



MANUFACTURING NORTHERN IRELAND

Manufacturing Northern Ireland: Furlough FAQs under the Revised Job Retention Scheme

Disclaimer: These FAQs are intended to provide information and guidance on the HR and employment law implications of the Covid-19 situation. They do not constitute legal advice and should not be relied upon as such.

1. Who can be furloughed under the Revised Scheme?

In order to be furloughed under the Revised Scheme, an employee must previously have been furloughed for at least a three week period under the original Scheme, meaning that the last date on which an employee could be furloughed for the first time was 10 June 2020. However, there is an exemption for parents who have not previously been furloughed if they have been on maternity, paternity, adoption, shared parental or parental bereavement leave, provided that the employer has previously furloughed other employees.

There are also exceptions where you are furloughing employees who transferred to you under TUPE after 10 June, or armed forces reservists who are returning to their job after a period of active service.

To be furloughed under the original Scheme, employees must have been on the employer's PAYE payroll on or before 19 March 2020 and have been notified to HMRC on an RTI submission on or before 19 March 2020. They could be on any type of employment contract, including:

- full-time employees
- part-time employees
- employees on flexible or zero-hour contracts
- apprentices
- employees on fixed term contracts

In respect of employees on fixed-term contracts, their contracts could be renewed or extended during the furlough period without breaking the terms of the Scheme.

For full guidance and a full list, please click here;

<https://www.gov.uk/guidance/check-which-employees-you-can-put-on-furlough-to-use-the-coronavirus-job-retention-scheme>

2. Is there a maximum number of employees an employer can claim for in any claim period under the revised scheme?

The number of employees an employer can claim for in any claim period under the Revised Scheme cannot exceed the maximum number they have claimed for under any previous claim under the Scheme in its initial form. The guidance gives the following example: an employer had previously

submitted three claims between 1 March 2020 and 30 June, in which the total number employees furloughed in each respective claim was 30, 20 and 50 employees. The maximum number of employees that employer could furlough in any single claim starting on or after 1 July would be 50. Employers will need to bear this restriction in mind when determining how they make use of the Revised Scheme, as it may, for example, impact on a company that had previously been operating rotational furlough (e.g. keeping half the workforce on furlough for three weeks, with the other half working and then swapping them over) but now wishes to change so that all of the workforce works on a part-time basis and receives furlough pay for their remaining hours not worked.

However, there is an exception to the cap where you are furloughing for the first time employees who have previously been on family leave. The guidance provides that when calculating the maximum number of employees you can claim for, the number of employees you are furloughing for the first time due to them returning from family leave should be added to any previous maximum. This means the maximum number of employees you can claim for in these circumstances, is the maximum you claimed for in any one claim before 30 June, plus any employees that you are furloughing for the first time due to them returning from family leave. There are also exceptions where you are furloughing employees who transferred to you under TUPE after 10 June, or armed forces reservists who are returning to their job after a period of active service.

3. What levels of financial support are available under the revised scheme?

In June and July, the amount that employers can claim under the Revised Scheme remains the same as it was under the original Scheme (although if you bring employees back to work part-time in July, only their non-working (or furloughed) hours will be covered and the monthly cap on furlough pay will be proportional to the hours not worked).

- Current scheme whereby Government pays 80% up to a max of £2,500 continues in June and July 2020 (although if you bring employees back to work part-time in July, only their non-working (or furloughed) hours will be covered and the monthly cap on furlough pay will be proportional to the hours not worked).
- Flexi-furlough can start from 1st July whereby employers will have maximum flexibility i.e. an employer can bring an employee in to work for 2 days and pay them for 2 days and furlough them for the other 3 days
- Aug - The Government will pay 80% of wages up to a maximum of £2,500 but employers will then have to start paying NI and pension contributions
- Sept - The Government will pay 70% of wages up to a max of £2,190 and employers will contribute 10% of wages as well as national insurance and pension contributions
- Oct - The Government will pay 60% of wages up to a max of £1,875 and employers will contribute 20% of wages as well as national insurance and pension contributions

The Revised Scheme is set to end on 31 October 2020.

4. How do you select whom to offer part-time work during furlough if you only have work for some employees to do?

The Government guidance makes clear that when employers are making decisions in relation to furlough, equality and discrimination laws will apply in the usual way.

As a first step, employers need to think carefully about what roles they now require employees to perform and the numbers they need in each role. For example, an employer seeking to restart its production will require a certain number of supervisors to work, in addition to the production operatives.

Employers will also have to consider the cost of recalling particular employees back to work part-time during furlough, as furlough pay for such employees under the Revised Scheme will cover non-working (i.e. furloughed) hours only, with the cap of £2,500 per month adjusted proportionately. Employers will be fully responsible for paying employees for the part-time work that they do. In addition, the level of support that the Government provides under the Revised Scheme will reduce gradually from August.

Having identified the numbers it needs to recall from furlough on a part-time basis in particular roles, and the associated costs, our view is that an employer can probably ask employees to volunteer for this. Where an employer receives more volunteers than it needs to return, or does not receive enough volunteers, it will need to conduct some sort of selection process.

Manufacturing NI has been working closely with Upskill Enterprise who is offering a free service during this period to help you capture the skills within your workforce to help you make objective and proactive selection decisions. To register, logon at www.talentsensus.com.

A further possible alternative may be a rotational furlough arrangement, whereby some employees are kept on full furlough while others return to work full-time, and then the groups are switched over. Employers can continue to rotate those on furlough provided that - from 1 July - those employees have been furloughed for a period of 3 consecutive weeks at some point before 30 June. From 1 July, employers have more flexibility and could rotate on a weekly basis.

5. What process should you follow to place an employee on furlough or flexi-furlough?

Before being able to access the scheme, qualifying employees must have their contractual status changed to that of a furlough worker. This change to a worker's contract and status is however, intended to be temporary. There is some discord between the previous Directions issued by the Treasury and the HMRC guide as to whether employees have to agree in writing to the change in contractual status. However, as explained by HMRC in a separate communication to a barrister:

"...the employer and the employee must reach an agreement and an auditable written record of this agreement must be retained. It does not necessarily follow that the employee will have provided written confirmation that such an agreement was reached in all cases."

The new Treasury Direction appears to have resolved this issue: whilst agreement between the employer and employee is still required in writing, it can be 'confirmed' by the employer to the employee and 'writing' includes communications by email. Agreement may be made by way of collective agreement, and it must specify 'the main terms and conditions upon which the employee will cease all work'. The advice is to set out furlough status (and any changes including flexible furlough) in writing and where possible, to agree the change in status and reduction in wages in writing with your furloughed workers and keep record of it (for 5 years - until 31 October 2020). An email is sufficient. Certainly, as a minimum, all employees should be written to explaining the change

of status and reduction in pay. It appears employees do not have to agree in writing before their furlough leave etc. commences; however, employers would be advised to keep seeking written agreement.

Remember, HMRC have the power to audit claims – and we should expect they will.

Some contracts of employment may already include a short time or lay off clause allowing employers to reduce pay or send employees home where there is no work; although it would be prudent in the circumstances to write to employees explaining the situation, the change of status and that this is due to coronavirus.

However, remember that normal contractual rules relating to changing terms still apply. Claiming under the JRS means a reduction in pay which should be agreed in writing to avoid claims for unlawful deduction of wages or breach of contract claim. Also, employers may want to agree other changes to terms during this time – pension contribution changes, changes in holiday accrual for example. It would be advisable to seek agreement in writing, therefore.

6. How should I gain agreement from the employee in respect of furlough / flexi furlough arrangements?

Good communication is key in order to encourage agreement. While in-person meetings with all affected staff might still not be possible in the current circumstances, we would recommend that employers try to arrange some form of meeting (e.g. via Zoom, Skype, or even telephone) at which they can explain to affected employees what they are proposing and the reasons why full or flexible furlough is necessary, before sending them letters to seek their agreement.

It is best for an employer to write to the employee setting out the proposed arrangements and ask the employee to sign and return a copy of the letter. E-signatures would be appropriate if the company has the necessary software. If e-signatures are not possible, the employer could ask employees to sign and return a hard copy letter. However, if the letter is sent by email to employees who are not currently in the workplace (e.g. because they are working remotely, or they are currently on full furlough), they may not have access to printing and scanning facilities that would enable them to provide this. Accordingly, employers could as an alternative provide for employees to confirm their agreement by email or text message to an appropriate contact at the company (e.g. HR or line manager) using a set form of words, or replying to the employer's email using voting buttons.

7. Does an employer still continue to pay holiday leave under the new arrangements?

Yes – we know that during furlough leave, (and flexi furlough) “employees still have the same rights at work” which includes the accrual of holidays – Working Time Regulation Holiday and contractual holiday. If employers do want to vary holiday, it cannot go below basic Working Time Regulation leave. If an employee usually works bank holidays then the employer can agree that this is included in the grant payment.

Provided employees follow usual holiday request rules they are able to take holiday during furlough leave.

Please click below for Government [guidance on holiday entitlement and pay during coronavirus](#)

https://www.gov.uk/guidance/holiday-entitlement-and-pay-during-coronavirus-covid-19?utm_source=458b84c0-5181-43ea-9d13-fd803529f23d&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

8. Are there any rules around claim periods after 1st July?

There is no maximum length for claim periods that end on or before 30 June.

However, claims for any periods starting before 1 July must end on or before 30 June. From 1st July, claim periods cannot cover more than one calendar month. Claims for periods ending on or before 30 June 2020 must be made by 31 July 2020. Claim periods starting on or after 1 July must start and end within the same calendar month and must last at least 7 days unless you're claiming for the first few days or the last few days in a month.

When claiming for employees who are flexibly furloughed employers should not claim until they are sure of the exact number of hours that will and will not be worked during the claim period. This may mean you claim in arrears. If employers do claim in advance and the employee works for more hours than HMRC have told been told about, employers will have to pay some of the grant back to HMRC.

9. Is there a minimum furlough period?

From 1 July, agreed flexible furlough agreements can last any amount of time. Employees can enter into a flexible furlough agreement more than once.

Where a previously furloughed employee starts a new furlough period before 1 July this furlough period must be for a minimum of 3 consecutive weeks. This is the case regardless of whether the 3 consecutive week minimum period ends before or after 1 July.

Although flexible furlough agreements can last any amount of time, unless otherwise specified the period that you claim for must be for a minimum claim period of 7 calendar days.

10. How do employers calculate the wages subsidy where employees are paid differently?

Under the terms of the JRS, employers can claim back 80% of a worker's normal wages up to £2500 per month – plus minimum automatic employer pension contributions and Employer National Insurance Contributions (on top of the £2,500 cap) – per furloughed worker.

Fixed salary/monthly pay – For full time and part time employees take their actual monthly salary before tax as at 19 March 2020 – this is the salary snap shot date, used to calculate the 80%/cap.

For variably paid employees - If an employees pay varies and they have been employed (or engaged by an employment agency) for a full twelve months prior to the claim, a claim can be made for the higher of either:

- the same month's earning from the previous year; or
- average monthly earnings from the 2019-20 tax year

For 'varied pay' employees who have been employed for less than a year, an average of their monthly earnings since they started work should be used to claim.

Key documents and guidance

- **The government has published guidance on changes to the CJRS**

<https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme>

- **The Treasury Direction (TD) under the Coronavirus Act 2020 sets out the legal framework for the scheme and was last updated on 25 June 2020.**

https://www.gov.uk/government/publications/treasury-direction-made-under-sections-71-and-76-of-the-coronavirus-act-2020?utm_source=07c67266-8869-4f71-a0c1-54e37c8411ba&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

- **Government information on claiming back Statutory Sick Pay (SSP).**

<https://www.gov.uk/guidance/claim-back-statutory-sick-pay-paid-to-employees-due-to-coronavirus-covid-19>

- **Government guidance on calculating employee wages**

<https://www.gov.uk/government/publications/find-examples-to-help-you-work-out-80-of-your-employees-wages/example-of-a-full-calculation-for-an-employee-who-is-flexibly-furloughed>