether that should actually be treated as part of their statutory holiday entitlement on the basis that time spent on furlough is not time in which the employee can actually rest and relax. That argument is not without difficulties and, in our view, it is likely to be weaker in the current state of lockdown where the public is entitled to leave their homes for certain identified reasons such as exercise.

Until there is further clarity, employers looking at their short-term financial position, may decide not to instruct workers to take their annual leave in order to avoid making payment which is not recoverable from HMRC.

Other employers may take the view that as HMRC have not explicitly excluded holiday pay from the sums that can be recovered they may direct workers to take annual leave (giving the notice required under the WTR 1998) on the basis that HMRC will pay for it (at least up to the cap).

Can an employer make employees on furlough redundant?

The [Employees' CJRS guidance](#) confirms that an employee can be made redundant while on furlough or afterwards, and that an employee's redundancy rights will not be affected by being furloughed. However, an employer cannot claim reimbursement of redundancy payments under the scheme ([Employers' CJRS guidance](#)).

In some instances it also could be argued that dismissing an employee who has agreed to be furloughed would be unreasonable and therefore unfair.

There are obvious practical difficulties that could arise in undertaking redundancy consultation were employees are on furlough. The employer would need to consider virtual meetings and, where the employees concerned do not have the facility to participate in a video call, the possibility of conducting consultation meetings by telephone or in writing.

Can an employee on furlough be served with notice and what notice pay are they entitled to?

Given that the key (if not the sole) objective of the Scheme is to support employers so that they may avoid having to make employees redundant it could be argued that it would run contrary to the aims of the scheme (especially as it is Taxpayer funded) for employers to fund some or all of any notice pay due to employees on furlough whom the Employer dismisses. That said there is nothing within the Guidance published by the scheme which explicitly states that this cannot be recovered. This could mean however that some Employers are encouraged to do the very thing the scheme is intended to prevent, with their incentivised to give notice to dismiss so as to claim the notice pay which would fall to be paid before 31st May from the Scheme.

Employers intending to pursue this course should bear in mind that under the Scheme HMRC reserves the right to audit claims and where appropriate claw back payments. The Direction published yesterday also contain a paragraph which states that *"No CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purpose of CJRS"*

The rules on statutory notice pay are complex and depend on whether the employer is required to give only statutory notice, or at least a week more than statutory notice, and whether the employee has normal working hours or not.

For any period of notice which exceeds the minimum statutory requirement, the terms of the contract of employment would need to be considered. The comments below relate to the statutory position only.

Employers in a redundancy context may often be inclined to pay in lieu of notice. However, there does not appear to be any mechanism for employers who dismiss and pay in lieu of notice to reclaim the PILON payment under the CJRS. It may therefore be financially preferable from the employer's perspective to keep employees on furlough for their notice period so that at least part of their notice pay can be recovered.

Employees with normal working hours

An employee with normal working hours who is entitled to only statutory notice from their employer (or less than one week more than statutory notice) will be entitled to their normal remuneration for working their normal working hours, even if they are on furlough and therefore on reduced pay at the time notice is served, as long as they are ready and willing to work ([section 88\(1\)](#), ERA 1996).

If they remain on furlough during their notice period, the employer will only be able to recover their notice pay up to the usual 80%/£2,500 cap.

An employee with normal working hours who is entitled to at least one week more than statutory notice from their employer will not benefit from the terms of section 88. Their statutory notice pay will instead be based on the pay that they would otherwise have received during their notice, which will be their reduced furlough pay if they remain on furlough for the duration of their notice.

Employees without normal working hours

An employee without normal working hours who is entitled to only statutory notice from their employer (or less than one week more than statutory notice) will be entitled to a week's pay calculated in the way set out in the week's pay provisions in the ERA 1996. If they remain on

furlough leave during their notice period, the employer will only be able to recover their notice pay up to the usual 80%/£2,500 cap.

An employee without normal working hours who is entitled to at least one week more than statutory notice from their employer will not benefit from the terms of section 88. Their statutory notice pay will instead be based on the pay that they would otherwise have received during their notice, which will be their reduced furlough pay if they remain on furlough for the duration of their notice.

If you have any further questions regarding the above please contact either:

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Please note: Wheelers Solicitors became part of The Morrisons Group in January 2020