

Coronavirus Job Retention Scheme & Furlough Update

Which employers are eligible?

The guidance provides that the scheme is designed to help employers whose operations have been severely affected by COVID-19 "to retain their employees and protect the UK economy". However, it makes clear that all employers (rather than "UK employers") are eligible to claim under the scheme "and the government recognises different businesses will face different impacts from coronavirus". Under the new guidance any entity with a UK payroll can apply for a grant provided they have:

- Created and started a PAYE payroll scheme on or before 28 February 2020;
- *Enrolled for PAYE online* (this is new); and
- A UK bank account

Which workers are eligible to be furloughed?

Individuals who ceased to be on your PAYE payroll after 28 February 2020 can be re-employed and furloughed:

- It doesn't matter why the employee left your employment (the previous guidance just referred to those who had been made redundant)
- The ex-employee can ask to be re-employed but you are not required to re-employ them – it is up to you as the employer to decide what to do (although there could be discrimination issues if you are selecting some but not all of the staff that left, so take advice if this is the case)

There is more detail on the types of workers that are covered by the scheme:

- Salaried LLP members, office holders including company directors, agency workers including those employed by umbrella companies and Limb (b) Workers who are paid through PAYE are all covered. As are apprentices and foreign nationals
- Employees who are shielding, or who can't work due to caring responsibilities, are covered, as are employees that started unpaid leave after 28 February 2020
- Employees on fixed term contracts can be furloughed. You can extend or renew their contracts while they are furloughed
- To be eligible for a grant under the scheme for employees you wish to furlough, you must confirm in writing to them that they have been furloughed and keep a record of this for five years

What rules apply during furlough leave?

Employees who are furloughed are not allowed to perform any work for you (or a linked or associated company) other than training:

- BUT they are permitted to work for other employers and
- You are free to consider allocating any critical business tasks to staff that are not furloughed
- Employees with more than one job can be furloughed by all or any of their employers and the pay cap applies to each employer individually

- Employees can be furloughed multiple times provided each period of furlough leave is a minimum of 3 weeks (this means you can rotate your staff on and off furlough)

How much can you claim?

There is more detail on how much you can claim:

- You will be able to claim for 80% of pay subject to a cap of £2,500 - it is now clear that these figures are before tax
- For those employees whose pay varies, "pay" means an employee's "regular" contractual pay which includes wages, "compulsory commission" (which presumably means contractual past commission earned) and past overtime
- Variable pay does not include discretionary bonuses, discretionary commission, tips, non-cash payments or benefits in kind (e.g. gym membership)

New guidance is given for those employees on salary sacrifice:

- The lower sacrificed salary is the relevant amount to take into account for the purposes of claiming from the scheme
- BUT HMRC has confirmed COVID-19 is a "life event" which means employees can revert to their pre-salary sacrificed salary if they wish
- Grants under the scheme cannot be used to cover redundancy payments (but nothing is mentioned about notice payments)

Are there any uncertainties still?

No clarification is given on the uncertainties around holidays. However:

- We note that ACAS guidance indicates that a furloughed employee can take annual leave at the same time as being on furlough leave.
- Nevertheless, there remains a risk that if employees take holiday leave during furlough leave (e.g. for pre-booked holiday or for bank holidays they are contractually entitled to), the furlough scheme will not cover the pay for that leave
- If you are considering requiring your employees to take holiday whilst on furlough leave, you should take advice.

No further clarification is given around maternity and other parental leave during furlough or as regards sickness during furlough leave:

- It is still unclear whether an employee who is sick during furlough reverts to sick leave (and therefore Statutory Sick Pay (SSP) and their employer's sick pay scheme (if relevant)). It may be advisable to suspend the operation of the company sick pay scheme during furlough leave
- The updated guidance does say that you cannot claim for employees while they're getting SSP, but they can be furloughed and claimed for once they are no longer receiving SSP
- Also unclear is whether an employer's claim for a grant to cover enhanced maternity pay has the effect of ending maternity leave, which could put at risk any SMP entitlement at risk when furlough leave ends

Do employers have to pay full holiday pay if holiday is taken during a furlough period?

Based on extensive previous case law, holiday pay must be based on normal remuneration. This applies for at least the four weeks EU minimum leave and includes overtime, allowances, commission and bonuses, meaning employees do not get less pay when they are not working.

Normal remuneration is assessed over an average of 52 weeks from April 2020 (formerly 12 weeks) so annual leave during furlough must be based on normal remuneration. Although it is more expensive to have an employee on holiday rather than furlough, the advantage for the employer is that the employee's remaining holiday entitlement between now and the end of the holiday year is reduced.

In the absence of express guidance employers who force furloughed employees to take holiday can claim the 80% grant money from HMRC for employees on holiday leave as they are not at work and not working. However, it seems employers have to top the holiday pay to the full salary amount in contrast to the furlough period where they can choose to top up pay (or not). This need to top up applies for at least the four weeks EU minimum leave. For the remaining 1.6 weeks there is a potential legal argument that an employer could get the employee to consent to just being paid the 80% but employers should probably pay the full amount for the entire holiday period too.

The guidance is not clear on the relationship between furlough and holiday, the interrelationship is untested and legal advice may need to be taken if a problem arises.

If we can help you with this or any other HR issue, please do not hesitate to contact a member of our HR Team at HR Services Scotland Ltd on

0800 652 2610 – select option 2 for HR