

# **Employer's Guide to the Coronavirus Job Retention Scheme**

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# Employer's Guide to the Coronavirus Job Retention Scheme

## Introduction

### What is the Coronavirus Job Retention Scheme [CJRS]?

The CJRS is a temporary scheme operated by HMRC to support employers during the current outbreak. It allows employers to place certain employees on a period of furlough leave and reclaim reimbursement of a proportion of their wage costs from HMRC.

### What is furlough?

Furlough does not have any particular meaning in employment law terms. It is a label used by the Government to describe a period of leave, where staff are instructed to cease working for 3 weeks due to circumstances arising from the coronavirus outbreak. This could be due to a downturn in the employer's activity meaning staff are at risk of lay-off, or any of the other permitted reasons specified in the Government's guidance.

### How long will the scheme be open for?

The Chancellor has announced that the CJRS will be open until the end of October 2020. It will operate in its current format until 30 June 2020 after which employees will be permitted to return to work in a limited, part-time capacity. The full details of this next phase of the CJRS have yet to be published and we expect to receive further guidance from the Government on 12 June 2020. For now, the following details have been confirmed:

- Until 30 June 2020: The Scheme will operate as normal and employers can continue to claim for 80% of eligible employees' wages up to £2500, along with pension and national insurance contributions.
- From July 2020: Only employees who had been on furlough for a full 3 week period before 30 June 2020 can be furloughed from 1 July. The guidance does not yet specify the practical details of how this will work, for example, whether those furloughed on 30 June 2020 can continue to rotate on and off furlough in July or be brought back part-time. We await further guidance from HMRC on 12 June. What has been clarified is that employees would need to be furloughed by 10 June 2020 to ensure they have completed the required 3-week period of furlough before July. For these employees, you can continue to claim 80% wages up to £2500, NI and pension contributions until 31 July 2020.
- From August 2020: The amount of reimbursement available under the CJRS will remain at 80% of wages up to £2500. The key change is that NI and pension contributions will no longer be reimbursed and will need to be met by employers.
- From September 2020: The amount of reimbursement employers can claim through the CJRS will be reduced to 70% of wages up to a maximum of £2187.50. Employers will be required to top this up to 80%, up to the £2500 cap. Employers will continue to pay NI and pension contributions themselves.
- From October 2020: The amount of reimbursement will drop further to 60% of wages up to a cap of £1875. Again, employers will be required to top this up to 80% up to the cap of £2500, and pay NI and pension contributions.

## Who Qualifies?

### Which organisations are eligible to apply to the Scheme?

All UK employers who:

- Had a PAYE payroll on or before 19 March 2020;
- Are enrolled for PAYE online; and
- Have a UK bank account.

Your PAYE scheme must have been registered on HMRC's real time information system by 19 March 2020. However, there is an additional requirement that a payment must have been made to employees which is shown in a return under the PAYE Regulations. In other words, you must have sent HMRC an RTI submission notifying a payment in respect of that employee on or before 19 March 2020. This means employees who have not yet been on a payroll run prior to 19 March 2020 are not covered by the CJRS.

The CJRS is open to private sector businesses, charities and public sector organisations, provided they are not receiving ongoing public funds for staff costs. Employers who continue to receive public sector funding should continue to use it to pay staff wages in the normal way, and there will be no need to furlough staff under the Scheme.

### Which employees can be placed on furlough?

Current employees on any type of contract can be furloughed, provided their circumstances fall within the guidance described below. This means that full time, part-time, zero hours and agency contract employees could all be eligible provided they were on your payroll and notified on an RTI submission to HMRC no later than 19 March 2020. A separate scheme is available for self-employed workers.

When it was first published, the Government guidance advised that only employees who would otherwise be at risk of being laid off would be covered by the Scheme. That requirement has since disappeared. Instead, eligible furlough employees are described as **those who have been instructed to cease all work for 21 days or more due to the circumstances arising as a result of coronavirus.**

This definition captures a much wider pool of employees and does not limit the Scheme to those at risk of lay-off. Even staff whose work is still available could be furloughed, provided they have been instructed to stop working for coronavirus related reasons.

The Government guidance makes it clear that furloughed staff should not undertake any work for their employer when they are being furloughed. This means that it will not apply to staff who you have put on short-time working or cut their hours. In that case, you will have to pay staff a pro rata proportion of their salary to which they also need to agree.

### Does this mean that staff with childcare responsibilities can be furloughed?

Yes. As well as the definition under the Direction, the online guidance confirms that employees with caring responsibilities can now be furloughed under the Scheme. This would include employees who need to look after their children due to school closures, where they cannot work from home.

However, neither the guidance nor the Direction provides that staff in this position must be placed on furlough, only that they can be. It would therefore appear that the decision is ultimately up to the employer whether to furlough the employee or not. It is also not clear whether a refusal to furlough someone in these circumstances could be a breach of the implied duty of trust and confidence entitling them to resign and claim constructive dismissal, or if there could be an indirect discrimination element to such a refusal which you would need to objectively justify. This is currently unknown and will largely be down to specific circumstances.

## Can staff with underlying health conditions now be furloughed?

Employees who are advised to self-isolate or shield pursuant to public health guidance must be distinguished from those who have other underlying health conditions.

Self-isolation is for people showing Covid-19 symptoms or living in the same household as a person showing symptoms. Shielding is where an employee has been advised by the NHS (usually by letter) that they are required to shield because they are considered “extremely vulnerable”. It is important that any GP or NHS letters from employees be verified so that employers understand what the employee is being advised to do. Both self-isolation and shielding are dealt with below under “Sick Leave”.

For employees who have underlying health conditions but are not required to self-isolate or being advised to shield, the position is not clear. Unlike shielding employees, there is no mention in the guidance to vulnerable employees (as opposed to extremely vulnerable employees) being entitled to furlough. In such circumstances, advice should be taken and the employee’s GP consulted if required. Consideration could also be given to whether you would have furloughed employees in this situation regardless of their condition

Care should also be taken if the medical conditions which places them in the most vulnerable group would mean they would be classed as having a disability under the Equality Act 2010. Separate advice should be sought in these circumstances to ensure employers comply with equality and discrimination legislation.

## What about fixed-term contracts which are due to end shortly?

Employees on fixed term contracts can be furloughed. For those whose contracts would otherwise expire during the furlough period, the guidance advises their contracts can be extended or renewed without breaking the terms of the Scheme. This is relevant particularly if the only reason you were not renewing or extending the contract is because of the effects of the pandemic. However if the contract is not renewed or extended then you will no longer be eligible to claim under the Scheme.

## My employee has another job. Can I claim for them through the CJRS?

Yes, this has been confirmed by the latest guidance. Employees can be furloughed for each job they have and the financial caps apply to each employer individually.

## I am an individual who has employees - can I furlough them?

Yes, however, in order to be able to submit a claim you have to be registered for PAYE online. This can take up to 10 days so if you are not already enrolled for this you should do it as soon as possible.

## I am a company Director, can I be furloughed?

Specific guidance for company directors is set out on page 14.

## I am a member of an LLP, can I be furloughed?

Some members of LLPs, particularly in some professional practices, are salaried and remunerated through the PAYE system. If that is the case, then they too can be furloughed in a similar way to directors, with the same caveats and warnings in relation to their statutory duties. The LLP members' agreement should also be looked at and may require amendment to allow this to happen.

## I am a worker not an employee, can I be furloughed?

If you are a worker paid through PAYE then you are eligible under the Scheme. Workers are individuals who undertake to do or provide personally any work or services to another party, but are not carrying out a business or profession. Many people on zero hours contracts and contractors fall within this definition.

## We use agency workers – are they eligible for furlough and, if so, who claims the reimbursement?

Agency workers can be furloughed provided they are paid through PAYE. This is the case even if they are employed by umbrella companies. This will require discussion between the end client and the agency as to the need to furlough agency workers and the length of any furlough period.

The party who pays the agency worker i.e. who operates PAYE for them can furlough them and will make the claim. As with other employees, the worker's agreement will be required before placing them on furlough. Where an agency worker is furloughed they cannot provide any work through or on behalf of the agency while furloughed, and that includes work for the agency's clients.

## Can I claim for employees transferred under TUPE or business succession rules?

Yes. HMRC have confirmed that new employers that have undertaken a TUPE transfer after 19 March 2020 will be eligible for the CJRS. Therefore, a new employer is eligible to claim in respect of the employees of the previous business transferred after 19 March 2020, if either the TUPE or PAYE business succession rules apply to the change in ownership.

## Can apprentices be furloughed?

Yes. Many businesses will have apprentices either working through the Modern Apprenticeship or other recognised schemes. Apprentices can be furloughed in the same way as other employees and can continue training whilst on furlough. Any time spent training must be paid at the correct rate of the National Minimum Wage – either the Apprenticeship Minimum Wage, the National Living Wage or the National Minimum Wage. These rates increased on 6 April 2020. You will still only be able to reclaim 80% of wages (capped at £2,500) under the Scheme, so any difference required to reach the National Minimum Wage rates will be at the employer's expense.

## Can I claim for employees who are working reduced hours?

No. The CJRS will only be available where the employee is not working or generating any revenue for the employer. This means that staff working reduced hours or for a reduced salary will not be eligible.

## How do I choose which employees to furlough?

### Do I require written agreement before placing an employee on furlough?

Yes. The process of placing an employee on furlough remains subject to the normal rules of employment law. Any change of an employee's contractual terms requires variation of their contract. Employers need to seek the employee's agreement to being placed on furlough but updated guidance has confirmed that this doesn't require to be in writing, provided the employee has otherwise expressed their agreement. However, we would recommend getting written confirmation and keeping a record of this for five years.

In the present circumstances it is unlikely that employees are going to refuse if the alternative is being made redundant, particularly in the climate that they may not be able to work elsewhere for many months. As such, when taking the proposal to put all or sections of staff onto furlough, you should explain that the alternative is to start a redundancy consultation process.

If employers are having to choose which employees to furlough and when, the normal rules of employment law and discrimination apply. Employers should consider implementing selection criteria and be wary of prioritising specific classes of employee, particularly those who have protected characteristics. For discrimination law purposes, age is a protected characteristic so it could be deemed discriminatory against younger staff to only furlough those over a certain age. That said, such discrimination can be justified if it is pursuing a legitimate aim and it could be argued that protecting more vulnerable employees is justified in the circumstances.

Employers could also consider asking for volunteers although it is unlikely that most employees will volunteer in the circumstances. Other options could include providing incentives to those who do not take furlough, such as an increase on their annual holiday allowance or an end of year bonus.

### What if staff don't agree?

In the unlikely event your staff do not agree to be placed on furlough and you cannot continue to offer them work, then you have to follow a fair redundancy process (albeit it may be possible to do this more quickly than normal in the given circumstances). This means that if you need to select individuals from a pool of employees, you will have to identify and apply fair selection criteria. You will also have to consult with them.

Depending on the numbers of redundancy, you may also have to collectively consult with them under the Trade Union & Labour Relations (Consolidation) Act 1992, meaning with unions (if they are recognised by the business) or employee representatives (who will have to be appointed or elected by those employees whose jobs are at risk of redundancy). The collective consultation period is 30 days if you are proposing to dismiss 20 or more employees within a 90 day period, rising to 45 days if it is 100 or more employees.

The difficulty (particularly where one of the reasons for redundancies is to try and preserve the viability of the business) is that each employee who is dismissed can bring a claim of up to 13 weeks wages (known as a "protective award"), if collective consultation is not complied with, which in itself may tip a business into insolvency.

### Can I rotate furlough between employees?

Yes. Employers who still require some staff presence may consider that the fairest way to handle this

is to rotate furlough between employees. The minimum period of furlough is 3 consecutive weeks. Employees can be placed on furlough for at least 3 weeks, taken off furlough for a period of time, and placed on furlough again. The guidance does not state that there is a minimum period they have to be brought back for, just that each period of furlough must be for at least 3 weeks. Each separate instance of furlough must last 3 consecutive weeks.

This will give employers some flexibility to cover sickness or holidays in non-furloughed staff, maintain minimum service levels and take a fair approach to choosing who to furlough.

### Can employees carry out any work while on furlough?

No. Employees cannot do anything which provides services to or generates revenue for their employer.

### What about training or volunteer work?

Employees can do volunteer work or training. Any time spent training would need to be paid at National Minimum Wage. This means employers would need to top up the 80% received from the government for any time the employee spends on training activities if it means otherwise that they would receive below the minimum wage for that time.

### Can one of my furloughed employees work for someone else?

Many employment contracts will include a provision that the employee can't work for someone else without their employer's consent. There is nothing under the CJRS from preventing you from giving your consent and the employee still remaining on furlough, however you need to make sure that they are available when you need the employee to return to work whether that be temporarily or permanently.

## Redundancy

### Do employers need to furlough employees or can they make them redundant or terminate their contracts instead?

There is nothing in the guidance which suggests that employers have to place employees on furlough. The guidance specifically states that employees can still be made redundant during their furlough leave.

However, before deciding whether to make someone redundant or terminate their contract, the ability to place them on furlough should be considered as a direct alternative. Otherwise, there is a risk that such dismissal may be unfair. Where an employee has been made redundant or termination, reimbursement under the Scheme would end.

Any redundancy process would need to be lawful and subject to the normal, legally prescribed procedures including consultancy and giving notice. Employers may face claims for unfair dismissal if they do not follow a fair redundancy process before dismissing staff. Similarly, employers could only consider terminating contracts where it is legally possible for them to do so.



## I've already laid staff off. What do I do about them?

Employees who have been made redundant or otherwise stopped working after 28 February 2020 are eligible for furlough, provided their employer re-engages them and then places them on furlough with immediate effect. This only applies to employees who were on your payroll as at 28 February and had been notified to HMRC on an RTI submission on or before 28 February 2020.

For employers, this will mean contacting relevant employees (although you may find the individuals will contact you directly) and offering to withdraw their dismissal by re-engaging them (on the condition that they are treated as being on furlough from their date of dismissal). Whilst in law you cannot unilaterally retract a dismissal, it is unlikely that employees are not going to agree to this.

Employers are not obliged to take this course of action and it is important to remember that the CJRS is to help businesses whose operations have been affected by the pandemic to retain their employees and protect the UK economy. It is not clear what evidence HMRC may look for in relation to why the employee had already left your employment e.g. if they resigned or were dismissed for say capability or misconduct.

## I've already paid them redundancy pay and notice pay. Will I get it back?

If they have been paid redundancy pay, a condition of re-engagement should be that they repay the sums to you, as they would not otherwise have received them.

## Can employees remain on furlough where they have been given notice of termination following a redundancy process?

The online guidance is silent on the relationship between notice pay and furlough.

In a redundancy situation, however, it is clear that employees' rights continue to apply as they normally would regardless of whether that employee has been on furlough. This means that any notice pay to which the employee is entitled, be it statutory or contractual notice, would need to be paid at 100% of the employee's usual wage. For employees who remain on furlough during their notice, their employer will need to top-up any grants received under the CJRS to 100% for any period deemed as notice.

It is further unclear whether employers should be claiming grants for notice pay at all, as the guidance provides the following warning:

"Grants [under the CJRS] cannot be used to substitute redundancy payments. HMRC will continue to monitor businesses after the scheme has closed."

Many employers who are making redundancies may consider setting a later termination date to ensure the employee can continue to receive a proportion of their salary under the CJRS. While this is not expressly prohibited, the above warning suggest that HMRC, taking a strict approach, may not look kindly on a termination date being pushed back in a genuine redundancy situation purely to benefit from the CJRS. While it is unclear, this course of action would need to be taken at the risk that HMRC could ask for repayment of any grants paid under the CJRS at a later audit stage. It is unlikely that they would have the resources to perform these checks now, at the point of payment.

## How do I apply?

Businesses will have to designate employees as furloughed employees through the HMRC Portal. HMRC opened the Job Retention Scheme Portal on 20 April and hope to have the first reimbursements made around 30 April. In order to make a claim in respect of those employees on furlough, employers will need:

- Your employer PAYE reference number
- The number of employees being furloughed
- National Insurance Numbers for the employees you want to furlough
- Names of the employees you want to/have furloughed
- Payroll/works number for the employees you want to furlough
- Your Self Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number
- The Claim period (start and end date)
- Amount claimed (per the minimum length of furloughing of 3 consecutive weeks)
- Your bank account number and sort code
- Your contact name
- Your phone number

Employers will be required to work out how much they are claiming. HMRC guidance also states that they reserve the right to retrospectively audit all aspects of a claim.

## How do I calculate wage costs?

### How much will employers get reimbursed?

Until 31 July 2020, employers can apply to the CJRS to recover 80% of eligible employee's usual monthly wage costs (known as "reference salary"), up to £2,500 a month, plus the associated Employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on the reimbursed furlough pay.

As outlined above, employer National Insurance and pension contributions will no longer be reimbursed under the CJRS from 1 August 2020. From September, the amount of reimbursement under the CJRS will also drop each month, with employers able to claim 70% of wages up to £2187.50 in September and 60% of wages up to £1875 in October. Employers will be required to top wages up to 80% in both September and October subject to the current cap of £2500. Further details of this next phase of the Scheme are due to be published on 12 June 2020.

### How much should I pay my employees?

In order to be eligible for reimbursement at present, the employee must be being paid either 80% of their reference salary or at least £2,500. Wages will be subject to income tax, national insurance, student loan repayments and minimum auto-enrolment pension contributions as usual. In other words, employers must pay their employees the entirety of the grant received under the CJRS in money. It is expected that this will be the case from 1 August 2020 as the amount of reimbursement available under the CJRS begins to reduce. Employers will be required to top wages up to 80% up to £2500 in September and October, when the percentage of wages reimbursed under the CJRS will be reduced.

## Do I need to top up wages by 20%?

Until the end of August, there is no requirement to top-up. Subject to the contract of employment saying otherwise, employers can also choose to top up their employees wages to 100% if they can afford it. This will be discretionary. National insurance and pension contributions on any topped up salary will not be reimbursed through the Scheme.

## How is “reference salary” calculated?

There are different calculations depending on whether the employee:

- Receives a fixed rate monthly salary;
- Works variable hours and has more than 12 months service;
- Works variable hours and has less than 12 months service;
- Works variable hours and started in February or March 2020.

HMRC have made an online calculator available to assist employers with this calculation. If the employee is to be furloughed over several calendar months, employers need to calculate the maximum amount for each calendar month and add them together.

As the CJRS portal has only been live for a short time, it is unclear how strict an approach HMRC will take to auditing individual calculations. The online guidance advises employers to choose the calculation they think best fits the way to pay the employee, confirming that they will not seek repayment due to calculation choice as long as a reasonable choice of approach is made.

## How to calculate reference salary for fixed rate employees

Fixed rate employee means those who earn an annual salary paid in instalments, for a number of hours as set out in their contract, and that those hours do not normally vary according to business, economic, agricultural or seasonal considerations. Fixed rate employees can be full-time or part-time.

Reference salary for a fixed rate employee is the salary that was paid to the employee during the last pay period, ending on or before 19 March 2020. Employers would need to work out the usual salary of any fixed-rate employees who were paid pro-rata during this period, for example, because they only started working in February or March 2020.

## How to calculate reference salary for variable hours employees

For employees on variable or zero hours, there is a difference of approach depending on whether the employee has been employed for more or less than 12 months before the claim.

For those more than 12 months service, reference salary is the greater of:

- The average monthly (or daily or other appropriate pro rata) amount paid to the employee for the period comprising the tax year 2019-20; and
- The actual amount paid to the employee in the corresponding calendar period in the previous year (i.e. April 2019).

For those with less than 12 months service, employers should calculate their average monthly earnings from when they started working.

If the employee started in February 2020, the calculation will be based on a pro-rata for their earnings so far.

## What should be included and excluded in the calculation of reference salary?

The CJRS is designed to reimburse regular salary or wages. This will only include payments which:

- Are not conditional on any matter;
- Are not a benefit of any other kind;
- Arise from a legally enforceable agreement or arrangement (e.g. contract of employment); and
- Cannot vary according to:
  - Performance of the business;
  - Contribution of the employee to the performance of the business;
  - Performance of any duties of employment; or
  - Any similar considerations.

In other words, the CJRS will reimburse contractual pay, such as wages, compulsory commission and past overtime. This reflects that in many sectors it is not uncommon for someone to be on a low basic salary at NMW level, but earn significantly more due to overtime or commission.

In terms of what would not be included, conditional payments where the employer would be under no contractual obligation to pay, such as discretionary commission, tips and bonuses, would not be included. Non-cash payments, non-monetary benefits and benefits in kind are also excluded. Such payments should not be taken into account when calculating reference salary.

When placing employees on furlough, employers should be wary of making salary payments during furlough conditional on reimbursement under the CJRS. As above, conditional payments are expressly excluded from the meaning of regular wages. The Treasury Direction published by the Chancellor and setting out the legal framework for the CJRS provides for reimbursement of wages which the employer “reasonably expects to be paid”, suggesting that earnings being deferred until the Scheme reimburses the employer may still be covered. It is important to distinguish between payments which are deferred and those which are conditional.

## What if paying the employee 80% will bring their income below the National Minimum Wage?

The guidance clarifies that employers who pay National Minimum Wage are not obligated to top up their employee’s wage to 100% during furlough, as minimum wage is only due on hours worked, and no hours are being worked when on furlough. The exception to this is that any training undertaken by the employee during furlough must be paid at national minimum wage.

## What do I include if my employee earned holiday and sick pay in April 2019 or during 2019/20? Is this included in calculating average pay?

The calculation is less clear for employees who may have received holiday or sick pay in April 2019 or during the last tax year. The guidance does not explicitly advise whether or not such payments are included in the meaning of “regular wages” for the purpose of calculating the reference salary for those on variable hours.

A strict interpretation of the Direction would suggest that reference salary should be calculated based on “actual amount paid” to the employee. Indeed, that is what HMRC will have a record of. As SSP and holiday pay are not expressly excluded, it is arguable that they should be taken into account where they were actually paid.

The position is different if the employee is returning from another form of statutory leave after 28 February 2020. In that situation, claims should be calculated against the employee’s normal salary before tax, not the pay they received whilst on leave. An employee cannot be on statutory leave and furlough at the same time.

## We operate a salary sacrifice scheme – are wages based on the pre or post salary sacrifice wage?

Normally once an employee signs up to a salary sacrifice arrangement they cannot come out of it unless there is a life event. The guidance states that “HMRC agrees that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements” provided the contract of employment is updated.

HMRC have updated their guidance to clarify that benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee’s taxable pay should not be included in the reference salary. Therefore, the reference salary is the employee’s salary post sacrifice and not the pre-salary sacrifice amount.

## If reimbursement is some weeks away, what do I do in the meantime if I can’t afford to pay?

This is a real difficult one, as employees will be wanting paid. The portal suggests that HMRC will aim to make payment within 6 days of the application. If cash-flow allows for you to pay salaries in the meantime, then you should pay. Alternatively you could consider your eligibility for a Coronavirus Business Interruption Loan.

## Holidays

### Do employees accrue holiday while they are on furlough?

Yes, per their contractual entitlement. Working Time Regulation holidays (that is, the 5.6 weeks holiday to which almost all workers are entitled) must be paid at normal holiday pay rates. This means employers would be required to pay holidays in full, topped up from the amount reimbursed under the CJRS, if taken during furlough.

### What if someone already has annual leave booked before they were placed on furlough?

If an employee is placed on furlough they can still request and take their holiday in the usual way (including bank holidays which is particularly relevant in April and May).

### Do employees need to be brought off furlough to take annual leave?

No, workers can take and be told to take annual leave while they remain on furlough. The latest guidance clarifies this position which was previously unknown and subject of much speculation.

This means that employers can continue to claim for employee wages even while they are using annual leave. However, holiday pay must be paid during any period of annual leave at the rate the worker would normally be entitled to. This means that employers would need to top-up the grant received under the CJRS to meet the workers' usual entitlement to holiday pay.

## Can I ask employees to take holidays when they are on furlough?

Yes, the latest guidance has confirmed that the usual notice requirements for employers requiring staff to take annual leave apply during furlough as they do normally. This means that any employer seeking to require an employee to take part of their Working Time Regulations holidays (5.6 weeks) on a certain date, whether during furlough or otherwise, must serve sufficient notice before the first day of annual leave. Sufficient notice is twice the length of the proposed period of annual leave, e.g. you must give 3 days' notice before requiring an employee to take 6 days' annual leave. Employers, as an alternative, could consider asking employees to take a minimum number of annual leave days before a certain date.

## Sick Leave

### My employee is self-isolating or on sick leave. What should I pay them?

The relationship between furlough and sick leave is quite ambiguous but largely depends on the decision of the employer.

Employees who are on sick leave or self-isolating can get Statutory Sick Pay ("SSP"). The guidance specifically states that the CJRS is not intended to support short-term absences due to sickness, suggesting any short-term sickness leave should be paid at SSP rates. However, the guidance is contradictory as it further specifies that employers can furlough employees for business reasons who are currently off sick. This suggests that furlough must be due to a separate business reason rather than purely as a result of the employee being off sick.

### Can I claim reimbursement of SSP under the CJRS?

No. Employers must meet the cost of SSP themselves as it will not be reimbursed. Employees who are or were receiving SSP must stop receiving SSP to be placed on furlough.

### For employees who are already on sick leave, can they be furloughed when they come back?

Yes. While on sick leave or self-isolating, employees should receive SSP. Once they recover, they should be taken off SSP and placed on furlough.

### What if an employee becomes ill while on furlough?

It is up to the employer to decide whether staff who become ill during furlough should be kept on furlough (at their furloughed rate of 80% normal salary) or taken off furlough and moved to SSP.

Employees who are sick must receive SSP as a minimum. Employers may want to consider whether or not the employee has been on furlough for the minimum period of 3 weeks before they become ill.



HMRC will not reimburse employers for periods of furlough of less than 21 days.

## Does this apply to employees who are shielding?

The online guidance provides that employees who are advised by public health guidance to shield (i.e. they have received a letter from their GP or the NHS) can be placed on furlough if they are unable to work from home.

However, there is some uncertainty as to whether shielding employees should be furloughed or paid Statutory Sick Pay since the Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020 (SI 2020/427) was introduced. This took effect on 16 April 2020 and introduced entitlement to Statutory Sick Pay for shielding employees who are unable to work from home.

The Chancellor's Treasury Direction states at paragraph 6.3 that, where SSP is payable or liable to be paid when the employee is instructed to stop working, furlough does not begin until "the original SSP has ended".

This could suggest that, for employees placed on furlough after 16 April 2020 due to shielding and who cannot work from home, there is a risk that employers will not be able to recover the furlough pay through the scheme. However the explanatory note to the amendment regulation (above) provides:

*"This instrument ensures entitlement to SSP in cases where people are unable to work because they are shielding themselves in accordance with the guidance and where they meet the SSP eligibility criteria as set out above in 6.1. This is intended as a safety net for individuals, in cases where their employer chooses not to furlough them under the Coronavirus Job Retention Scheme and does not have other suitable policies in place (e.g. the ability to work from home, or the provision of special leave)."*

Conversely this suggests that SSP for shielding employees only arises where they have not been furloughed i.e. their entitlement to SSP is conditional on their employer not choosing to place them on furlough. However it is unclear to what extent employers can rely on this given that it is not included in the wording of the actual regulation, only the notes.

On that basis, shielding employees should be considered in two groups:

- Those furloughed before 16 April 2020. SSP entitlement had not arisen when they were instructed to stop working so there is nothing to suggest that they would not be eligible for furlough.
- Those furloughed after 16 April 2020: It is unclear if furlough or SSP is the appropriate option and will largely depend on how strictly HMRC follow the Treasury Direction. For the time being, the online guidance still states: "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". This is a clear indicator that HMRC does support shielding employees being placed on furlough. Given the ambiguity in the information available, employers could certainly make an application to the CJRS in good faith.

## Can employers furlough staff who are on long-term sick leave?

Yes, the guidance specifically allows this and states that the decision to furlough those who are on long term sick leave is the decision of the employer. Again, employees in this position would need to be taken off SSP and moved to furlough leave, as the CJRS will not reimburse SSP.

## Maternity/Shared Parental/Paternity/Adoption Leave

### Can employees who are on parental leave be furloughed?

There is nothing in the guidance which suggests that an employee returning from a period of statutory parental leave cannot be placed on furlough on their return to work.

However, employees who are already on or due to take maternity leave must take the minimum period of leave (2 weeks or, for factory and workshop employees, 4 weeks) after childbirth. The guidance provides that enhanced, contractual Maternity Pay can be claimed through the Scheme (subject to the limits). Statutory Maternity Pay or other parental pay will not be reimbursed.

Employees on parental leave already who agree to end their parental leave and go on furlough, cannot return to parental leave once their period of furlough is over. For example, a new parent taking 9 months parental leave who opts to go on furlough after completing only 2 months' parental leave, cannot complete the remaining 7 months once furlough is over.

### Does furlough affect the payment of statutory Maternity Pay?

Employees still have the same rights as regards statutory parental leave, meaning employees who are eligible for Statutory Maternity Pay or Maternity Allowance remain entitled to it under the normal rules. This means that such employees will be eligible for 90% of average weekly earnings for the first 6 weeks, followed by 33 weeks of 90% average weekly pay or the statutory flat rate (£151.20 per week from 6 April 2020). The guidance does not specify whether employees can cut their maternity leave short in order to be placed on furlough, but they would have to give notice to end their maternity leave early by giving their employer 8 weeks notice.

## Directors

### Can company directors be furloughed?

Salaried company directors can be furloughed provided:

- They are paid via PAYE;
- The Board of Directors considers it can still comply with their statutory duties under the Companies Acts;
- The decision is formally adopted as a decision of the company;
- It is formally recorded (by resolution) in the company records;
- It is communicated in writing to the director to be furloughed.

This also applies to salaried individuals who are directors of their own personal service company (PSC).

Where directors are employees, you also have to comply with employment law and therefore seek their consent before placing them on furlough as it amounts to a variation to their contract of employment. Many directors only take a small salary (if any) and receive income from their business as dividend payments from their shareholding. Any income derived from dividend payments is not covered by the CJRS or by the self-employed income support scheme.



## Can a furloughed director carry out any statutory duties while furloughed?

Directors who are on furlough can still carry out certain statutory duties. However, the only statutory duties which can be undertaken during furlough are those arising from an Act of Parliament relating to:

- The filing of company accounts; or
- The provision of other information in relation to the administration of the company

The initial Government guidance suggested that directors would be limited to carrying out duties that were “reasonably necessary”. This wording has now been replaced with the above, giving a much narrower definition of permitted duties.

Non-compliance with some statutory duties can lead to personal liability. A director’s personal liability for statutory duties such as “wrongful trading” is expected to be suspended for 6 months, once the detailed guidelines are published. However, there are other statutory duties such as the prohibition against fraudulent trading, which remain in place, and can still lead to personal liability. This area of personal liability for non-compliance with statutory duties is complicated and nuanced, so we would be very happy to discuss particular issues directly.

## What about non-executive directors or other office holders?

Guidance now provides that they can be furloughed provided they are paid through PAYE, but they will only be able to claim in respect of that income.

*This guide is correct as of 5 June 2020.*

*Updated guidance will be uploaded to the Thorntons website as and when it becomes available.*

**If you have any queries or require further information about any of the issues raised in this guide, please contact us by using the contact details below:**

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