

THE CORONAVIRUS JOB RETENTION SCHEME - FAQS



This note answers the questions that we are being frequently asked about the new Coronavirus Job Retention Scheme (the “Scheme”) announced by the Government on 20 March 2020. The Scheme affords all UK employers, regardless of size or sector, the ability to claim funding from HMRC to cover 80% of the wage costs of its furloughed employees (employees who are not working at this time but are kept on the payroll), of up to a maximum of £2,500 per calendar month, for each employee.

This note is correct at the time of writing, 27 March. More guidance providing clarity on some of these issues is expected and we will update schools when we can.

Selecting staff for Furlough

Q1. How do you select which staff to furlough?

Aside from the Government guidance on who is eligible to be furloughed, ultimately, it is likely to be up to the employer to decide which employees to designate as “furloughed”. We would of course advise schools to be mindful of the risk of discrimination when selecting those employees to furlough for example, where the selection process is linked to protected characteristics such as age or disability.

Q2. Can you furlough someone against their will?

You can't impose furlough on an employee, but we anticipate that very few employees are going to resist if it's offered when the alternative is redundancy. Some schools may have a contractual right to lay off staff which it may be able to rely on instead, if needed.

However in relation to the Scheme, whilst the employee can select which employees it would like to furlough, it is likely that they may have to (if agreement cannot be reached) follow a consultation process, and therefore an employee's agreement to the proposal is likely to be required.

Q3. Will a school need to collectively consult if they intend to put 20 or more employees on furlough leave?

Yes, if sufficient numbers. Assumes that the school intends to dismiss employees who do not consent to the change, although arguably the duty does not arise at the initial stage where consent is being sought. From a pragmatic viewpoint, it might that a ‘soft’ informal consultation will achieve employee

agreement without the need to formally consult.

The circumstances in which the HMRC reimbursement can be claimed are not entirely clear at this stage (more guidance expected), it seems likely that it is intended to apply in what would otherwise be lay-off or redundancy situations. This means that, in many (but not all) cases, an intention to dismiss underpins the furlough proposal.

Q4. Can you rotate people through Furlough, for example on a ‘month-on-month-off’ basis? Can you furlough an employee more than once?

We have been asked this a lot. Unfortunately, we do not have enough information about how the Scheme will operate yet to answer this as it is unclear whether having a rotating workforce would work within the parameters of the Scheme. What we do know is that to be a furloughed worker the person must be on leave and not working, and that the minimum period for furlough leave is 3 weeks. It is not yet clear whether the same employee can be furloughed more than once.

Further information about the Scheme is needed to reach a determination on this issue.

Q5. Can you dismiss an employee for redundancy if furlough is available?

There is no clear answer in the guidance at present, but your cash flow will be an important factor. Any process for dismissal must follow a full and fair process, as in a normal circumstance.

The guidance has however confirmed that an employee's right to a redundancy payment will still apply.

Q6. What if an employee has a second job?

If your employee has more than one employer they can be furloughed for each job. Each job is separate, and it will be up to each respective employer to decide whether or not they want to furlough that employee from their role. The cap on furlough pay (the £2,500) applies to each employer individually, and it will not matter whether the other employer has already submitted a claim to furlough the employee.

It is unclear whether a furloughed employee is able to start a new job (for example, at a supermarket) while on furlough leave during their spare time. We expect that HMRC may take interest in this however so may be tricky.

Q7. What if a furloughed employee has two roles in school such as a teacher and a houseparent? Can we furlough one role?

We are awaiting guidance but we anticipate that as the idea is for the employee to be at home and not working for the employer, this might be difficult. The current HMRC guidance is not clear on this.

Furlough and Unpaid Leave

Q8. Can I furlough an employee already taking unpaid leave?

It depends. Employees that were already on unpaid leave before 28 February 2020 cannot be

furloughed. However, staff that have been placed on unpaid leave after 28 February 2020 are eligible for furlough.

Q9. Can an employee who elects to take unpaid leave to be able to look after their children whilst they are home from school be put on furlough leave instead?

As above, it depends. If they were already on unpaid leave before 28 February 2020 you will not be able to furlough them. However, staff that have been placed on unpaid leave after 28 February 2020 are eligible for furlough.

Please note, it is likely that the Government will retain the right to retrospectively audit all aspects of the Scheme with scope to claw back fraudulent or erroneous claims.

Furlough and Sickness Absence

Q10. Can we furlough staff that are on sick leave or self-isolating?

Employees on sick leave or are self-isolating should get Statutory Sick Pay (SSP), but can be furloughed after this.

Vulnerable or high risk employees who are shielding in line with public health guidance can however be placed on furlough.

Q11. Can we select staff that are on long term sick to be furloughed?

Unfortunately the guidance does not address this. Based on the above, staff that are on sick leave should receive SSP but can be furloughed after this. It may therefore be possible for staff on long term sick to be furloughed once their entitlement to SSP has been exhausted, however further guidance is needed to provide a definitive answer.

Q12. If furloughed staff take sick leave, would they drop to SSP whilst furloughed?

As above, there is not enough information available yet to understand how furlough will interact with other types of leave but the guidance does confirm that furloughed employees will have the same employment rights as they did previously, which includes entitlement to SSP.

It is possible that the Scheme will require furloughed workers to be “available for work” and if this is the case, illness may halt the worker’s entitlement to furlough pay, and instead they may shift to SSP. However we do not have any information at the moment to determine this.

Furlough and Annual Leave

Q13. Will annual leave continue to accrue during a period of furlough?

It seems likely that the statutory leave entitlement under the Working Time Regulations 1998 (5.6 weeks for full time staff) would continue to accrue during furlough leave, as it would if an employee was on sabbatical, for example.

Schools could attempt to negotiate a change in contractual terms such that any annual leave over and above statutory leave does not accrue during furlough leave, but this may make it less attractive to workers and it is not clear whether the employer is entitled to add extra conditions to furlough leave, beyond a reduction in pay. We would need further guidance on the terms of the Scheme to advise either way.

Q14. Can we require staff to take annual leave? What notice must we give them to do so?

Generally speaking, an employer can require an employee to take statutory annual leave (5.6 weeks for full time staff) on particular days, provided it gives the employee the appropriate advance notice. “Appropriate notice” for this purpose under the Working Time Regulations requires the employer to specify the day or days on which leave is required to be taken and must be given twice as many days in advance of the earliest day specified in the notice as the number of days to which the notice relates (i.e. if you want an employee to take a week’s annual leave, you must give at least two weeks’ advance notice).

With respect to any contractual annual leave entitlement over and above the statutory entitlement, the employer should follow its own rules and procedures about how and when leave can and should be taken.

We do not anticipate that this principle will be changed under the Scheme, but no information has been published to address this point specifically yet.

Q15. Can we ask furloughed employees to take annual leave during the furlough period and pay them normal pay instead of furlough pay?

Unfortunately there is not enough information available about the Scheme to determine this. We understand that the Scheme is not going to interfere with the rights under employment law and therefore, subject to a specific Scheme rule being published to the contrary, as set out above, an employer has the right to require its employees to take annual leave by providing at least twice as many days’ notice as you require them to take. What is unclear at the moment however, is whether an employer will be able to require an employee to take annual leave during the furlough period, and we will need to await further guidance to confirm this.

In the meantime, would suggest reserving the right to ask furloughed employees to take holiday whilst on furlough leave might be pragmatic. That way the School has written agreement to the principle from the employee if it turns out under the terms of the Scheme that you can require them to take annual leave.

Q16. If staff were to take leave during a furlough period presumably this would require the rules to allow employers to place people on and off their furloughed status?

The latest guidance has confirmed that the minimum period for furlough is 3 weeks. If an employee was to take annual leave at the end of a period of furlough, the employer would need to reapply for a furloughed employee to be re-designated as furloughed.

Q17. Are we allowed to let staff cancel pre-booked annual leave if they are unable to work?

Many employees affected by travel restrictions and cancellations as a result of the coronavirus outbreak will have to cancel holidays, and employees may want to cancel pre-booked annual leave to take it later in the year when things have (hopefully) calmed down.

Whether an employer has to agree to this cancellation will depend on the rights under the employee's contract of employment or the terms of the relevant internal policy. There is no statutory requirement for an employer to agree to a request to cancel annual leave.

Schools should take into account the needs of the school, and also the employee's personal circumstances, and we would recommend agreeing to the cancellation where this would not cause it significant inconvenience as this will always be best for staff morale.

Employers should also bear in mind that, employees must be allowed to take their statutory annual leave entitlement (the 5.6 weeks) during the leave year, so employers should plan to avoid this situation where possible.

With respect to any additional contractual annual leave, schools will need to refer to the terms of their holiday policy or staff handbook to determine what happens with any accrued but untaken additional leave, which might include a "use it or lose it" rule, or the right to be paid for untaken leave. We recommend taking legal advice before taking any action in respect of holiday entitlement.

Q18. If staff have exercised their discretionary right to purchase additional annual leave days, are we able to offer to purchase this back at the same rate? Are there any concerns with this?

As additional holiday days are a contractual right, and not a statutory right, the ability to buy back additional holiday days, and the rate that you can purchase them will be governed by your internal policies and procedures. We would strongly recommend that schools take legal advice before attempting to buy back additional leave to ensure that any risks and liabilities can be identified in advance.

Furlough and Family Leave

Q19. Can we select staff that are on maternity leave to be furloughed? What happens to their rate of pay? Will it break their maternity protection?

Individuals who are on or plan to take Maternity Leave from school must take at least 2 weeks off work immediately following the birth of their baby for health and safety reasons.

If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of the lower of their average weekly earnings or the statutory flat rate (currently £148.68 a week, rising to £151.20 a week from April 2020).

Whilst you should continue to claim SMP/Maternity Allowance as normal for furloughed staff, if you

offer enhanced contractual maternity pay, this will be included in the calculation of wage costs for the purposes of the Scheme so you will be able to claim for a subsidy of this.

Employees will still benefit from the same employment protections whilst on furlough, and this will include maternity protection.

If the Scheme does not prohibit it (and we do not know at this stage whether it does or does not), it may be that for some employees there is a short term benefit in taking the six weeks' statutory maternity pay (at the rate of 90%) and then returning to work on a furloughed basis to receive 80% of their usual salary for the period of furlough. However, at present the Scheme is only due to run for an initial period of 3 months, and consequently there is a risk that if the Scheme is not extended the employee may have to return to normal work sooner than anticipated.

Q20. What about other family leave?

We understand that the same principles apply where your employee qualifies for contractual adoption, paternity or shared parental pay.

Furlough and volunteering

Q21. Can an employee volunteer for the school whilst on furlough?

A furloughed employee must not do any work for an employer that has furloughed them, as the intention of the Scheme is to allow employers to pay staff who are without work to do. The latest guidance has however confirmed that a furloughed employee can take part in volunteer work or training, as long as it does not provide services for or on behalf of the employer, which includes generating income. From this, we have deduced that whilst a furloughed employee can volunteer, it cannot volunteer for the employer that has furloughed them, without jeopardising the right to furlough pay. The employee can however volunteer for another organisation.

If the school is seeking volunteers to assist during this period, please remember that the usual recruitment checks will apply if a new staff volunteer.

Q22. Can an employee volunteer elsewhere whilst on furlough?

Yes, furloughed workers are able to volunteer for another organisation whilst on furlough.

In addition, non-furloughed workers also have the right to take volunteer leave. The Coronavirus Act 2020 has introduced the right for employees and workers to take emergency statutory volunteer leave in blocks of two, three, or four weeks' unpaid leave. This is independent of furlough leave. The Act has confirmed that:

- There is no obligation on the employer to pay wages to a volunteer during a period of volunteering leave;
- An employee on emergency volunteering leave will be entitled to the benefit of all of the terms and conditions of employment (except remuneration) that would have applied if the employee had not

- been absent from work; and
- The employee will be entitled to return from volunteering leave to the job in which he or she was employed before the absence, on no less favourable terms and conditions.

Because the emergency volunteer work will be unpaid, the Government have committed to set up a UK-wide compensation fund to compensate volunteers for a loss of earnings and expenses incurred at a flat rate for those who volunteer through an appropriate authority (for example, the NHS).

Training

Q23. Can we require staff to complete training during furlough?

Yes. A furloughed employee can take part in training, as long as it is not providing a service, or generating revenue for the organisation.

However, if workers are required to complete training whilst they are furloughed, then they must be paid at least the National Minimum Wage (or National Living Wage) for the time they spend training, even if this amounts to more than the 80% subsidised wage received under the Scheme. The school will be responsible for paying the difference.

Staff morale during furlough

Q24. How will Furloughed staff feel being selected? How do you manage staff morale for staff who remain at work when their colleagues are on Furlough and are on near full pay at home for doing nothing?

It may on the face of it seem unfair that some employees will be required to continue working, and others will be permitted to receive a substantial proportion of their salary and not be required to do so. Legally speaking, provided the employer has used non-discriminatory criteria to select which employees are put on furlough leave, it is lawful for an employer to choose to furlough only part of the workforce.

The current climate is likely to have an impact on morale, employers should be transparent, compassionate and should endeavour to keep their employees updated as matters progress.

Furloughed workers are likely to feel anxious that they have been selected for furlough in the first place so offering reassurance to these workers that they will return to work as soon as the situation changes will help. We would also suggest that schools continue to provide the furloughed workers with general updates to make sure they still feel included in your workforce.

With respect to those continuing to work, they are likely to be frustrated that they are still working, but may also feel grateful that their jobs are not perceived to be at risk by the school. Regularly demonstrating your appreciation of the work they are doing and continuing to support them with their additional needs during the outbreak (for example, taking dependents leave and/or annual leave) will go a long way.

Q25. How do we incentivise staff who are not designated as furloughed?

This will be up to the individual school to consider. Suggestions of incentives that we have heard from the sector include additional holiday days (perhaps with conditions on when they can be used), bonus payments, flexible hours for this uncertain period.

Q26. If employees are already at home doing no work, can we just give them 80% pay without using the Scheme?

To implement a change in salary would amount to a contractual change, for which the school would need to carry out a consultation process, and seek the employee's agreement. The requirement for collective consultation may also be triggered subject to numbers (more than 20 staff). The expectation, however, would be that most employees would agree to a temporary reduction in salary if the alternatives that they are presented with are either redundancy or to receive no pay for the period they are not working.

We understand that employers will need to follow a consultation process to designate an employee as furloughed in any event (subject to any 'soft' approach). Subject to further information about the Scheme's application process being published, we would anticipate that it would be more beneficial for schools to seek to agree to designate certain employees as furlough (and therefore be able to benefit from the Government subsidy towards wages) rather than consult and have to pay those wages itself. This may also reassure staff that the salary reduction is temporary and will only apply to the furloughed period.

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