

TOYNBEE HALL'S FREE LEGAL ADVICE SERVICE: CORONAVIRUS ACT 2020: FURLOUGH & THE JOB RETENTION SCHEME

FREQUENTLY ASKED QUESTIONS

as at 27 April 2020

In this time of national emergency, many employers are putting their employees on “furlough” under the government’s Job Retention Scheme. As an employee, you may want to know what this means for you.

These FAQs provide some answers as general guidance. Please contact a local CAB, law centre or our own Free Legal Advice Centre if you require advice about your rights and entitlements.

1. **What is the Government’s “Job Retention Scheme”?**

The Scheme’s purpose is to keep existing employees “on payroll” so they can be return to work as soon as conditions allow. The government funds part of the employee’s wage/salary whilst the employee is on furlough.

Employees on the Scheme are on “furlough” and remain employees, without any break in their continuity of service. Redundancy is not the only condition for someone to be furloughed. The furlough can also be “by reason of circumstances arising as a result of coronavirus or coronavirus disease”.

2. What are the key features of the “Job Retention Scheme”?

Employees on furlough will be paid 80% of their wage/salary, subject to a limit of £2,500 per month. This means employees on a wage or salary up to £37,500 a year should receive at least 80% of their salary whilst on furlough.

However, the actual amount you will be paid is not always straightforward, especially if you have variable hours. Some of the other questions deal with these topics. The minimum furlough period is three weeks and the Treasury has confirmed it will be in place until at least late October 2020, but that how it operates is to change well before then. The scheme will continue in its current form until the end of July and changes to allow more flexibility (including allowing limited working whilst on furlough) will come in from the start of August. More specific details and information around its implementation will be made available by the end of May.

3. What type of workers qualify for the Scheme?

Employees and any worker (including agency workers and those on fixed-term or zero hours contracts) can be furloughed under the Scheme. This is if they are paid via PAYE. Your payslip should show whether or not you are paid this way.

4. When does the Job Retention Scheme start and finish?

The Scheme started on 1 March 2020. It was to run originally until 31 May, but this has been extended until late October 2020. It can be extended past this date if the government decides to do so, but that decision will depend on the specific scenario the country is facing at the time, which is impossible to predict.

For the Scheme to be available to you in relation to a particular job, you need to have been employed and on the employer’s PAYE payroll on or before 19 March 2020. Employees hired after 19 March 2020 cannot be furloughed or claimed for. This is unless they were on the payroll on 28 February and are being rehired in order to be put on furlough.

The minimum period of furlough is three weeks – you cannot be on furlough for less than this. The expectation is that periods of less than three weeks can be dealt with by using annual leave, unpaid leave or partly paid leave.

5. Does my nationality matter?

The government has explained that people on all type of work visas are eligible for the scheme. As long as you are legally permitted to work and meet the other criteria (below), your employer can furlough you and claim under the Scheme.

6. Does it matter if my employer changed as a result of a TUPE transfer?

A new employer is eligible to claim under the Scheme for employees transferred after 19 March 2020. This is if the TUPE rules apply to that transfer. If your employer changed as a result of a TUPE transfer, you should be eligible for furlough.

7. Who actually pays me while I'm on furlough – my employer or the government?

You need to remain “on payroll” to be eligible for furlough. While on furlough, your wages/salary are paid to you by your employer in accordance with the usual payroll process. As this is paid through payroll, the frequency of payment (e.g., weekly, monthly) should be the same as before you went on furlough.

Your employer receives the 80% funding contribution from HMRC. You do not receive your wages/salary directly from HMRC.

8. Can my employer “top up” my wage/salary while I'm on furlough?

Yes. Some employers are doing this so that the employee continues to receive a payment above the 80% government subsidy (or above the £2,500 monthly limit).

Clearly, this will depend on the employer's financial situation and they are not required to “top up” even if they can afford it.

9. What happens if my employer wants to put me on furlough under the Job Retention Scheme but will only pay me, for example, 50% of my usual wage/salary?

This is strictly not allowed. If you are on the Scheme, you should be receiving at least 80% of your “normal” wage/salary. If your employer is paying you less than that and pocketing the difference, it is not complying with the terms of the scheme.

However, before leaping to conclusions – please read the questions about how the amount you are paid under furlough is actually calculated – it can be complicated!

If you are not under the Scheme, you and your employer can agree that you go on partially paid leave – which might mean you receive less than the Scheme would allow for. For example, you might reach an agreement to receive 70% of your usual wage for working three days a week instead of five. These types of arrangements are still permissible – this is not considered to be furlough.

If you are on furlough (the Job Retention Scheme), you cannot perform **any** work for your employer during this period. At the moment, there is no such thing as partial furlough. However, you can work for other employers during the furlough period, as long as your employment contract does not have an exclusivity clause. If you have any concerns about whether you can work for another employer, talk to your manager or HR department.

10. Can an employer make me go on furlough?

Most employment contracts do not automatically allow for furlough. You and your employer would need to agree to furlough following a consultation process. Your employer has to obtain your written consent in order to qualify for the Scheme.

Consider your options carefully. If your employer asks you to go on furlough and you say no, they may require you to take your annual leave, go on unpaid leave, or make you redundant.

For many employees, receiving 80% of earnings or £2,500 per month (whichever is lower) and having the option to take another job while on furlough, will be preferable to unpaid leave, reduced hours with reduced pay, or redundancy.

11. How does an employer decide who to put on furlough? What if I want to go on furlough, but my employer keeps me on and puts another colleague on furlough instead?

Alternatively, what if I want to stay on, but my employer wants to put me on furlough and keep another colleague on instead?

Decisions on who remains in post and who goes on furlough are ultimately for the employer. The employer will need to make these decisions based on their assessment of future economic activity for the business, operational considerations, etc. In making these decisions, the employer cannot act in a discriminatory or punitive manner.

Unless you can prove discrimination (and the definitions of discrimination are specific and not necessarily in line with the average person's definition), these decisions are difficult to challenge in practice. You should also note that you may not be fully aware of all the considerations an employer needs to take into account in making their decisions. Our best advice is that if you prefer a particular outcome, you should talk to your employer about it.

The following types of arguments generally won't work:

"That's not fair, my colleague on furlough is getting 80% of their salary and not doing any work – but I need to work every day to keep my salary. And in addition, I need to cover for my colleagues on furlough so I'm doing even more work than normal".

If you have these types of concerns (e.g., additional workload due to covering other employees), try to talk to your employer about them – but don't bring other employees into it in this way. Focus on your own role and your own workload. If the workload is increasing over time, your employer may want to bring back some employees who are on furlough. Similarly, if you have childcare issues or other caring responsibilities, then you could argue that this makes furlough a sensible solution in your circumstances.

12. Is the amount I receive while on furlough taxable?

Yes, it's treated as employment income. Your employer will deduct PAYE tax and employee national insurance contributions based on the amount you are paid while under furlough.

13. How exactly is the furlough pay calculated?

This depends on whether your pay is fixed or variable. Tips, commissions and bonuses are not taken into account when calculating furlough pay.

If your pay is **fixed** (for example, you're a full-time or part-time salaried employee), your salary as at **28 February 2020** is used to make the calculation. For example, if you earn £2,000 a month (on 28 February 2020), your furlough pay is £1,600 a month (which your employer can top up should they choose to).

If your pay is **variable** (for example, you're on a zero-hours contract), and you've been working for your employer since **1 March 2019**, your furlough pay is calculated based on the higher of the same month's earnings from the previous year (a March 2020 furlough is calculated on March 2019 earnings) or average monthly earnings for the year.

If your pay is **variable**, but you only joined your employer **between 1 March 2019 and 31 January 2020**, then the amount you'll get is based on the average of monthly earnings since you started working.

If your pay is **variable**, but you only joined your employer in **February 2020**, your furlough pay will be based on a pro-rata calculation for your earnings in February 2020.

What you receive under furlough pay might be less than the national minimum wage or national living wage. The national minimum wage and national living wage only apply to hours actually worked – if you are on furlough you are by definition not working any hours. There is no entitlement for the furlough pay to be topped up to what you would have received under the national minimum wage or national living wage had you worked your normal hours. There is nothing stopping you from asking your employer to top up your salary to make it equate to your full-time salary, but as has been mentioned above, this is an option for the employer, not an obligation, so think carefully but how you make such a request before doing so.

14. What if I'm employed by an agency?

Agencies can also use the Scheme – under the current rules, you must not have any work coming in from that agency. If you are still performing some work under that agency (for example, a second job arranged through that agency), then you are not eligible for furlough. If you are employed by an agency, it is the agency and not the company you are placed with who are responsible for applying to the scheme.

If you work for multiple agencies, you can be furloughed by one and accept work with another. Similarly, as with directly employed staff, you can be furloughed by your agency and be employed directly by another employer.

15. What if I'm self-employed? Or receive a salary as a director of my own company?

The Scheme is not available for the self-employed – other government schemes are available.

You are eligible for the Scheme if you are a director of your own company or otherwise employed by a company which you own. This is if your company is already registered for PAYE and your salary as director/employee has the usual income tax and NI deductions. In this situation, the 80% government subsidy to your company will be based on the amount of the director/employee salary only. It will not include any amount relating to dividends or distribution of company earnings paid to you.

16. What happens if my employer wants to keep me on but significantly reduce my hours?

You cannot undertake **any work** for your employer while you are on furlough.

Furlough must be for a minimum three-week period. Furlough does not cater for situations such as reducing full-time work to part-time work for individual employees.

If your employer wants to reduce your contracted hours, they will need to look to an alternative approach or consider reducing your hours to zero and put you on furlough [see next question].

An employer with many employees could consider a scheme of “rotating furlough”. For example, if an employer needs to scale back its workforce by 50%, it could put half the employees on furlough for the minimum three-week period. Then they could put the other

half of employees on furlough for the following three-week period bringing the first group back to work during that period, and so on. Whether this is practical depends on the circumstances. While this may work for some employers, other employers may find this process administratively burdensome and prefer to furlough only one group of employees for a longer period. They will have a wide discretion in how they choose who to furlough, as discussed above.

17. What if I'm on a zero-hours contract or other variable hours contract and my employer wants to significantly reduce my hours instead of putting me on furlough? I would be financially better off on furlough so I want to go on furlough instead.

Talk to your employer about this – you may be able to convince them to put you on furlough for these reasons. It might be the case that your employer has a misunderstanding about how the Scheme works. The salary paid to you under the Scheme is reimbursed by the government. In practice, it costs the employer nothing to furlough you.

As a general principle, rather than reducing every employee's hours, employers should be encouraged to maintain close-to-normal working patterns for as many employees as possible. The Scheme should be used to put other employees on furlough. This is the best way of safeguarding incomes for as many employees as possible.

However, your employer is not required to put you on furlough, and it is not something which you can choose by yourself. If your employer refuses to put you on furlough but will only offer you a few shifts (or none at all), you may want to seek other work. We would advise against resigning in this situation because if you resign you will no longer be entitled to furlough. Stand your ground and consider getting advice from a local CAB, law centre or Toynbee Hall's Free Legal Advice Centre.

18. What if my employer wants to make me redundant (but hasn't yet)?

Talk to your employer about putting you on furlough instead of redundancy. The government would encourage employers to use the Scheme instead of making employees redundant during this time: indeed, this is arguably the main purpose of the Scheme. You cannot force your employer to avoid redundancy.

If you have two years' service, you might be able to bring a claim for unfair dismissal if they dismiss for redundancy when the scheme is available as an alternative. In addition, if you have two years' service, you could qualify for a redundancy payment. There are specific laws and guidance that apply to redundancy situations: it is recommended that you seek advice as soon as redundancy is announced to be under consideration so you can ensure the process is carried out properly.

19. What if my employer tells me that there won't be a job for me to come back to, even if conditions improve in future? For example, due to a restructuring of the workforce that eliminates some positions.

It is very difficult to job hunt in the current environment when few opportunities are available. We recommend you talk to your current employer about putting you on furlough during the Coronavirus emergency instead of making you redundant at this stage. There is no cost for your employer to put you on furlough. This is because 80% of your wage/salary is funded from the government and there is no obligation for your employer to bring you back on board or pay you anything else whilst you are furloughed.

Once the Scheme ends, your employer can make you redundant at that point – but at least you would have had some income coming in during the peak of the Coronavirus crisis.

20. What if I work multiple jobs?

Decisions on furlough are for each employer based on their circumstances.

For example, you might work three part-time jobs with different employers. One employer might keep you on, another employer might make you redundant, and a third employer might put you on furlough. Neither you nor any of your employers needs to take into account what might be happening with your other employers.

Note – if you work with an agency, each agency counts as one employer, regardless of how many jobs you take under that agency. Even if you are doing any work under an agency, that agency won't be able to put you on furlough. Consider whether you might be better off asking the agency to put you on furlough rather than taking the odd assignment here and there.

21. Can I take another job or volunteer while I'm on furlough?

Generally, yes. In most cases there should not be an issue. However, this is subject to the terms and conditions of your employment contract. It may be more of a problem should you take up a job with a competitor of your employer. Check your contract to see if it has a clause stating you must exclusively work for them only, or for anything that states you cannot work for a business in competition with your employer.

Many furloughed employees have already taken up jobs with other employers (for example, airline staff working in supermarkets).

22. Can I perform any work for my current employer while I'm on furlough?

No, this is strictly not allowed. You cannot perform any work or generate revenue for your current employer when they have furloughed you – whether this in the employer's workplace or remotely (for example, working from home).

The only exception is if you are a furloughed company director but only to perform legal or statutory obligations as a director (for example, filing accounts with Companies House).

You and your employer can discuss setting a timeframe for ending your furlough and returning to work. However, you should not be performing any work for your employer during this time.

There is no such thing as "partial furlough". For example, your employer cannot ask you to work one day a week (and pay you 20% of your usual weekly wage/salary for the day you work and claim the remaining 80% on your behalf through the Scheme).

**23. What impact does furlough have on my annual leave or sick leave entitlements?
What if I'm already on sick leave?**

You should continue to accrue annual leave whilst on furlough. Any statutory annual leave entitlements accrued but not taken in the current year can be carried forward to the next two years: this is contrary to the normal rule that you cannot carry over leave without your employer's permission. If you take annual leave whilst on furlough, it should be paid at the usual holiday rate. Employers may need to top up payments accordingly.

If you are already on statutory sick pay (SSP), you cannot be furloughed by your employer. You and your employer would need to wait until you are no longer eligible for SSP. There is conflicting documentation as to whether or not your employer can move you onto SSP if you become sick whilst on furlough. However, HMRC has issued guidance saying furloughed employees do not qualify for SSP. If you become sick whilst on furlough, you should tell your employer and request that they continue to pay you and seek reimbursement under the Scheme. If they are unsure of their legal position, they should contact HMRC.

Any other questions? Contact us at flac@toynbeehall.org.uk and we will arrange an appointment to speak to one of our Free Legal Advice volunteers.