



## BRIEFING PAPER

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# FAQs: Coronavirus Job Retention Scheme

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## Summary

On 20 March 2020 the Government announced the Coronavirus Job Retention Scheme. The Scheme is part of a range of Government measures to support businesses during the Covid-19 pandemic which the Chancellor has labelled the “most comprehensive and generous suite of interventions of any major developed country in the world.”

Under the Job Retention Scheme, the Government will provide a grant to employers to cover 80% of workers’ wages, up to £2,500 per month. The Scheme is set to come into effect by the end of April but will be backdated to 1 March 2020. It will last for three months, although it can be extended.

The purpose of the Scheme is to ensure that employers who cannot pay staff wages do not make redundancies.

Employers can only claim for workers who are ‘furloughed’. This is a unknown term in UK employment law and describes a situation where a worker remains employed but is not provided with any work. Workers on reduced hours are excluded from the Scheme.

The Scheme is tied to PAYE and employers can only claim for workers who were on their payroll as of 28 February 2020. This would exclude many workers in the gig economy, even if they would be found to be ‘workers’ under employment law.

The Job Retention Scheme is simply a mechanism through which employers can claim money from HMRC. It does not alter existing employment law rights and obligations.

Employers will normally be liable under the employment contract to pay workers their full wages, even if they cannot provide any work. In many cases, the employment contract would need to be varied to allow employers to furlough a worker on reduced pay. This would likely require the worker’s agreement.

The decision to designate a worker as furloughed is one for the employer. This could cause problems for zero-hours workers and agency workers whose employers could simply reduce their work to zero without making a claim under the Scheme.

The Scheme also sits amongst a range of existing statutory employment rights. These include protections from discrimination, protections from unfair dismissal and rights to consultation in cases of collective redundancies. It also includes the rules on statutory sick pay, statutory maternity pay and holiday pay. In many cases, the current Government guidance does not provide indication of how the Scheme will interact with these rights.

This paper covers a number of frequently asked questions on the Job Retention Scheme.

**This is a fast-moving area and the paper should be read as correct at the time of publication.**

**This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. A suitably qualified professional should be consulted if specific advice or information is required.**

# 1. Background

The Covid-19 pandemic continues to have a significant impact on economic activity in the UK, including on jobs and income. An academic survey conducted on 25 March 2020 found that 57% of workers were engaging in less paid work and that 8% of workers had already lost their jobs. It also found that the economic impact of the pandemic was most strongly felt by those in precarious working arrangements.<sup>1</sup>

On 26 March 2020, the Government made the [\*Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020\*](#). Similar regulations have been made for the other three nations. The regulations require businesses in a range of sectors to close their premises. They also make it an offence for a person to go to work if it is “reasonably possible” for that work to be done from home.

The Government’s [guidance on self-isolation](#) states that a person who shows symptoms of coronavirus illness must self-isolate for 7 days. Those in the same household as a symptomatic person must isolate for 14 days. Meanwhile the Government’s [guidance on shielding](#) strongly advises all those in the ‘extremely vulnerable’ category not to leave their home for 12 weeks.

The Government recognised that these interventions could lead to workers being made redundant.

## Coronavirus Job Retention Scheme

On 20 March 2020, the Chancellor announced the [Coronavirus Job Retention Scheme](#) (‘JRS’). Under the Scheme the Government will cover 80% of worker’s wages up to £2,500 per month.

Both the [Trades Union Congress](#) (TUC) and the [Confederation of British Industry](#) (CBI) welcomed the measures.

Section 76 of the [Coronavirus Act 2020](#) provides that HMRC shall, in relation to Covid-19, have such functions as directed by the Treasury. This would appear to be the legislative basis on which the JRS will operate. The Explanatory Notes say:

This clause provides that Her Majesty’s Revenue and Customs (HMRC) have such functions as the Treasury may direct in relation to Covid-19. It allows the Treasury to grant additional functions to HMRC where these are necessary to deliver the Government’s response to Covid-19. In particular, it will enable the Treasury to grant the functions necessary for HMRC to pay grants to businesses to deliver the Coronavirus Job Retention Scheme.<sup>2</sup>

The announcement of the Scheme gave rise to a number of questions about its compatibility with existing employment law. This was covered in the Library Insight, [Coronavirus Job Retention Scheme: How will it fit with employment law?](#)

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<sup>1</sup> Abi Adams-Prassl, Teodora Boneva, Marta Golin and Christopher Rauh, [Inequality in the Impact of the Coronavirus Shock: New Survey Evidence for the UK](#), 1 April 2020.

<sup>2</sup> [HL Bill 110 Explanatory Notes](#) (the Explanatory Notes for the Coronavirus Act 2020 are not yet available on the legislation.gov.uk website).

On 26 March, the Government published more detailed [guidance for employers](#) and [guidance for employees](#). The guidance was further updated on 4 April 2020.

### **Other steps taken to support businesses and workers**

The JRS is one of a number of measures the Government has introduced to provide financial support to businesses and workers. The Chancellor said the JRS, along with the other support measures, is the “most comprehensive and generous suite of interventions of any major developed country in the world.”<sup>3</sup>

The Library Briefing, [Support for businesses during the Coronavirus \(Covid-19\) outbreak \(CBP-8847\)](#), covers the business measures in detail, including the Business Introduction Loan Scheme, business rates holidays, VAT deferrals and more.

The Government has announced new insolvency measures to help businesses hit by the COVID-19 pandemic. Significantly, the proposed new insolvency measures include a three-month suspension of the wrongful trading rules in order to remove the threat of directors incurring personal liability whilst trading on during the pandemic. The change in law will apply retrospectively from 1 March 2020 for an initial period of three months. All other “checks and balances” that help ensure directors fulfil their legal duties properly are to remain in force. This is covered in the Library Briefing, [Coronavirus: changes to insolvency rules to help businesses \(CBP 8877\)](#).

The Government has also reformed the rules on statutory sick pay to extend it to those who are self-isolating in prescribed circumstances and to make regulations to provide employers a rebate for SSP payments relating to Covid-19. The Library Briefing, [Coronavirus Bill: Statutory Sick Pay and National Insurance Contributions \(CBP-8864\)](#), covers this in detail.

The Government has also announced a [Self-employment Income Support Scheme](#), which provides similar support for the self-employed.

#### **A note on terminology...**

A number of terms are used frequently throughout this paper.

- “Guidance for employers” means the Government’s [guidance for employers on the JRS](#).
- “Guidance for employees” means the Government’s [guidance for employees on the JRS](#).
- “Guidance for businesses” means the Government’s [guidance for businesses on the JRS](#).
- “Government guidance” refers collectively to the three documents above.

The Government’s guidance uses the terms ‘employee’ and ‘worker’ interchangeably and in an apparently non-technical manner (see Q13). This paper uses the term ‘worker’ to refer generally to those who will qualify under the JRS. The term ‘employee’ is used when referring to specific employment rights that only apply to those who are employees as defined in employment legislation.

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<sup>3</sup> [HC Deb 24 March 2020 vol. 674 c190](#).



## 2. Eligible employers

### Q1. Which employers are eligible?

The [guidance for employers](#) says that any UK organisation that has set up an PAYE payroll by 28 February 2020 can make a claim to the JRS.

Eligible organisations can include:

- Businesses
- Charities
- Recruitment agencies (if they have agency workers on PAYE)
- Public authorities

The guidance says that public sector employers are expected not to furlough workers if they continue to receive funding for staff costs.

The updated guidance clarifies that individuals who employ someone (such as a nanny) can put them on furlough and make a claim under the Scheme, provided they pay that person through PAYE.

The guidance says that where a business has gone into administration, the administrators can make claims to the Scheme.

### Q2. What can employers claim?

The [guidance for employers](#) says that employers can claim 80% of a furloughed worker's regular wages, up to £2,500 per month.

The guidance says that employers can claim an additional grant to cover associated Employer National Insurance Contributions (NICs) and minimum automatic enrolment employer pension contributions.<sup>4</sup>

The Institute of Chartered Accountants in England and Wales (ICAEW) [provides the following illustration](#) of how a claim could work:

X Ltd employs Mr B at an annual salary of £42,000, so £3,500 per month. Mr B has opted out of auto enrolment.

Each month, Mr B currently receives net pay of £2,675 which is after deducting PAYE of £492 and employees NIC of £333. On this salary, the employer pays employers' NIC of £383.

The available grant for the employer is the lower of

(c) 80% of £3,500 = £2,800, and

(d) £2,500

Plus employers NIC, £245, on this amount

So X Ltd claims a grant of £2,500 plus £245 = £2,745.

### Q3. Do employers need to prove they cannot pay their workers?

The [guidance for businesses](#) says that the Scheme will cover the wages of workers "that would otherwise have been laid off during this crisis." Here the term 'laid off' appears to be used to mean 'redundant'.

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<sup>4</sup> See [Pensions: Automatic enrolment – current issues](#), Commons Library Briefing Paper CBP-6417, 4 February 2019 (Section 3.2).

It is still unclear whether employers will need to show that they cannot otherwise pay their workers' wages. The updated [guidance for employers](#) says that the Scheme is for employers who "cannot maintain [their] current workforce" because of coronavirus. However, the guidance also says that "all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus."

The guidance for employers contains a list of the things an employer will need to provide before making a claim. It does not ask for evidence that a worker would otherwise have been made redundant. However, the guidance does say that "HMRC will retain the right to retrospectively audit all aspects of your claim."

### **Q4. When will the Scheme come into effect?**

The JRS covers a period of three months, beginning on 1 March 2020. However, the [guidance for employers](#) says that the systems for making claims will not be in place until the end of April.

During Treasury Questions, the Chancellor explained that claims will be paid in the April payroll and can be backdated to 1 March:

We are already working night and day to construct something from scratch, but claims will be allowed to be backdated to 1 March so that businesses have the security of knowing that the cash-flow rebate will be coming. As I have said, the aim is to have the Scheme up and running so that the April payroll can be reimbursed through it.<sup>5</sup>

The [guidance for businesses](#) says that if a business is experiencing cashflow problems, it should access the Business Interruption Loan to cover wages until claims can be made to the JRS.

### **Q5. How will employers make a claim?**

The [guidance for employers](#) says that claims will be made to HMRC through a new online portal. Claims can be made after an employer has run a payroll or in advance of an imminent payroll.

The guidance lists the information employers will have to provide:

To claim, you will need:

- your ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- your bank account number and sort code
- your contact name
- your phone number

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<sup>5</sup> [HC Deb 24 March 2020 vol. 674 c204.](#)



## 3. 'Furloughed workers'

### Q6. What is a furloughed worker?

The [guidance for businesses](#) states that a furloughed worker is someone who remains employed but who is not provided with any work:

[The JRS] applies to employees who have been asked to stop working, but who are being kept on the pay roll, otherwise described as 'furloughed workers'.

The JRS will only cover the wages of workers who are designated as 'furloughed'. This is not a recognised term in UK employment law (although the term is more commonly used in the USA).

This is closer to the concept of 'lay-off' in UK employment law.<sup>6</sup> This is somewhat confusing as the guidance uses the term 'laid off' to describe what would actually be called 'redundancy'.

There are a number of tests in employment law for determining what constitutes 'work', most obviously the tests used for calculating National Minimum Wage entitlements.<sup>7</sup>

The [guidance for employers](#) says that work is anything that provides services to or generates revenue for an organisation. It does say that workers can undertake training while furloughed, although it notes that this would count as work for NMW purposes.

### Q7. Does the Scheme cover workers on reduced hours?

No. The [guidance for employers](#) states:

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme.

Such workers would need to continue to be paid in accordance with their contract (subject to any variations regarding reduced hours).

### Q8. How do employers designate a worker as furloughed?

The [guidance for employers](#) notes that in most cases the contract of employment will need to be varied to designate a worker as furloughed.

Varying a contract typically requires agreement with the worker. Employers cannot usually change contracts unilaterally. This is covered below under 'Selecting workers for furlough'.

The guidance says that employers can only make a claim if they have provided workers with written confirmation that they are furloughed. The Arbitration, Conciliation and Advisory Service (Acas) has [produced guidance](#) which lists some of the issues a furlough agreement should cover.

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<sup>6</sup> Section 147, *Employment Rights Act 1996*. Acas, [Lay-offs and short-time working](#).

<sup>7</sup> Department for Business, Energy and Industrial Strategy, [National Minimum Wage and National Living Wage: Calculating the minimum wage](#), April 2019.

### **Q9. Can workers do volunteer work while on furlough?**

The [guidance for employers](#) says that workers can do volunteer work or training while they are furloughed. However, this cannot provide a service to or generate revenue for their employer. The updated guidance says that employers can help their furloughed workers find volunteering opportunities.

It is unclear how furlough leave will interact with the new right to emergency volunteering leave created by the *Coronavirus Act 2020*. Under that Act, volunteering leave is unpaid although the Government is required to compensate volunteers.<sup>8</sup>

### **Q10. Can a worker be furloughed by multiple employers?**

The [guidance for employees](#) says that where a worker has more than one employer, each employer will be treated separately. As such, it is possible for a worker to be furloughed by more than one employer, or to be furloughed by one employer while continuing to work for another employer.

### **Q11. Can someone work for a new employer while on furlough?**

The updated [guidance for employees](#) says that workers can undertake work for a new employer while on furlough and that this will not affect their existing employer's ability to claim under the JRS. This means that a worker can receive 80% of their wages from their existing employer in addition to the wages they receive from their new employer.

The [guidance for employees](#) clearly states that this is subject to the worker's employment contract. As such, any clauses prohibiting a worker from undertaking work for another employer (such as a competitor) would continue to apply.

### **Q12. Can workers come on and off furlough?**

Yes. The [guidance for employers](#) states that while a worker must always be placed on furlough for a minimum period of three weeks, they can be placed on furlough more than once.

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<sup>8</sup> See [Coronavirus Bill: health and social care measures](#), Commons Library Briefing Paper CBP-8861, 20 March 2020.

## 4. Eligible workers

### Q13. What workers are covered by the Scheme?

The [guidance for employers](#) says that the scheme will cover the wages of any worker who is on a PAYE payroll as of 28 February 2020. It says that the contractual arrangement is not a determinative factor and notes that workers on zero-hours contracts and agency workers can qualify. The Scheme covers those on fixed term contracts and these contracts can be extended or renewed during the furlough period. Apprentices are also covered under the Scheme.

It is now clear that eligibility for the JRS will be based solely on whether a worker is on a PAYE payroll (a tax law distinction). The updated guidance lists categories of workers who are covered by the Scheme even though they may not be 'employees' for the purposes of employment law.<sup>9</sup> Those listed include office holders, salaried members of LLPs, agency workers and limb (b) workers.

However, this test would exclude workers who are not on PAYE but who would be found by an Employment Tribunal to be 'limb (b) workers' or even 'employees' for the purposes of employment law.<sup>10</sup> Many workers in the gig economy will fall into this category.

The guidance says that limb (b) workers who are not on PAYE may be able to claim under the Self-employment Income Support Scheme if their trading profits are taxed through Income Tax Self-Assessment.

Further details on the SEISS can be found in the Library Briefing, [Coronavirus: Self-employment Income Support Scheme \(CBP-8879\)](#).

### Q14. Does the Scheme cover foreign nationals?

Yes. The updated [guidance for employers](#) is clear that employers can furlough foreign national workers and make a claim for their wages under the JRS. The Government has clearly stated that this includes workers whose visas are subject to a condition that they have no resource to public funds.

This is discussed further in the Library Briefing, [Coronavirus: Calls to ease No Recourse to Public Funds conditions \(CBP-8888\)](#).

### Q15. Does the Scheme cover director-employees?

In employment law, a person can be both a director of a company (an office holder) and an employee. Today, a significant number of workers work through personal service companies (PSCs) of which they are both the sole director and employee.

The updated [guidance for employers](#) now makes clear that salaried directors, including directors of PSCs, can put themselves on furlough and claim 80% of their regular salary through the JRS.

However, the Institute for Chartered Accountants (ICAEW) notes that this would only cover salary and not pay they receive as dividends:

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<sup>9</sup> [Employment status](#), Commons Library Briefing Paper CBP-8045, 28 March 2018.

<sup>10</sup> See e.g. [Autoclenz Ltd v Belcher \[2011\] UKSC 41](#).

### Owner/managed companies

2. Many owner managed company director/shareholders pay small salaries and the balance of income as dividends. The scheme does not extend to dividends. Only the salary is relevant to the scheme. Such companies must have been paying a salary through a payroll to be eligible for a grant.<sup>11</sup>

Commentators had also expressed concern that directors carrying out their statutory obligations would be found to be undertaking ‘work’ and therefore become ineligible under the JRS.<sup>12</sup> The updated guidance makes it clear that directors can carry out statutory duties but must ensure that they “do no more than would be reasonably judged to be necessary.”

### Q16. Can the Scheme cover workers who have already been dismissed?

The [guidance for employers](#) originally said that a worker who had been made redundant since 28 February 2020 could be rehired and put on furlough. The updated guidance clarifies that any worker whose employment was terminated after 28 February can be rehired and furloughed. This would include those who resigned as well as those who were dismissed for a reason other than redundancy, such as misconduct.

There is no obligation on employers to re-hire a worker whose employment has been terminated. Darren Newman, an employment law commentator, notes that many employers could be unwilling to re-engage workers:

But it is hopelessly unrealistic to expect that employers are going to reemploy people who have resigned or been dismissed purely so that they can be placed on furlough. To be blunt, what is in it for the employer? They incur the cost of administering the employee’s furlough pay and face potential legal difficulties when the furlough period ends.<sup>13</sup>

If workers are re-engaged, complex questions would remain about how this interacts with other employment rights. For example, Alan Bogg and Michael Ford QC, Professors of Law at the University of Bristol, have noted that qualifying employees who were made redundant and rehired would still be entitled to claim statutory redundancy pay.<sup>14</sup> In addition, depending on the manner in which the worker’s employment was terminated, their continuity of employment may or may not be preserved (see further Question 32).

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<sup>11</sup> ICAEW, [The Coronavirus Job Retention Scheme: furlough guidance](#), 30 March 2020 (accessed 2 April 2020).

<sup>12</sup> Andrew Hubbard, [Coronavirus job retention scheme](#), *Taxation*, 31 March 2020 (accessed 1 April 2020).

<sup>13</sup> Darren Newman, [New Starters and the Coronavirus Job Retention Scheme](#), A Range of Reasonable Responses, 6 April 2020 (accessed 6 April 2020).

<sup>14</sup> Alan Bogg and Michael Ford QC, [Legislating in Times of Crisis: The Coronavirus Job Retention Scheme](#), UK Labour Law Blog, 23 March 2020 (accessed 31 March 2020).

## Q17. Does the Scheme cover new starters?

The [guidance for employers](#) says that the key question is whether a worker was on the PAYE payroll on 28 February 2020. As such, it is unlikely that those who have been made a job offer would be covered.

During a Twitter Q&A session on 3 April, the Chancellor said that these rules had been put in place to prevent fraud. Darren Newman explains:

The Government's view is that the only evidence of employment that works for them is the PAYE system. The scheme is being run and administered by HMRC and the PAYE records are something that HMRC can easily check. An employee starting in March will have all sorts of documentation showing that the appointment is a genuine one, but the system will not allow for HMRC sifting through letters of appointment and signed contracts of employment – it is PAYE that counts.<sup>15</sup>

If a new starter has accepted an employment contract, the employer would be contractually obliged to pay their wages, even though they would be unable to make a claim under the JRS. However, a new starter would not have two years continuous service and would not be covered by the provisions on unfair dismissal and statutory redundancy pay.<sup>16</sup> As such, new starters can normally be dismissed in accordance with the terms of the contract. Lewis Silkin LLP, the law firm, explains:

If a potential new joiner has not yet accepted the offer, it can be withdrawn because no contract is in place yet. If the new joiner has accepted an offer, the employer should check the offer letter and/or contract with the new joiner, and in particular what notice period has been agreed. The employer can terminate the contract before the new joiner was due to start by making a payment in lieu of notice. Failing to pay notice in this situation would give the individual a potential breach of contract claim. An employer only needs to pay notice for the period when the employee was due to be working and receiving pay, so it may be possible to give a new joiner notice which expires before they were due to start work and not make an actual payment.<sup>17</sup>

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<sup>15</sup> Darren Newman, [New Starters and the Coronavirus Job Retention Scheme](#), A Range of Reasonable Responses, 6 April 2020 (accessed 6 April 2020).

<sup>16</sup> Sections 108 and 155, *Employment Rights Act 1996*.

<sup>17</sup> Karen Baxter and Bethan Carney, [Coronavirus – FAQ for employers](#), Lewis Silkin LLP, 30 March 2020, p. 16.

## 5. Selecting workers for furlough

### Q18. Do employers have an automatic right to furlough workers?

No. The JRS is a mechanism through which employers can reclaim worker's wages from HMRC. It does not alter existing employment law rights and obligations. The [guidance for businesses](#) clearly states that workers will need to be furloughed in accordance with existing employment law.

As a general rule, workers have a right to be paid their full wages if they are ready, able and willing to work.<sup>18</sup> The employer has a contractual obligation to pay, even if no work is available. If an employer failed to provide work and unilaterally reduced pay this would likely amount to a breach of contract and an unlawful deduction from wages.

In some cases, employment contracts will contain a clause that gives an employer the right to send workers home without pay (called a lay off clause). However, these clauses are rare in practice.

Absent such a clause, an employer would need to vary the employment contract before it could put a worker on furlough.

The [guidance for employers](#) suggests that the contract should be varied by agreement. In many cases the alternative to furlough will be redundancy, so workers may be inclined to agree. The Advisory, Conciliation and Arbitration Service (Acas) has [produced guidance](#) that lists a number of points a furlough agreement should cover.

Where workers do not agree to vary a contract, another common practice is 'termination and re-engagement', where workers are dismissed and rehired on less favourable terms. However, such practices carry a range of risks, including claims for unfair dismissal.

Alan Bogg and Michael Ford QC have argued that UK employment law is not suited to contractual variations in times of crises.<sup>19</sup>

### Q19. Can workers demand to be furloughed?

No. Under the JRS, the decision to designate a worker as furloughed and claim the grant from HMRC is one that must be made by the employer. Workers who wish to be furloughed, which could include those with caring responsibilities or those who cannot work from home, do not have an explicit right to place themselves on furlough.

Daniel Dyal notes that aggrieved workers will need to rely on existing employment law rights to challenge any selection decisions.<sup>20</sup>

This is discussed further in Questions 21 and 22.

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<sup>18</sup> [Beveridge v KLM UK Ltd \[2000\] IRLR 765](#).

<sup>19</sup> Alan Bogg and Michael Ford QC, [Legislating in Times of Crisis: The Coronavirus Job Retention Scheme](#), UK Labour Law Blog, 23 March 2020 (accessed 31 March 2020).

<sup>20</sup> Daniel Dyal, [Covid-19: Furlough and job retention: Key issues for Employment Lawyers](#), Cloisters, 30 March 2020 (accessed 31 March 2020).

## Q20. Can agency workers and zero-hours workers be furloughed?

The [guidance for employers](#) notes that agency workers and workers on zero-hours contracts can be furloughed, provided they are on PAYE.

The updated guidance says that agency workers should be put on furlough by their agency or the umbrella company they are engaged through. The guidance says that agency workers cannot undertake work through or on behalf of their agency while on furlough.

The fact that the decision to furlough workers is for the employer is a particular problem for agency workers and zero-hours workers. For such workers, the right to pay is contingent on work being provided and generally the employer or agency is not under a contractual obligation to provide them with work. The employer or agency could reduce the worker's hours to zero without designating them as furloughed.

Bogg and Ford highlight that zero-hours workers and agency workers are ultimately dependent on their employers:

So, once the assignment has been ended, why should the agency bother to write to the workers and confirm they have been 'furloughed', as the Scheme requires? Unless it happens to be motivated by altruism, it is easier for it to rely on its existing contractual provisions and do nothing at all. That, after all, is often the economic point of these contractual arrangements for firms, giving agencies and end-users the flexibility to adjust quickly the supply of labour in accordance with demands.<sup>21</sup>

## Q21. What about vulnerable workers?

The Government's [guidance on shielding](#) 'strongly advises' people who are categorised as extremely vulnerable not to leave their home for a period of 12 weeks. However, such people are not considered to be 'isolating' for the purposes of statutory sick pay (SSP).<sup>22</sup>

The updated [guidance for employers](#) says that workers who are shielding can be designated as furloughed but only if they cannot work from home and would otherwise have been made redundant. Notably this caveat is not added for workers with caring responsibilities, who are also noted in the guidance as workers who can be furloughed.

Lawyers at Farrer & Co., the law firm, have argued that distinguishing between such workers would be illogical and have suggested that the term 'redundant' is being used in a non-technical sense.<sup>23</sup>

In the present situation, vulnerable workers who are not put on furlough may have a right to refuse to attend their workplace.<sup>24</sup>

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<sup>21</sup> Alan Bogg and Michael Ford QC, [Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2](#), UK Labour Law Blog, 31 March 2020 (accessed 31 March 2020).

<sup>22</sup> Reg. 3, [The Statutory Sick Pay \(Coronavirus\) \(Suspension of Waiting Days and General Amendment\) Regulations 2020 \(SI 2020/374\)](#).

<sup>23</sup> Alice Yandle and Amy Wren, [Coronavirus Job Retention Scheme: a further update](#), Farrer & Co., 6 April 2020 (accessed 7 April 2020).

<sup>24</sup> Stuart Britten, [The Coronavirus: Rights to Leave the Workplace and Strikes](#), UK Labour Law Blog, 27 March 2020 (accessed 31 March 2020); Schona Jolly QC,



## Q22. How should employers select which workers to furlough?

In many cases employers who are operating at reduced capacity will need to select which workers to furlough. This could create problems if either too few or too many workers want to be furloughed.

The [guidance for employers](#) does not set out how an employer should select the workers that it furloughs.

When selecting which workers to furlough employers will be bound by general employment law.

An obvious area of law that will be applicable is discrimination law.

Daniel Dyal, a barrister at Cloisters chambers, explains:

There are also many equality implications arising out of the Scheme. The guidance makes clear that the employer must apply the Scheme in a way that is consistent with equality law. Some of these implications are obvious and simple: it would be unlawful to dismiss rather than furlough an employee because he is of a particular race. But others are complex and difficult. For instance, if furloughing decisions take into account the number of hours particular employees are able to offer in current circumstances that could easily engage indirect sex discrimination considerations, which would need to be carefully thought through. Likewise furloughing decisions may need to take into account what tasks particular employees can do and from where. They will often then engage challenging disability discrimination issues, particularly in respect of reasonable adjustments, indirect discrimination and discrimination arising from disability.<sup>25</sup>

If a worker refuses to be furloughed and is dismissed, the fairness of the selection criteria will likely be a consideration in any subsequent unfair dismissal claim.

Bogg and Ford have also suggested that a failure to use a fair selection criteria could possibly amount to a breach of the implied term of mutual trust and confidence.<sup>26</sup>

## Q23. Do employers have to consult workers?

In most cases an employer will need a worker's agreement before they can put them on furlough. As such, individual consultation will clearly be necessary.

Whether an employer is required to consult the workforce more broadly will again be determined by existing employment law.

Where an employer proposes to make 20 or more employees redundant within a period of 90 days, they have an obligation to consult

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[Covid-19: Critical workers refusing work – What if everyone is being reasonable?](#), Cloisters, 26 March 2020 (accessed 31 March 2020).

<sup>25</sup> Daniel Dyal, [Covid-19: Furlough and job retention: Key issues for Employment Lawyers](#), Cloisters, 30 March 2020 (accessed 31 March 2020).

<sup>26</sup> Alan Bogg and Michael Ford QC, [Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2](#), UK Labour Law Blog, 31 March 2020 (accessed 31 March 2020).

employee's representatives.<sup>27</sup> The [guidance for employers](#) notes that as the alternative to furlough will often be redundancy, employers may be under such an obligation.

If there is an information and consultation agreement in place for a workforce, this may require an employer to consult employee representatives on furloughing decisions. A standard agreement will cover situations where there is a threat to employment within the organisation.<sup>28</sup> If no agreement is in place, negotiations can be triggered by a request from 10% of the workforce (dropping to 2% of the workforce from 6 April 2020).<sup>29</sup>

## Q24. Can employers make redundancies before the Scheme comes into effect?

Yes. However, any dismissal will need to be in accordance with general employment law.

Employees with two years' continuous service are protected from unfair dismissal.<sup>30</sup> While redundancy is a potentially fair reason for dismissal, the availability of the JRS, and the Government's Business Interruption Loans, may be relevant factors in considering whether dismissal was reasonable in the circumstances.<sup>31</sup>

Employees who are made redundant may also be entitled to statutory redundancy pay.<sup>32</sup>

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<sup>27</sup> Section 188, *Trade Union and Labour Relations (Consolidation) Act 1992*. See also Acas, [Handling large-scale redundancies](#), April 2014.

<sup>28</sup> Reg. 20, [Information and Consultation of Employees Regulations 2004 \(SI 2004/3426\)](#).

<sup>29</sup> Reg. 7, ICE Regulations 2004; Reg. 16, [Employment Rights \(Miscellaneous Amendments\) Regulations 2019 \(SI 2019/731\)](#).

<sup>30</sup> Part 10, *Employment Rights Act 1996*.

<sup>31</sup> See generally [Key Employment Rights](#), Commons Library Briefing Paper CBP-7245, 23 November 2018 (Section 27).

<sup>32</sup> Section 135, *Employment Rights Act 1996*.

## 6. Meaning of wages

### Q25. What wages are covered by the Scheme?

The [guidance for employers](#) says that the Scheme will cover a worker's 'regular wages'. The original guidance specifically excluded bonuses, fees and commission from 'wages'. The updated guidance says that non-discretionary "past-overtime, fees and compulsory commission payments" are included. Tips, discretionary bonuses and commission are excluded, as are non-monetary benefits such as Benefits in Kind.

The methods of calculating wages (discussed below) are different from the normal rules on calculating 'a week's pay' in employment law.

### Q26. How will wages be calculated?

The [guidance for employers](#) sets out how wages will be calculated for different types of workers. An employer will be able to claim 80% of these wages, up to £2,500, with an additional grant to cover employer National Insurance and pension auto-enrolment contributions.

For salaried workers, wages will be their regular salary as of 28 February 2020. This suggests that payments under the Scheme will not reflect any increases to salary that occur after that date.

If a worker's pay varies and they have been employed for a full 12 months, their pay will be the higher of:

- their earnings in the same month in the previous tax year; or
- their average monthly earnings for the 2019-20 tax year.

If a worker has not been employed for a full 12 months, their wages will be their average monthly earnings since they started work.

If a worker only began work in February, their earnings will be pro-rated to determine their monthly wages.

### Q27. Will employers have to top up the wages?

The [guidance for employers](#) says that it is for employers to decide whether to top up wages (the extra 20% or anything above £2,500).

However, as noted in Question 18, the default position under the contract will normally be that workers are entitled to their *full wages* if they are ready, willing and able to work.

If the contract is not varied, an employer would likely be in breach of contract by only paying 80% of wages. This could also be an unlawful deduction from wages.

### Q28. Will employee NICs and pension contributions have to be deducted?

The [guidance for employers](#) says the normal deductions will need to be made for income tax, employee NICs and auto-enrolment pension contributions. If pay is reduced to 80% the deductions should reflect this change.

## Q29. Do furloughed workers have to be paid the National Minimum Wage?

The [guidance for employers](#) says that furloughed workers are not undertaking 'work' within the meaning of the [National Minimum Wage Act 1998](#) and so do not have to be paid the National Living Wage / National Minimum Wage (NLW / NMW). As such, it will be permissible to vary the employment contract to reduce a worker's pay to 80%, even if this puts their wages below the NLW / NMW.

However, the guidance notes that if a worker undertakes training then this will constitute work for the purposes of the 1998 Act and the worker must be paid the NLW / NMW. The implication is that the employer must top up the JRS grant. Workers cannot contract out of their right to be paid the NLW / NMW.<sup>33</sup>

Likewise, the updated guidance says that apprentices who continue to undertake training must be paid the Apprentices Minimum Wage.

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<sup>33</sup> Section 49, [National Minimum Wage Act 1998](#).

## 7. Other employment issues

### Q30. Can workers who are on sick leave be furloughed?

The [guidance for employers](#) notes that employees who are on sick leave or self-isolating in accordance with the advice issued by Public Health England should claim statutory sick pay (SSP). However, the guidance says that such people can be put on furlough once they return.

Secondary legislation is expected to be made to allow employers to reclaim coronavirus-related SSP payment from the Government.<sup>34</sup>

It is currently unclear whether an employee who is already on furlough would be required to drop to the lower rate of SSP if they are required to self-isolate while on leave.

It is also unclear whether employers who are paying workers enhanced contractual sick pay are entitled to make a claim for this under the JRS. As noted below, enhanced maternity pay is considered to be 'wages' that can be claimed under the Scheme.

### Q31. Does being furloughed affect maternity rights?

The JRS does not alter existing rules on maternity leave and statutory maternity pay (SMP). However, being furloughed could impact a woman's eligibility for SMP or the rate of SMP she receives.

An employee who has worked for her employer for a continuous period of 26 weeks by the 15<sup>th</sup> week before the expected week of childbirth will be eligible for SMP. Her normal weekly earnings must be above £118 per week (£120 from 6 April 2020). SMP is paid for 39 weeks. The first 6 weeks are paid at 90% of the woman's normal weekly earnings. The remaining 33 weeks are paid at the statutory rate of £148.68 (£151.20 from 6 April 2020). Some women will have a contractual right to enhanced maternity pay.<sup>35</sup>

'Normal weekly earnings' for the purposes of SMP can include bonuses and commission. They are calculated by reference to the eight weeks preceding the 'qualifying week' (the 15<sup>th</sup> week before the expected week of childbirth).<sup>36</sup>

The [guidance for employers](#) notes that as the JRS does not alter maternity rights legislation, a woman will be entitled to SMP at the usual rate. Employers can already reclaim most of the cost of SMP from the Government.<sup>37</sup> The guidance notes that employers who pay enhanced maternity pay can claim this as 'wages' under the Scheme.

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<sup>34</sup> See [Coronavirus Bill: Statutory Sick Pay and National Insurance Contributions](#), Commons Library Briefing Paper CBP-8864, 20 March 2020.

<sup>35</sup> See [Key Employment Rights](#), Commons Library Briefing Paper CBP-7245, 23 November 2018, (Section 9).

<sup>36</sup> Regs. 20-21, [Statutory Maternity Pay \(General\) Regulations 1986 \(SI 1986/1960\)](#).

<sup>37</sup> Section 167, [Social Security Contributions and Benefits Act 1992](#).

However, Maternity Action, a leading maternity rights organisation, has noted that a woman who is furloughed or on SSP in the period preceding her 'qualifying week' would be on lower pay and that this could impact either her eligibility for SMP or the rate at which it is paid:

**If I'm off work on Statutory Sick Pay (SSP) or on furlough, does that count towards the 26 weeks continuous service for qualifying for Statutory Maternity Pay (SMP)?**

Yes, any weeks on SSP or on furlough count as continuous employment. In order to qualify for SMP you must be employed by the same employer for at least 26 weeks by the 15<sup>th</sup> week before your baby is due. If you are on SSP or on furlough during part of that period it will still count towards your continuous employment. But bear in mind that SSP is below the earnings threshold for SMP, so it may affect your average earnings, see question above. If you are on furlough and receiving 80% of your normal pay this will also affect how much SMP you will get.<sup>38</sup>

A woman who becomes ineligible for SMP will still be able to claim [Maternity Allowance](#). However, this is paid entirely at the statutory rate.

### **Q32. Does being furloughed affect continuity of employment?**

The Government guidance does not address continuity of employment.

A number of employment rights are only available to employees who have a period of continuous employment with their employer. Examples include the protection from unfair dismissal, the right to redundancy pay and notice pay. Continuity of employment is generally broken by a period of more than one week where the relationship is not governed by the employment contract, although there are exceptions.<sup>39</sup>

As the employment contract continues to apply during periods of furlough, being furloughed itself should not affect continuity.

However, employees whose employment was terminated after 28 February 2020 can be re-hired and put on furlough (see Question 16). Periods between termination and reengagement can break continuity.

Under the 'temporary cessation of work' rule, continuity of employment can be preserved where a worker is made redundant following a reduction in the amount of work but is later re-hired.<sup>40</sup> Continuity can also be preserved where an employee is re-engaged after making a complaint of unfair dismissal.<sup>41</sup> However, it is unlikely that these rules would apply if an employee resigned in order to find a new job.

Alan Bogg and Michael Ford QC have called for statutory provision to specifically preserve continuity for coronavirus-related cases.<sup>42</sup>

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<sup>38</sup> Maternity Action, [FAQs: Covid-19 – rights and benefits during pregnancy and maternity leave](#) (accessed 1 April 2020).

<sup>39</sup> Section 212, *Employment Rights Act 1996*.

<sup>40</sup> See e.g. *Fitzgerald v Hall Russell & Co Ltd* [1970] A.C. 984.

<sup>41</sup> Section 219, *Employment Rights Act 1996*; Reg. 2, *Employment Protection (Continuity of Employment) Regulations 1996 (SI 1996/3147)*.

<sup>42</sup> Alan Bogg and Michael Ford QC, [Legislating in Times of Crisis: The Coronavirus Job Retention Scheme](#), UK Labour Law Blog, 23 March 2020 (accessed 31 March 2020).

### Q33. Does being furloughed affect annual leave?

The relationship between furlough and annual leave is among the most complicated issues involving the JRS. The issue of annual leave is not addressed in any of the Government guidance. While the issue is addressed in [Acas guidance](#) this has been changed a number of times and has been the subject of debate amongst employment lawyers.

In the UK, the right to paid annual leave is set out in the [Working Time Regulations 1998 \(SI 1998/1833\)](#) ('WTR'). This sets out a right to 5.6 weeks of annual leave. This is comprised of 4 weeks, plus an additional 1.6 weeks to reflect the year's eight bank holidays. So far as the 4 weeks are concerned, the WTR implements the EU's [Working Time Directive \(Directive 2003/88/EC\)](#) ('WTD'). Although the UK has left the EU, it remains bound by EU law during the implementation period.<sup>43</sup>

The [Working Time \(Coronavirus\) \(Amendment\) Regulations 2020 \(SI 2020/365\)](#) allow workers to carry over up to four weeks of annual leave into the next two leave years where it was not "reasonably practicable" for them to take that leave because of coronavirus.

There are a number of issues concerning the relationship between annual leave and furlough:

- 1 Does annual leave accrue during furlough?
- 2 Can workers take annual leave during furlough?
- 3 Can workers be required to take annual leave during furlough?
- 4 What rate is annual leave during furlough paid at?

#### Accruing annual leave

The generally accepted position appears to be that as workers on furlough remain employed, the 5.6 weeks of statutory annual leave will continue to accrue. Lewis Silkin LLP, the law firm, explains:

##### **Will workers continue to accrue holiday allowance while they are furloughed?**

Yes, because they remain employed. You could agree to reduce any enhanced contractual holiday (beyond the statutory minimum of 5.6 weeks per year) to reflect the fact that an employee has been on furlough, but employees will retain their right to annual leave under the Working Time Regulations.<sup>44</sup>

#### Workers taking annual leave during furlough

The [Acas guidance](#) suggests that workers can continue to request to take annual leave while they are on furlough. It says:

If an employee is 'furloughed' (temporarily sent home because there's no work), they can still request and take their holiday in the usual way. This includes taking bank holidays.

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<sup>43</sup> See [Constitutional implications of the Withdrawal Agreement legislation](#), Commons Library Briefing Paper CBP-8805, 20 February 2020.

<sup>44</sup> Lucy Lewis and Richard Moore, [Furloughing employees - FAQs for employers on the coronavirus job retention scheme](#), Lewis Silkin, 4 April 2020 (accessed 7 April 2020).



However, David Reade QC and Daniel Northall, barristers at Littleton chambers, have noted that it is unclear whether taking annual leave is compatible with the concept of furlough under the JRS:

If annual leave is deemed incompatible with furlough, in the sense that a given day cannot both be a day's leave and a day's furlough, does that give rise to the prospect of annual leave 'breaking' the period of furlough. The employer would not then have furloughed the worker for the minimum prescribed period of three weeks and so may have no right to claim under the scheme.<sup>45</sup>

### **Employers requiring workers to take annual leave**

Under regulation 15 of the WTR, employers can require workers to take annual leave on particular days. For example, many workers will be required by their employment contract to take eight days of their annual leave on bank holidays.<sup>46</sup>

It is unclear whether employers can continue to require workers to take annual leave during periods of furlough.

The Acas guidance says workers can be required to take annual leave on bank holidays while they are furloughed:

Employees and workers may still be required to use a day's paid holiday for bank holidays, including when they're furloughed.

However, the guidance also says that it would not be "reasonably practicable" for workers to take annual leave during furlough and that they would be able to carry leave over into the next two years.

David Reade QC and Daniel Northall note that if employers were able to require workers to take leave, they could require workers to exhaust their annual leave entitlement during the furlough period:

The outstanding question is whether an employer is entitled to require its workers to take annual leave at times other than bank holidays. If the answer to this question is a simple, unqualified 'yes', one is forced to concede that it leads to a superficially unattractive proposition: an employer can run down annual leave entitlement to nought by requiring its staff to take lengthy or repeated periods of annual leave during periods of furlough. In this way, workers would receive neither additional leave nor additional pay and, so the argument would go, the right to annual leave would be illusory.<sup>47</sup>

UK case law suggests that workers can be required to take annual leave during periods when they would not otherwise have been working.<sup>48</sup>

However, CJEU case law also suggests that there are circumstances in which workers cannot be required to take leave, such as during sick leave where a worker is unable to enjoy a period of rest and leisure.<sup>49</sup>

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<sup>45</sup> David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: More holiday cancellations?](#), Littleton, 2 April 2020 (accessed 7 April 2020).

<sup>46</sup> Bank holidays are not, strictly speaking, holidays – although in practice most workers will take annual leave on these days. See Commons Library Insight, [Bank holidays: How are they created and changed?](#), 23 August 2019.

<sup>47</sup> David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020).

<sup>48</sup> [Russell v Transocean International Resources Ltd \[2011\] UKSC 57](#).

<sup>49</sup> [Stringer and ors v HMRC \(C-520/06\) \[2009\] ICR 932](#).

Alan Bogg and Michael Ford QC have argued that workers cannot be required to take annual leave during furlough as, in the current circumstances, furlough is more akin to a period of sick leave:

Although the CJEU case-law is not entirely clear, we think the better argument is that ‘furloughing’ for most workers in circumstances of the current lockdown is closer to sick leave, following the orthodox line in cases like *Stringer*, than it is to zero-hours working or taking parental leave. First, ‘furlough’ leave is not foreseeable and it is entirely beyond the control of the employee. The decision to furlough is the employer’s, not the employee’s, and the current situation as regards employment and economic activity could scarcely have been predicted a matter of weeks ago. While that cannot provide the complete answer, more important may be a second factor. ‘Furlough’ leave in the current circumstances, like sick leave, is subject to extensive physical and psychological constraints.<sup>50</sup>

### **Rate of pay during annual leave**

If workers choose to take periods of annual leave during furlough, or are required to do so, there is an additional question about the rate of holiday pay they should receive.

Under the WTR, holiday pay is paid at the rate of ‘a week’s pay’. This is calculated in accordance with the [usual rules](#) in the *Employment Rights Act 1996*. However, under EU law, a worker must be paid their ‘normal remuneration’ during four weeks of annual leave. This does not always correspond with ‘a week’s pay’ in UK law.<sup>51</sup>

It is unclear what would constitute ‘normal remuneration’ during periods of furlough.

The Acas guidance suggests that workers who take annual leave during furlough should be paid “in the usual way”.

Reade and Northall note that an argument could be made for holiday pay during furlough to be paid at a reduced rate of 80%. However, they say that “the safest course [...] which would eliminate all risk of litigation” would be for holiday pay to be paid at the full rate of pre-furlough remuneration.<sup>52</sup>

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<sup>50</sup> Alan Bogg and Michael Ford QC, [Furloughing and Fundamental Rights: The Case of Paid Annual Leave](#), UK Labour Law Blog, 6 April 2020 (accessed 7 April 2020).

<sup>51</sup> [Lock v British Gas Trading Ltd \[2016\] EWCA Civ. 983](#).

<sup>52</sup> David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020).

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