

COVID-19

***Operator
Employment Support***

Update: 8 April 2020

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COVID-19 – Operator Employment Support

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The information below is based on current guidance produced by the UK Government and from various announcements, as such the information may be subject to change and is **valid as at 8 April 2020**.

Note: this update does not constitute legal advice and operators are advised to seek specific advice in relation to their business.

The government has recently updated published guidance regarding the Coronavirus Job Retention Scheme (“CJRS”). It remains unclear whether HMRC intends to rely on this guidance only, or whether there will be legislation and/or further statutory instruments enacted.

The full guidance is available by visiting:

<https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme>

<https://www.acas.org.uk/coronavirus>

Further publications and resources provided by Backhouse Jones can be found here:

<https://www.backhousejones.co.uk/covid-19-resource-hub/>

Key Points

1. Eligibility
2. Making a claim
3. Furloughed Employees – what “can,” and “can’t,” they do?
4. Can employee take, or be made to take, annual leave during Furlough?

5. What if an employee does not want to be furloughed?

6. Guidance for specific types of employees:

- a) Agency workers;
- b) Office holders;
- c) Company directors;
- d) Members of an LLP; or
- e) Limb (b) workers.

The term “furlough” has not been commonly used within UK employment but was introduced by the Chancellor of the Exchequer when announcing the intention to implement the CJRS. It means that an employee is granted a leave of absence from work whilst maintaining the employment relationship. In its current context it has been utilised by the government to prevent mass redundancies and maintain employment so that business can continue after the Coronavirus pandemic.

Under the CJRS, employees can be furloughed, and employers can apply for a grant to cover 80% of the monthly wage costs for furloughed employees, up to a maximum of £2,500 plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions.

1. Eligibility

Employer

Any entity with a UK payroll can apply for the CJRS, including businesses, charities, recruitment agencies and public authorities, provided they have the following:

- started a PAYE payroll scheme on or before 28 February 2020;
- enrolled for PAYE online (this process can take up to 10 days); and
- a UK bank account.

Employee

Employees can only be furloughed if they were on the PAYE payroll on 28 February 2020.

Employees (including foreign nationals) on any type of employment contract are eligible, this includes:

- full-time employees
- part-time employees
- employees on agency contracts
- employees on flexible or zero-hour contracts

It is recommended that employers keep an open dialogue with their workers if they are considering furloughing of staff and seek agreement with the individual before placing them on furlough. The decision and agreement should be communicated in writing and an example letter can be found at <https://www.backhousejones.co.uk/wp-content/uploads/2020/04/COVID-19-Letter-template-consenting-to-furlough.pdf>

A record of this notification should be kept for five years.

Those businesses who have taken on employees after 28 February 2020 (who would not be eligible for the CJRS) will need to consider other options. For individuals who have already commenced work this may include lay-off where there is a valid clause with the contract of employment permitting this or the worker agrees, short-time working (reduced hours) and again with a valid clause within the contract or agreement, or in some circumstances termination of employment. For individuals who are due to commence work on previously agreed terms this may include deferring the start date for employment or rescinding the offer of employment, however this can have employment law implications and so employers are encouraged to seek advice.

Employers may also be due to commence new work and could be in the process of taking on additional workers under TUPE. Government guidance is not currently clear as to what impact the eligibility criteria will have on these workers and the ability to furlough staff along with other potential implications that may apply where the transferring contract is with a public body (see below). Businesses who are going through a TUPE transfer are encouraged to seek guidance at an early stage.

Administrators

If a company is under the management of an administrator, the administrator can furlough employees provided there is a reasonable likelihood that the employees will be rehired following the period of furloughed leave, for example if the business is to be sold.

Apprentices

Apprentices can be furloughed in the same way as any other employee and can continue to take part in training whilst furloughed, so long as it does not provide any services or generate any income for the employer.

Where an apprentice is continuing to train, the employer must ensure that they are paid at least the Apprentice Minimum Wage, National Minimum Wage or National Living Wage for all the time they spend training whilst furloughed. The 80% furlough payment from the government may cover this, however where there is a shortfall between any monies paid through the CJRS and the minimum wage, the employer will have to make up this shortfall.

Further guidance in relation to the effects of COVID-19 on apprenticeships can be found on the government website.

Employees who have been made redundant or left

Any employees who were made redundant or stopped working on or after 28 February 2020 can be re-engaged and furloughed however, it is important to stress that this arrangement is a temporary measure during the current crisis and not a permanent retention.

Employers who are considering this option are encouraged to seek legal advice before re-engaging staff.

Unpaid leave

If an employee started unpaid leave on or after 28 February 2020, they will be eligible for this scheme.

Employees with more than one employer

An employee **can** be put on furlough by one employer and continue to work for another. If they are put on furlough by more than one employer, they will receive separate payments from each employer. However, the 80% of the regular wage up to a £2,500 monthly cap applies to each job.

If the employee is on maternity leave, adoption leave, paternity leave or shared parental leave

Employees will remain on the statutory leave and continue to receive the relevant statutory payments from their employer.

An employer can however 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

If an employee is pregnant and about to start maternity leave

The employee should start maternity leave as normal. If their earnings have reduced because they were put on furlough beforehand or off sick before their maternity leave started, this may affect the employee's Statutory Maternity Pay. The same rules apply to adoption pay, paternity pay and shared parental pay.

Fixed Term Contracts

Employees on a fixed term contract can be furloughed and where necessary their contracts can be renewed or extended whilst they are furloughed. If a fixed term contract comes to an end and it is not renewed, you will no longer be able to claim the grant for that employee.

Self-isolating

If an employee is self-isolating or on sick leave, they cannot be furloughed during this period, but they will still be entitled to SSP. Once the period of self-isolation or sick leave has ended, they can then be furloughed.

Shielded Employees

If an employee is shielding in line with government guidance, or they live with someone who is shielding and they are unable to work from home, they can be furloughed.

Carers

Employees who cannot work due to having caring responsibilities arising as a result of COVID-19 can be furloughed. This includes any employees who have stay at home to look after children.

Public Sector Employees

The government expects that the scheme will not be used by many public sector organisations, as the majority of public sector employees are continuing to provide essential public services or contribute to the response to the Coronavirus outbreak.

Where employers receive public funding for staff costs (e.g. via contracts for public services), and that funding is continuing, employers are expected to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them.

If an employer has employees providing any public services or works for the benefit of the public sector (e.g. for local authorities, councils, etc.), we would advise that they seek specific legal advice on [Procurement Policy Note 02/2020](https://www.backhousejones.co.uk/advice-note-procurement-policy-note-02-20-supplier-relief-due-to-covid-19/) (<https://www.backhousejones.co.uk/advice-note-procurement-policy-note-02-20-supplier-relief-due-to-covid-19/>) before furloughing any of their employees

2. Making a claim

HMRC will administer the CJRS and are hoping to have the reimbursement system up and running by the end of April 2020.

Employers should only seek to claim reimbursement from the date that the worker stopped work and commenced furlough leave. This cannot be backdated.

National Insurance and pension contributions can also be claimed through the scheme. However, you will not be able to claim for any additional contributions that are made to

top up the employee's salary or additional pension contributions above the mandatory employer contribution.

An employer can claim for any regular payments that they are obliged to pay their employees, including past overtime, fees, bonuses and compulsory commission, however any discretionary bonuses, commission and non-cash payments cannot be claimed.

Non-monetary benefits and any benefits received through a salary sacrifice scheme should not be included in the salary when it comes to calculating how much can be claimed. HMRC has, however, agreed that COVID-19 would be considered as a life event which would allow changes to salary sacrifice arrangements if their employment contract is updated accordingly.

The CJRS grant does not cover student loans payments or the apprenticeship levy.

If the 80% grant would mean that the employee is receiving below the minimum wage, provided they are not taking part in any training whilst furloughed, the employer is not obliged to top up their wage.

Once HMRC have reviewed an employer's claim, the grant will be paid by BACs and must be made to a UK bank account.

3. Furloughed Employees – what "can," and "can't," they do?

Once an employee has been furloughed, they **cannot work for their employer or work for another linked or associated company.** Furloughed employees can take part in volunteer work or training whilst furloughed, so long as this does not provide a service or generate any revenue for their employer's business.

Any employees who are doing any training at the request of their employer whilst furloughed are entitled to receive at least the minimum wage for time spent training. The 80% grant may cover this requirement, however if there is any shortfall between the grant and the minimum wage, this will have to be made up by the employer.

If the contract of employment allows an employee to undertake additional employment, and they are furloughed by that employer, the employee may undertake work for another business. Most contracts of employment will contain a provision that requires an employee to seek consent to undertake other work which means that drivers should seek consent of the employer before undertaking work for another employer.

It is important to remember that a furloughed employee will need to be able to return to work for the employer that has placed them on furlough if they decide to stop that period of furlough. If this is not possible, it risks the possibility that the employer may not be able to reclaim from the Government the wages paid to that employee whilst on furlough. This could result in undesirable situations whereby furloughed drivers have refused to return to work having been given better terms when working for another haulier. It is hopeful that HMRC will provide further guidance as to the approach it will take in such circumstances otherwise it is possible that operators do not have sufficient drivers as and when the current pandemic abates and business returns to something resembling normality. Operators who are either considering permitting their drivers to undertake other work or have received a request from a furloughed driver to undertake other work should consider matters carefully and should seek advice where appropriate.

4. Can employee take, or be made to take, annual leave during Furlough?

The current government guidance is silent on the holiday point; however, ACAS guidance suggests that

"If an employee or worker is temporarily sent home because there's no work and the employer intends to claim for their wages under the Coronavirus Job Retention Scheme ('furloughed'), they can still request and take their holiday in the usual way. This includes bank holidays"

However, the interaction between annual leave and pay and furlough leave and pay is not currently clear and there are several potential issues with allowing or requiring workers to take annual leave during furlough:

- Annual leave may not be treated as furlough leave and so the pay might not be recoverable from HMRC under the CJRS.
- Furlough leave needs to be taken for a minimum of three weeks, so it arguably cannot be interrupted by annual leave.
- Even if annual leave during furlough leave does not end furlough leave, then the employer may still not be able to recover the holiday pay in full.

If holidays can be taken during periods of furlough leave, holidays will be paid at the employees' normal rate of pay, and not the furlough rate of 80%. Therefore, employers will either:

- Pay 100% of wages for the holiday period; or

- Claim 80% under the CJRS and top up the remaining 20%.

At this stage, at least for the first 3 weeks until the position is clear, it is advisable **not** to allow employees to take holidays and any pre-booked holiday, including bank holiday should be credited back to take at a later date. The risk of allowing holidays whilst the position is still unclear, is that HMRC audit your application for reimbursement and determine that the holiday pay is not recoverable or, worse, that the annual leave has broken the period of furlough leave such that the furlough pay is not recoverable either.

The government has of course introduced an extension to the WTR so as to allow workers to carry-over up to 4 weeks' holiday into the next two holiday years. This provision will apply where at the end of the year it has not been "*reasonably practicable*" for a worker to take some or all of this leave "*as a result of the effects of Coronavirus (including on the worker, the employer or the wider economy or society)*". This should help alleviate the issue of staff having to take a significant amount of annual leave prior to the end of the holiday year when things return to normal.

5. What if an employee does not want to be furloughed?

If an employer asks an employee to go on furlough and that employee refuses, they may be at risk of redundancy or termination of employment, depending on the circumstances of the employer and their business situation. However, this must be in line with normal employment law principles. Employers should take specific legal advice before making redundancies.

6. Guidance for specific types of employees:

(a) Agency Workers

Agency workers paid through PAYE can be furloughed, even where they are employed by an umbrella company. The agency and the worker would need to agree between themselves, however it may be appropriate to discuss this need with any end clients.

If an agency supplies workers who are employed by an umbrella company, it is for the umbrella company and the worker to agree to furlough the worker.

(b) A Company Director

Salaried company directors can be furloughed. When furloughing directors, the board must take into consideration whether they would still be in compliance with their statutory duties. If any directors are to be furloughed this should be adopted as a decision of the company, recorded accordingly and communicated in writing to the director who is being furloughed.

Whilst furloughed, directors are still able to fulfil any statutory obligations they owe to the company, but they must not carry out any other work which provides services for the company or would generate revenue.

(c) A salaried member of a Limited Liability Partnership

Salaried members of an LLP can be furloughed. If there is a Partnership Agreement in place, this may need to be varied by a formal decision of the LLP to reflect the members absence whilst furloughed.

For any member who is treated as being employed by the LLP, salary shall refer to the employees profit allocation and shall not include any amount determined by performance.

(d) A Limb (b) Worker

Limb (b) workers ('dependent contractor') who are paid through PAYE are eligible for the Job Retention Scheme.

If you require any specific legal advice in respect of your employees or anything further mentioned in this update, please don't hesitate to contact Backhouse Jones at 01254 828300.

Disclaimer: This note is not intended to constitute legal advice and operators should seek specific advice which will be provided based on their particular circumstances.

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