

Coronavirus Job Retention Scheme – An Update (17 April 2020)

In our article of 27 March 2020, we outlined the HMRC Guidance published on 26 March 2020 on the operational framework of the coronavirus (COVID-19) Job Retention Scheme.

The Coronavirus situation is developing rapidly and on 4 April 2020, 9 April 2020, 15 April and 17 April 2020 HMRC published updated guidance. We have updated our article to include key additional points contained in the updated guidance. In addition, on 15 April 2020, the Treasury published “The Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction”.

We have also included a section on the Self-Employed Income Support Scheme (SEISS), announced by the Chancellor on 26 March 2020.

HMRC has published two guidance documents which provides considerable further detail on the operational framework of the coronavirus (COVID-19) Job Retention Scheme, dated 26 March 2020 and as updated in April 2020.

[HMRC guidance for employers on the coronavirus \(COVID-19\) Job Retention Scheme, 26 March 2020 and updated on 4, 9, 15 and 17 April 2020.](#)

[HMRC guidance for employees on the coronavirus \(COVID-19\) Job Retention Scheme, 26 March 2020 and updated on 4, 9, 15 and 17 April 2020.](#)

Who can claim?

Any organisation/entity making a claim must:

- have created and started a PAYE payroll scheme on or before **19 March 2020 (previously this date was 28 February 2020)**,
- enrolled for PAYE online, and
- have a UK bank account

The scheme covers:

- businesses;
- charities;
- recruitment agencies that pay agency workers through PAYE;
- public authorities.

Although the 26 March version of the guidance indicated that the scheme would be open to ‘UK organisations’ who had created and started a UK PAYE payroll scheme on or before 28 February 2020, the update of 4 April 2020 confirms that the scheme will be open to any entity who had created and started a UK PAYE payroll scheme on or before 28 February 2020. However, this date was changed to 19 March 2020 in the update of 15 April 2020.

As a result of the updates, employers who are individuals can furlough employees (such as nannies) provided the employer pays them through PAYE and sent HRMC an RT1 submission notifying a payment in respect of the employee on or before 19 March 2020.

The update of 4 April clarifies the limited circumstances in which company administrators will be expected to access the scheme: *'we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business'*.

The update of 4 April 2020 provides that although the scheme is designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus.

For which employees may claims be made?

Claims may be made in respect of furloughed employees who satisfy the following criteria:

- the employee was on the claiming employer's PAYE payroll on or before 19 March 2020 and which were notified to HMRC on an RT1 submission on or before 19 March 2020 (it follows that employees hired after 19 March 2020 or who were not notified to HMRC on an RT1 submission on or before 19 March 2020 cannot be furloughed and no claim may be made in respect of them under the scheme).
- the employee may be:
 - full time;
 - part time;
 - on an agency contract;
 - on a flexible or zero-hours contract.
- if the employee was made redundant by the employer since 28 February 2020, but are rehired by the employer, claims may be made in respect of them (i.e. where an employer had already reacted to the business circumstances brought about by the pandemic by making one or more employees redundant since 28 February, they may rehire such employees and furlough them at no cost to the employer, so as to provide them with an income from the scheme). The update of 15 April 2020 provides that employees that were employed as of 28 February 2020 and on payroll, and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough.
- employees on unpaid leave as at 28 February 2020 cannot be furloughed. However, the update of 15 April 2020 provides that if an employee went on unpaid leave on or before 28 February 2020, they cannot be furloughed until the date on which it was agreed they would return from unpaid leave. Employees placed on unpaid leave after 28 February can be furloughed.
- The update of 15 April 2020 provides that employees who 'stopped working for' their employer on or after 28 February 2020 can also be re-employed, placed on furlough and claimed for under the scheme. This applies even if the employees were not re-employed until after 19 March 2020. This applies as long as the employee was on the employer's payroll as at 28 February 2020 and had been notified to HMRC on an RT1 submission on or before 28 February 2020.

- The update of 4 April 2020 contains:
 - a new section on apprentices
 - new guidance in relation to employees on fixed-term contracts, confirming that they can be furloughed and that their contracts can be renewed or extended during the furlough period ‘without breaking the terms of the scheme’. However, if the contract ends because it is not renewed or extended, the employer will no longer be able to claim for them under the scheme.
- The update of 4 April 2020 confirms that foreign nationals are eligible to be furloughed.
- The update of 4 April 2020 contains further guidance on specific considerations under the scheme in relation to certain other categories of individual who are paid via PAYE but who are not necessarily classified as employees. As well as employees, the grant can be paid for any of the following if they are paid via PAYE:
 - office holders (including company directors)
 - salaried members of limited liability partnerships (LLPs)
 - agency workers (including those employed by umbrella companies)
 - limb (b) workers.
- The update of 4 April 2020 provides that claims under the Scheme can be made in respect of ‘limb (b) workers’ (ie those who satisfy the definition of ‘worker’ in section 230(3)(b) of the Employment Rights Act 1996, provided they are paid via PAYE.

Meaning of ‘furloughed’

‘Furlough’ is a term that refers to a temporary suspension of employment for a specified period of time, during which an employee does not receive wages. Employers can furlough employees whose roles are not entirely redundant but who have no work, or less work to do.

In order to receive a grant under the scheme, employers will need to make a claim for wage costs through the scheme with effect from 1 March 2020 (see below). The scheme is likely to be in operation by late April so that wages due for March and April can be reimbursed.

The guidance makes it clear that, to be eligible, when on furlough, an employee **cannot** undertake work for or on behalf of the organisation, including providing services or generating revenue.

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for the scheme and the employer will have to continue paying them through its payroll subject to the terms of the employment contract.

The update of 4 April 2020 provides that any employee who has been furloughed may (with the agreement of their existing employer) take on a new job without jeopardising the furlough status of their original job; the new employer is required to disclose that the relevant employee is furloughed from another employment by ensuring the employee correctly completes the PAYE starter checklist and chooses Statement C (ie that they have another job).

The update of 4 April 2020 provides that employees can ‘roll-on and roll-off’ furlough, ie employees can be furloughed multiple times but:

- each separate instance of furlough must be for a minimum period of three weeks; and
- when an employee returns to work, they must be taken off furlough.

Written communication to furloughed employee is a requirement

A claim may only be made in respect of a given employee if the employer has written to that employee confirming that they have been furloughed. It is important to keep a record of that communication to prove that this condition has been satisfied. The update of 4 April 2020 provides that the written record of the employer’s communication with the employee confirming that they have been furloughed must be kept by the employer for five years (presumably from the date it is sent, although this is not stated).

However, the HMRC guidance on communication required is different to the Treasury Direction of 15 April 2020. The Treasury Direction provides that: “An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.” This suggests a notification letter would not be sufficient and that an actual written agreement is required.

If you would like assistance with preparing letters or written agreements to the workforce, please get in touch.

Requirement not to work during furloughing

It is a requirement that an employee is not working during the period in respect of which the claim is made:

- when on furlough, an employee can not undertake work for or on behalf of the organisation;
- if a given employee **is** working, but on reduced hours, or for reduced pay, they will not be eligible for money under the scheme, and the employer will have to continue paying them through their payroll according to the terms of the employment contract that has been agreed.

Need for employers carefully to consider who to furlough and other changes

An employer needs to consider how many and which employees should be furloughed. The guidance states that employers should discuss this with their staff:

- a decision must be made as to whom furlough will be offered;
- in respect of some employees, it may be more appropriate to offer them changed contractual terms instead of furloughing them, e.g. work on reduced hours and/or reduced pay. The important point is that no claim under the scheme may be made in respect of any employee that continues to work at all. Where contractual changes are contemplated, employers should discuss these with the potentially affected employees and any changes made should be by agreement (and confirmed in writing);

- if, in relation to contemplated contractual changes, sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to those changes;
- in making such decisions, equality and discrimination laws will apply in the usual way, so the employer must be scrupulous in ensuring that it acts lawfully in this respect. It is therefore highly recommended that the employer should fully and carefully document the reasons why certain employees were furloughed and others were not, as well as the reasons for any contractual changes that are agreed in this context;
- given the potential discrimination and consultation issues that may arise, employers should seek legal advice on the process, including the preparation of a selection matrix/criteria for furloughed employees in order to ensure that the selection is fair and objective.

Employees receiving statutory sick pay (SSP) or shielding in line with public health guidance

Employees who are receiving SSP because on sick leave or self-isolating should continue to receive SSP for that period. However, once the SSP period ends, such an employee (who satisfies the other criteria set out above) may be furloughed and receive money under the scheme.

Tax and NI during furlough

While a given employee is on furlough, the employee's wage will be subject to usual income tax and other deductions.

Employers will be liable to pay:

- employer NICs, and
- minimum automatic enrolment employer pension contributions, unless an employee has opted out or has ceased saving into a workplace pension scheme.

Calculating what employers can claim under the scheme

The scheme will provide a grant from HMRC to cover whichever is the lower of:

- 80% of an eligible employee's regular wage before tax, as in their last pay period prior to 19 March 2020 (this previously was the employee's salary as of 28 February 2020, but it was changed to 19 March 2020 in the update of 15 April 2020. However, the updated Guidance of 15 April 2020 provides that, if based on previous guidance, employers have calculated their claim based on the employee's salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020) they can choose to still use that calculation for the first claim), or
- £2,500 per month

The amount received from HMRC will also include, in relation to that subsidised wage:

- the associated employer National Insurance Contributions (NICs), and
- the minimum automatic enrolment employer pension contributions (see below for further information on NICs and pension).

The guidance, in the section dealing with "what you can claim" states: "You will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, **plus** the

associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage”.

At a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. The employer may choose to top up an employee’s salary beyond the 80% up to their usual salary, but there is no obligation to do so under the scheme.

The update of 4 April 2020 provides that grants under the Scheme do not cover both the apprenticeship levy and student loans and these should continue to be paid as usual. The update also contains a section dealing with benefits in kind and salary sacrifice arrangements during furlough.

Fees, commission and bonuses

Fees, commission and bonuses should not be included in a claim under the scheme, whether the employee is full or part-time.

The update of 4 April 2020 provides that employers can include any regular payments that they are obliged to pay their employees, including wages, past overtime, fees and compulsory commission payments, when calculating their employee’s ‘wages’ (of which employers can claim 80%, up to a maximum of £2,500 per month).

Employer National Insurance Contributions (NICs) and pension contributions

All employers remain liable for associated employer National Insurance Contributions (NICs) and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

As mentioned above, when making a claim to HMRC under the scheme in respect of a furloughed employee’s wages, the amount claimed can also include the associated employer NICs and minimum automatic enrolment employer pension contributions on paying out the amount received from HMRC in respect of a given furloughed employee.

The guidance suggests that employers can reclaim “associated NIC” and the minimum automatic enrolment employer pension contributions on the subsidy. We understand this can be claimed *in addition* to the £2500 cap on the payment for wages.

Period of furlough

The minimum period of furloughing is three weeks. At present, the government has announced that the scheme will be open for a period of three months (1 March to 31 May 2020) but it may be extended.

Process for making a claim under the scheme

Employers will need to submit information to HMRC online about furloughed employees and their earnings. The online system should hopefully be up and running from **the end of** April 2020.

To make a claim, employers will need to provide (among other matters):

- ePAYE reference number;

- number of employees being furloughed;
- claim period (start and end date);
- amount claimed (the minimum length of furloughing is three weeks).

Employers may also apply for a business interruption loan if they need support with their cashflow.

It falls to the employer to calculate the amount being claimed. HMRC states that it retains the right retrospectively to audit all aspects of any claim.

The update of 15 April 2020 provides that if employers have fewer than 100 furloughed staff, they will be asked to enter the details for each employee they are claiming for directly onto the system. If the employer has 100 or more furloughed staff, they will be asked to upload a file with the required information.

Taking holidays during furlough

On 17 April 2020, the government updated its guidance to deal with the question of taking holidays during furlough.

Furloughed employees continue to accrue leave as per their employment contract.

The employer and employee can agree to vary holiday entitlement as part of the furlough agreement, however almost all workers are entitled to 28 days of paid annual leave each year under the Working Time Regulations (“WTR”) which they cannot go below.

Employees can take holiday whilst on furlough. The WTR require holiday pay to be paid at the employee’s normal rate of pay or, where the rate of pay varies, calculated based on the average pay received by the employee in the previous 52 working weeks.

Therefore, if a furloughed employee takes holiday, employers should pay their usual pay (as opposed to any reduced furlough pay (80%/£2500)) in accordance with the WTR. Furthermore, employers cannot reclaim the additional amounts paid during furlough for statutory holiday pay from the government. However, employers may agree to pay a different rate of pay for contractual holiday over and above the minimum 28 day statutory entitlement under the WTR.

If an employee usually works bank holidays, then the employer can agree that this is included in the grant payment. If the employee usually takes the bank holiday as leave, then the employer would either have to top up their usual holiday pay or give the employee a day of holiday in lieu.

Employers should note that employees also have the right to carry over up to 4 weeks holiday into the next 2 holiday years if they have not been able to take their statutory annual leave entitlement because of the coronavirus.

The government has confirmed that “we are keeping the policy on holiday pay during furlough under review” and therefore, it is possible that the guidance in relation to holiday pay will be updated again in due course.

What help is available to the self-employed?

Those who pay tax on their trading profits through Income Tax Self-Assessment may instead be eligible for the Self-Employed Income Support Scheme (SEISS), announced by the Chancellor on 26 March 2020. HMRC has published specific guidance entitled “Claim a grant through the coronavirus (COVID-19) Self-employment Income Support Scheme”.

This SEISS will allow those eligible to claim a taxable grant worth 80% of their trading profits up to a maximum of £2,500 a month. It will be available for 3 months but may be extended. A person can claim if they are a self-employed individual or a member of a partnership and they:

- have submitted their Self Assessment tax return for the tax year 2018 to 2019;
- traded in the tax year 2019 to 2020;
- are trading when they apply, or would be except for coronavirus;
- intend to continue to trade in the tax year 2020 to 2021;
- have lost trading profits due to coronavirus.

To be eligible they will need to confirm to HMRC that their business has been adversely affected by coronavirus. HMRC will use a risk-based approach to compliance. Furthermore, their trading profits must also be no more than £50,000 and more than half of their total income for either:

- the tax year 2018 to 2019
- the average of the tax years 2016 to 2017, 2017 to 2018, and 2018 to 2019.

We are currently assisting many businesses through this unprecedented time and have helped prepare relevant letters for ‘furloughing’ employees, advised on the process to follow and drafted homeworking policies. For further advice on how to manage the situation and reduce costs, please contact our specialist employment solicitors on 020 7956 8699 or email info@rllaw.co.uk.

This note confirms the position as at 17 April 2020. The information is provided for your assistance and should not be relied on as legal advice or as a substitute for legal advice.