

FURLOUGH FACTS AND GUIDANCE

Information provided by Halborns Limited.

This note is correct at 27 March 2020 but may be subject to further change. Please don't rely solely on this note as advice – you should take advice from your lawyer on the specific details your situation.

Q 1A: What support is the government offering UK businesses in respect of furloughed workers?

The Coronavirus Job Retention Scheme ('CJRS') is a temporary scheme open to all UK employers who had started a PAYE payroll scheme on 28 February 2020 and have a UK bank account.

The CJRS should be up and running by the end of April.

Under the CJRS you will be able to apply online to HMRC to claim:

- 80% of any furloughed employee's monthly wage costs (subject to a monthly maximum of £2500); and
- Employer National Insurance Contributions; and
- Minimum automatic enrolment employer pension contributions on the reduced wage

in respect of wages between 1st March 2020 and 30 May 2020.

Wages whilst on furlough will be subject to usual income tax and other deductions.

You must pay the employee a minimum of the lower of 80% of their regular wage or £2500 per month to be eligible for the CJRS. Wages do not include fees, commission and bonuses but can include enhanced contractual (earnings related) maternity pay.

You are entitled to pay more to furloughed employees than the amount you will be reimbursed under the CJRS – if you do you will not be reimbursed the top up (nor any employer's NICs or pension contributions on the top up). Neither will you receive a reimbursement in respect of any amount you pay in addition to the minimum automatic enrolment employer pension contributions.

When the CJRS ends you must decide whether employees return to their duties (if not you may make them redundant).

Q 1B: How do we work out what we can claim?

Claims can be backdated until the 1st March (if applicable).



Only one claim at least every three weeks is possible per employee under the CJRS.

Fees, commission and bonuses will not be reimbursed under the CJRS and should not form part of any of the following calculations.

Full-time and part-time employees

The employee's actual gross salary as of 28 February 2020 should be used to calculate the 80% (ignoring any pay increase taking effect after that date).

Employees who pay varies

If the employee has been employed for a full 12 months prior to any claim then you can claim the higher of either:

- The wage the employee received in the same month the claim is made but in the previous year;
- The average monthly earnings from the 19-20 tax year.

If the employee has been employed for less than 12 months at the point that you claim then you can claim for an average of their monthly earnings since they started work.

If the employee only started in February 2020 then you should use a pro-rata for their earnings so far.

You must pay the employee all of the grant that you receive – no fees can be charged from the money that is granted to you.

In addition to the above you will also need to calculate employer national insurance contributions and minimum automatic enrolment employer pension contributions on the amounts below.

Q 1C: What information will we need to provide HMRC using their online portal in order to claim?

Once the portal is set up you will need to provide the following information in order to claim:

- Your ePAYE reference number
- The number of employees being furloughed
- The claim period (start and end)
- Amount claimed (subject to minimum length of the furloughing of three weeks)
- Your bank account number and sort code
- Your contact name
- Your phone number
- You will also need to calculate the amount you are claiming.



HMRC retains the right to audit all aspects of the claim.

Q 2: What is a furloughed worker?

A furloughed worker is:

- An employee who was on your PAYE payroll on 28 February 2020 (and who was not hired after that date); and
- Who does not undertake work during furlough (including providing services or generating revenue); and
- Who remains on payroll during furlough; and
- Who has been designated by you as a 'furloughed employee' (for at least three weeks); and
- Who has been notified in writing of the change in their status to 'furloughed employee'.

If an employee was made redundant after 28 February 2020 and subsequently rehired by the same employer they classify as a furloughed employee provided they meet the other criteria.

You do not need to place all employees on furlough to benefit from the CJRS.

Employees who are shielding in line with public health guidance can be placed on furlough.

Q 3: Who cannot be a furloughed employee?

The following employees cannot classify as furloughed:

- Employees working short time or reduced hours;
- Employees on unpaid leave (unless they were placed on unpaid leave after 28th February 2020); or
- Employees receiving Statutory Sick Pay because they're on sick leave or self-isolating but they can be furloughed after this (this does not include employees who are shielding in line with public health guidance).

Q 4: Do we need the contractual right to designate an employee as furloughed?

If there is a provision within the employee's employment contract which allows you to reduce the hours they work and the pay they receive then contractually you will be able to furlough that employee without their consent. If there isn't that contractual provision and the employee hasn't agreed to be furloughed then you will be in breach of contract and the employee will have the right to claim damages for breach of contract (and constructive unfair dismissal if they resign as a result of the breach and have two years' service).



Bear in mind that for employees with more than two years' service you should exercise any contractual provision reasonably and without breaching the employee's trust and confidence – any such breach would give the employee the right to resign and claim constructive unfair dismissal. This means that even with the contractual right to reduce an employee's hours and pay you should give the employee reasonable notice that they will not be required to work (what amounts to reasonable notice might be set out in the contract) or secure their agreement (in which case reasonable notice is not required) (see Q9 for securing agreement).

Please note: There are complicated laws around when an employee accrues two years' service. Please take advice.

Q 5: How do we decide which employees are going to be designated as affected (if we're not going to furlough all employees)?

It is your choice as the employer who you are going to designate as a furloughed employee – employees do not have the right to insist that they become a furloughed employee.

Employment law and employment contracts still need to be observed.

Employment contracts

It's unlikely that you have anything set out in employment contracts that details how you should approach designating affected employees as furloughed employees but you should take advice before deciding that is the case.

Employment laws

Unfair dismissal (in respect of employees with more than two years' service)

Every employee has the implied right to put their trust and confidence in you to deal with employment matters reasonably and lawfully. If you select one employee over another without objective justification you will probably breach their trust and confidence giving them the right to resign and claim constructive unfair dismissal.

Selecting on the basis of performance (where you've properly recorded and measured performance previously), experience in the role, qualifications etc are a good starting point for objective selection. It's also a good idea to ensure that two managers are making the decisions to avoid arguments of bias.

Discrimination

Be careful to ensure that any criteria you apply to select affected employees as designated furlough workers is not discriminatory and if it is that you can objectively justify the practice. If you discriminate against an employee they can resign and claim constructive unfair dismissal as well as bring a discrimination claim.

Obvious selection criteria which are likely to be discriminatory include selecting:



- For experience (which could be age discrimination) but handled in the right way with the right evidence you should be able to objectively justify why experience in the role is so important at this point;
- Those employees with child-caring responsibility which is discriminatory against women and is unlikely to be capable of objective justification
- Using sickness absence records as disabled employees are likely to have a poorer absence record so you'll need to make adjustments to put them on an equal footing with their non-disabled colleagues.

Q 6: Is asking for volunteers for furloughed worker status a good idea?

Securing the agreement of your workforce to furloughed worker status is the best possible approach to de-risking. But, if you're not designating your entire workforce as furloughed workers you'll still have the same issues as above in respect of Q5 and if your 'best' people volunteer you are then faced with challenging conversations to change those who are selected or a commercial challenge of running the business without your best behind you.

Q 7: Once we've determined which employees we want to designate as furloughed workers how do we notify them of their furloughed worker status?

The government have made it clear that you must write to every employee you want to designate as a furloughed employee confirming that they have been furloughed and keep a record of this communication.

You'll also need to consider – are you going to seek the agreement of your employees to designate them as furloughed employees or follow the terms of their employment contract if it includes provisions dealing with reductions in work/lay-off.

Agreement

This is the best approach in terms of minimising risk. Any agreement you reach should include details of what it means to be a furloughed employee and some form of consideration. Reaching agreement avoids any argument that you've breached trust and confidence or a contractual provision (which may give the right to resignations and claims for constructive unfair dismissal).

Any agreement should be in writing and be clear as to the consideration that is being given in return for the change (see Q8 below). Bear in mind that the employment contract may set out how variations to terms need to be affected so you'll need to follow that variation clause in designating an employee as furloughed.

Following the terms of the employment contract

If the employee's employment contract gives you the right to require that the employee does not come into work and is not then entitled to pay then you can follow the terms of that provision (provided you also follow any other terms which influence the interpretation or exercise of that provision). Bear in mind though that every employment contract has an implied unwritten term that you will not breach



the employee's 'trust and confidence' in the way that you require them to comply with the provisions of the contract and so you will need to consider whether notice should be given to exercise any contractual rights (see Q4 and Q5 for more information on mutual trust and confidence).

Q 8: If we're trying to reach agreement with our employees about furloughed work what should our approach be?

In any letter we'd recommend you email or write to each affected employee including some or all of the following (after taking advice):

- The name of the employee;
- The date when the agreement becomes effective;
- An explanation about furloughed working (and the fact this is not lay off or short time working – take advice to ensure that this is the case);
- An explanation about why you are exercising your right to furlough employees;
- That the employee will not be able to do any work for you whilst off;
- If the employment contract allows you to send them home without work say as much;
- That if they are furloughed their accruing holiday and continuous service are preserved;
- Why they have been selected/selection criteria and process;
- That the alternative to becoming a furloughed employee may be redundancy or unpaid leave (this is important to meet with the test for 'has consideration been offered');
- The first day they will be required to go home without work;
- Anything they need to do whilst off – like keeping in contact, telling you if they're sick, on holiday or self-isolating;
- That their employment contract continues to apply even though they are at home;
- What you will pay them, how that is calculated and when you will pay them;
- Any terms of eligibility or repayment if you're paying them more than 80%/£2500;
- When you think they might be asked to return and on what terms;
- That the furlough worker status and this agreement is temporary until further notice (but will last a minimum of three weeks);
- How they can raise questions;
- How they can accept;
- What happens if they don't accept expressly and how you will assume implied acceptance; and
- Any support you can offer with financial advice or hardship.

Q 9: If we reach agreement with our employees should we ask them to sign anything to indicate their agreement or can we rely on implied acceptance?

Express agreement and consideration

Express agreement for the changes that furlough status brings is best in terms of minimising risk. A signature from the employee is best. An email from the employee agreeing your terms is almost as good.

For the changes to be enforceable there has to be consideration. Making clear that the measures are being taken to save the employee's job should be sufficient to amount to consideration take advice on the specific scenario.

Implied agreement and consideration



For larger employers getting a signed agreement or email back from every employee is probably not going to be practical. So, how do you create a situation where the employee hasn't accepted expressly but you can still argue they impliedly accepted furloughed employee status with reduced pay?

There isn't a perfect and complete answer we can write here as every situation is judged on its facts but here are a few suggestions as to how you can ensure you succeed in an argument that the employee impliedly accepted the change:

- Ensure you put in writing the full details of the arrangements for furloughed working as set out in Q8;
- Check the employment contract to see whether there are specific provisions which set out how you vary the terms (take advice to ensure that you're interpreting those terms accurately);
- Ensure that you explain that the alternative is unpaid leave or redundancy (assuming that is the case as avoiding those outcomes should amount to consideration);
- Ask for express agreement;
- Explain clearly how the employee asks questions or objects;
- Be clear what acts on the part of the employee show they have impliedly accepted (if they don't expressly accept). That could include:
 - Not attending work
 - Not asking to work at home
 - Not objecting
- Make it clear that if the employee does not agree to the terms set out in the letter how you will deal with their objection (which might include making them redundant).

Q 10: Does designating employees as furlough workers amount to statutory lay off meaning that after four or six weeks those workers can give notice for a statutory redundancy payment?

As the law currently stands, if your contracts of employment do not contain a lay off provision entitling you to reduce hours and pay to zero then the furlough leave cannot amount to statutory lay off. If your contracts do contain a lay-off provision then furloughing employees can amount to statutory lay-off. When the government ends the scheme, you'll need to consider whether they can return to work at that stage and, if not, whether it may be necessary to make them redundant. Bear in mind, that they'll continue to accrue continuous' service during their furlough leave which could impact any redundancy pay they receive at a later date.

Q 11: In addition to that set out above there is a lot that remains unclear including:

- Whether the scheme will support the reimbursement of workers as well as employees;
- Whether or not statutory guarantee payments will continue to apply;



- How holiday etc works whilst on furloughed leave;
- Whether you can use holiday pay to top up furloughed employees pay to 100%;
- Whether any top-up you choose to pay can be off-set from any redundancy payment you subsequently need to make; and
- How abusers of the scheme will be dealt with.

Q 12: If we choose to temporarily close the business (rather than being forced to shut) are we still entitled to be reimbursed by the government under the Job Retention Scheme?

Yes – irrespective of any temporary closure of the business and your reasons for taking that decision provided that you meet with the criteria set out at Q2 and you apply for the reimbursement online using the government’s portal (when set up) you’ll be entitled to the reimbursement.

Q 13: How do we deal with maternity leave and pay, contractual adoption pay, paternity pay or shared parental pay?

Normal rules apply in respect of statutory family friendly leave and pay (with family friendly pay such as maternity pay being calculated in the usual way, meaning reduced pay during furlough leave may need to be taken into account). If you offer enhanced earnings related contractual pay to women on maternity leave this is included as wage costs if they are furloughed at the point that contractual entitlement can be paid (you can then claim through the CJRS (as with other enhanced pay for these types of leave)). If an employee thinks that being a furloughed employee is better for them financially and they end early their maternity, paternity or adoption leave before they have exhausted that leave they will not be able to return to the family related leave.

Q 14: Is there any support for us in the meantime before the CJRS is set up?

You may be entitled to support from the government’s Coronavirus Interruption Loan Scheme.

Q 15: Is there any other support available for our employees/furloughed workers?

You may have financial advice support through an EAP helpline which you could offer to your employees. In addition, they may be entitled to support from the welfare system or through Universal Credit.

Q 16: Can directors be designated as furloughed workers?

In theory yes provided that they have the status of an employee. But, if they’re doing any work you will not be entitled to reimbursement from the government. It’s difficult to see how a director could fulfil their directorship duties in running the company at such an important time without working.



Q 17: If we designate the high risk and vulnerable as furloughed will that amount to discrimination?

On the face of it such a practice could be deemed to be discriminatory although it might well be capable of objective justification. Take advice.

Q 18: Is it discriminatory that employees working 100% of the time may only receive 20% more pay than furloughed workers not working at all?

Provided that the selection process for who you decide will be designated as a furloughed employee is not discriminatory then you will not be discriminating against either the employees working and being paid 100% or the furloughed employees being paid 80%/£2500 or less.

Clearly though, you can see why employees who remain at work may consider that it's unfair that their non-working counterparts will be receiving 80%/£2500 of the pay they're getting. That message will need to be managed carefully from an engagement perspective but is not unlawful from an employment law perspective.

Q 19: Are we able to make some employees redundant and designate some employees as furlough workers?

Yes, although obviously you need to select fairly and without discriminating and follow a fair process to effect the redundancies..

Q 20: Do we need to pay affected employees designated as furloughed workers 80%/£2500 of their pay?

You need to pay to the employee the equivalent of the amount of their wage you will be reimbursed from the government (along with paying the minimum employer auto-enrolment pension contribution into their pension) less PAYE and other usual deductions.

Q 21: We'd like to top up employee's pay to 100% where they are a furloughed worker. Is that possible? How should we go about it?

Yes, it's possible. If you don't have a lay-off clause within your contract then you'll find agreement to furlough working easier to secure if you're initially paying 100% of pay. You'll need to be clear though if you're going to stop paying 100% at some point in the future. You'll also need to set out any criteria for securing 100% of pay along with any terms for repayment of the top up if the employee leaves within a certain period. Likewise top up terms in respect of poor performance, suspension, disciplinary etc should be clear.

Q 22: Do we need to ensure that furloughed workers are still paid national minimum wage/national living wage?



No, as national minimum wage is based on hours worked and output (unless the employment contract says otherwise) then as furloughed workers must not work or produce anything for you they are not entitled to pay at all.

See Q39 for payment to employees in respect of training they undertake while furloughed.

Q 23: How much do we have to contribute to the pension scheme of a furloughed worker?

If your employees are part of an auto-enrolment scheme, their pension contributions are calculated based on the remuneration they receive. So, if you're paying employees 80%/£2500 of their pay whilst they're furloughed, you'll need to calculate their pension contributions based on the 80%/£2500 figure they actually receive, not their full pay. However, you should check the employee's contract and the pension scheme rules to see if either of them set out an entitlement to full pension contributions, although this would be unlikely.

There is also a statutory minimum level of earnings that employees need to earn before you're required to make contributions under an auto-enrolment scheme. Once they're furloughed, if your employees receive less than these amounts then you won't need to make any contributions at all:

- £512 per month
- £118 per week
- £472 per 4 weeks

If your employees are not part of an auto-enrolment scheme then you'll need to check the individual pension scheme rules and the employment contract.

Q 24: Our employees receive certain benefits – will those benefits need to continue once the employee is designated as a furloughed worker?

The starting point is to consider what the employment contract says – lay-off provisions usually only state that pay will reduce but the clauses setting out each right to a benefit may detail whether the benefit continues when there is no work. If the contract doesn't deal with the provision of benefits you need to decide how you are going to treat each benefit and then reach agreement with your employees as to your intention as set out in Q9 (subject to minimum legal requirement in respect of pension contributions etc).

Q 25: How does designating employees as furloughed workers affect any statutory redundancy pay or notice pay?

Statutory redundancy pay

If an employee has normal working hours, you need to consider the amount 'payable under the contract' at the point you make them redundant to calculate the statutory redundancy pay which means:



- if you have furloughed the employee and agreed with them to reduce their pay then if they are still furloughed when made redundant, you would use the reduced pay to calculate the statutory redundancy pay ; or
- if you haven't agreed any reduction in pay with the employee (e.g. if you used a contractual right to lay-off), you would need to use their normal pay before they were designated a furloughed worker to work out their statutory redundancy pay.

If the employee doesn't have normal working hours, you take the average of the last 12 weeks' pay in order to work out their statutory redundancy payment including any weeks when they received reduced pay but ignoring any weeks when they received no pay.

Notice pay

If the employee has been designated a furloughed worker and notice to end employment has been served by either you or them the following rules apply:

- if the only notice that needs to be served by you is statutory notice (irrespective of who has actually given notice) and
 - they have normal working hours their notice pay will be calculated using the amount 'payable under the contract'. So, if you've agreed with the employee to reduce their pay as a result of their furloughed status then notice pay is calculated based on the reduced pay. If you have relied on a contractual lay-off clause to 'furlough' the employee and have not sought agreement to reduce their pay, the notice pay will need to be calculated based on their usual pay prior to any furlough reduction;
 - they don't have normal working hours you need to take the average of the last 12 weeks' pay in order to work out their weekly average (so you'll need to ignore any weeks where they haven't received any pay and include the weeks where they have received reduced pay within the calculation);
- if the notice you need to give is at least one week longer than the statutory notice (irrespective of who has actually given notice), then for employees with normal working hours you can calculate the notice pay based what you're currently paying them (so the reduced amount even if you've exercised a lay-off provision) and for those without normal working hours you'll take the average of the last 12 weeks' pay (ignoring unpaid weeks and including weeks with reduced pay).

Q 26: Do our employment contracts already deal with furloughed worker status?

It's highly unlikely that your contracts specifically refer to 'furloughed employee' status but if you have a lay-off provision or a term which sets out that you can reduce hours worked to nothing and pay to 80%/£2500 or less (usually the contract would say that where hours are reduced to nothing then pay can be reduced to nothing) then your contracts indirectly cover furlough working.



Q 27: If our employment contracts don't allow us to reduce hours and pay should we try and make changes to employment contracts now?

If your contracts don't include the ability to reduce pay and hours then as set out in Q7 and Q8 you'll need to secure the agreement of your employees to the furlough employee status or you'll be designating them as furlough employees in breach of contract. You can make changes to their contract of employment and ask them to agree those although:

- you need to think carefully about whether you want to include a lay-off provision within your contracts – if your contracts include such a clause then furlough working amounts to statutory lay-off meaning that the employee can request to leave with a redundancy payment after four weeks of consecutive furlough status (see Q10);
- you might find that it's harder to reach agreement in respect of permanent changes to an employment contract so you may not ultimately reach agreement to furloughed employee status;
- ideally, you'd be asking your employees to agree a temporary change in status so that they're reassured that they won't forever find that they are paid 80% or less even when coronavirus is under control.

Q 28: Should any new agreement make it clear that furloughed worker status is temporary and if so should we set out our terms for ending furlough working?

The furloughed employee status should be expressed as being temporary.

If you're able to be specific about ending furloughed employee status in the future then such reassurances will be helpful to achieve agreement with the employee. Although you may want to avoid such an inflexible approach and leave open your options on when to end furlough work.

It's worth bearing in mind the implied term in every employment relationship that you will exercise your rights under any agreement with the employee reasonably and with trust and confidence. This means that if you ultimately decide to continue to keep individuals as furloughed employees on a permanent basis or longer than necessary you'll be acting unreasonably meaning your furloughed employees could claim breach of contract or resign and claim constructive unfair dismissal (if they have two years' service or more).

Q 29: If we don't have the contractual right to designate employees as furloughed workers do we need to consult with those we want to designate?

Not unless your employment contracts say you need to (which is doubtful). However, see Q4 for further details as to risk and take advice.



Q 30: If we don't have the contractual right to designate employees as furloughed workers do we need to collectively consult with those we want to designate as furloughed workers?

Unless you're considering terminating the employment (including making redundancies and withdrawing job offers) of 20 or more employees over a 90 day period at one establishment if they don't agree to the furloughed employee status or the terms you're suggesting then you will not need to collectively consult.

Please note: The law on "one establishment" is complicated so please take advice from your lawyer.

Q 31: Our contracts say that we'll give notice to our employees where we're making changes to their employment terms. Do we need to ensure that's the case where we're asking employees to agree to furlough employee status?

Where you're trying to reach agreement with the employees to accept furloughed employee status you may still need to reach agreement to the variation in a certain way if that's what the employment contract sets out. Take advice on the exact interpretation of the contract.

Q 32: Will we still be able to put employees on to short-time working?

Yes, if you have the contractual right to do so or agree with the employees that is the case but those employees will not be able to be furloughed at that point. If any furloughed employee carries out short time working they will immediately cease to be a furloughed employee and you may not be reimbursed by the government in respect of some or all of their wage costs

Q 33: We want to designate some employees as furloughed workers but we'll still need them to pop into work to collect the post or do other small tasks – will we still secure the reimbursement?

You will not be able to secure reimbursement from the government in respect of any employee that does any work for you. That includes collecting the post, cleaning, checking emails or dealing with tribunal evidence or witness statements. The government have been clear that only non-working furloughed employees will you secure the 80%/£2500 reimbursement.

Q 34: Our furloughed workers want to take a second job while they're not working for us. Is that possible?

Yes, provided that they continue to honour the terms of your employment contracts, do not work during the hours their contract requires and they don't work in respect of any hours their pay covers. This will be subject to any specific terms set out in their employment contract (e.g. the contract might require your prior written consent to work for another employer).



The government have made it clear that if an employee has more than one employer they can be furloughed for each job. Each job is separate and the cap applies to each employer separately.

Q 35: Our furloughed employees want to do volunteer work – are they able to without us losing our eligibility for the CJRS reimbursement?

Yes, furloughed employees can take part in volunteer work.

Q 36: Once we've designated an employee as a furloughed worker can I then ask them to become an employee again and give them work and then when that work dries up put them back on to furlough working again.

You can only submit one claim to HMRC per employee under the CJRS at least every three weeks which is the minimum length an employee can be furloughed for.

Q 37: Can employees on maternity leave be turned down for KIT days they've requested?

Yes, if there is no work available for them.

Q 38: Can employees on suspension be designated furloughed workers?

Yes, although bear in mind that you won't then be able to progress any disciplinary process with them unless you remove their furloughed employee status. Depending on when you do that will determine whether any of that employee's wage costs will be reimbursed by the CJRS.

Q 39: Can we ask our furloughed workers to carry out training online?

Yes, the furloughed employee can take part in training as long as they do not provide services to you as their employer or generate revenue for you as their employer.

Bear in mind that where training is undertaken the employee must be paid at least national minimum wage/national living wage for the time spent training even if this means that you won't be able to recover all of those wages if they exceed the cap.

Q 40: It doesn't feel right that we're due to pay a bonus. Can that be avoided?

Yes, provided that the terms of the bonus scheme allow you to avoid payment or the employees entitled to the bonus agree not to be paid it. You should take advice on the terms of your bonus.

