

Below is a Q&A on how the UK grant for furloughed employees is currently operating

### Who can claim?

A UK employer that has a UK bank account and is operating a PAYE payroll scheme on 28 February 2020 can claim the grant until 1 June 2020.

### Which employees can I claim for?

It covers employees being paid through PAYE on 28 February 2020:

- If an employee was hired after that date they are not covered.
- If an employee was made redundant after 28 February 2020, the employer can rehire them and claim for them.

Full time, part time and employees on zero hours or flexible contracts can be claimed for. Recruitment agencies who pay agency workers through PAYE can claim for those workers if they are not working.

An employee with more than one job can be furloughed from each job, and each employer can receive the grant for each job. The cap will apply to each job – it is not aggregated across all jobs.

### How much will I receive?

The grant will reimburse you for 80% of furloughed employees' usual wages costs (so the amount received will include the income tax and employee's NICs which you need to deduct) as at 28 February 2020 up to £2,500 a month per employee. So employees will not receive £2,500.

Fees, commissions and bonuses are not included as wages and cannot be claimed. Overtime is not expressly included or excluded but may be caught in the flexible worker calculations. TRONC is not mentioned – particularly important for hospitality industry workers.

The employee will have to decide whether to continue making their pension contributions out of the money they receive. Failure to do so may have consequences under their pension scheme. We presume deductions for student loans etc. will continue to be made from the amount covered. Employees should contact the relevant agencies to see if they can arrange a suspension of payments.

Employers can choose whether to pay any salary or benefits due which exceed the grant – or not. Failure to do so does not prevent them claiming the grant. But if you do not get an employee's consent to any such reduction in salary or benefits (or the reduction is not permitted through the employee's zero hours or flexible contract) you may be liable for a claim from the employee.

Unless you furloughed employees from 1 March you will not be able to claim 3 months of wages – unless the Government extend the scheme. You can only claim the grant from the point the employee is furloughed.

### What if the employee is on a zero hours or flexible contract?

If the employee has been employed for more than 12 months up to the date of the claim, they get the higher of:

- the same month's salary for 2019; and
- average monthly earnings from 2019-20 tax year (not calendar year). Using the tax year is strange as reductions in salary in March and April 2020 will effect the amount and there could be a mismatch in the timings. But presumably they have used it because they can check the amount through PAYE records.

If they have been employed for less than 12 months before the claim starts, then the claim is for their average monthly earnings since they started. If they only started in February 2020 then it is a pro rata amount of those earnings.

### Who pays the employer's NICs etc.?

UK employers will get an additional grant to cover employer's NICs and minimum statutory auto-enrolment employer pension contributions on the amount reimbursed through the grant – not the full amount of salary if the employer chooses to pay more. Guidance on how to claim this will follow.

There is no mention of the apprentice levy.

If the employer's auto-enrolment contribution is more than £512 p/month (up to 5 April 2020) or £520 p/month (from 6 April 2020), the employer continues to be liable to pay that. If the employer does not want to make those additional payments they will need to agree this with the employee.

### When will I receive the cash?

The scheme is expected to start operating by the end of April so money will not be received until after that. HMRC will have to process claims and that will take some time. Businesses will have to fund employee costs until then.

### How do I work out if someone is "furloughed"?

An employee has to be stopped from working and notified of that to be furloughed. "Furloughed" means on a leave of absence from work. The employee can not do any work for the business – including providing services or generating revenue. Agency workers must not be working for the recruitment agency claiming a grant for them. See below for exceptions for training.

If an employee is still working but doing reduced hours they are not covered. The aim of the scheme is to help people comply with Public Policy to self isolate at home.

The employee must be furloughed in 3 weeks blocks to be covered. It looks like you can rotate different employees in and out of furlough provided they are off for 3 weeks blocks.

Employees hired after 28 February 2020 cannot be furloughed or claimed for under this scheme by their new employer.

### Can I furlough employees without their consent?

If you furlough employees and reduce their salary to 80% or the £2,500 cap without their consent, you may be in breach of their employment contract or employment law. Most fixed salary employment contracts will not allow you to reduce their salary without their consent.

The Government has also said that employers should discuss furloughing with their staff and they have suggested that redundancy consultation procedures may apply if enough employees are having their employment terms changed. This is unhelpful and will delay employers in being able to claim the grant and therefore reduce the amount they can claim.

Zero hours and flexible employees can probably be furloughed or their wages reduced without their consent – unless their contracts guarantee them a minimum number of hours.

### Can I furlough some employees but keep others working?

Yes, but there is a risk that an employee could bring a claim that selection has been unfair or discriminatory. This could be a claim by employees required to work when others are not or a claim by employees only receiving 80% of their salary if other employees still working are receiving full salary.

In most businesses it is likely that the CEO, FD & HR teams and others will need to continue working from home.

### Can a furloughed employee still do some work for me?

No. But the employee can still volunteer or do training with you provided they are not providing services to or generating revenue for the business. So producing marketing materials or other “work products” which can be used to generate revenue is probably not permitted. If employees do online training while furloughed they must still receive the National Living Wage or Minimum Wage (as applicable) for the time spent training - even if that takes them over the 80% of their wage that will be subsidised. So hours required for training should be carefully monitored.

### Can I claim the grant for wages since 1 March?

Only if employees were not carrying out any work for this period – and so were furloughed. See process below.

Some businesses will have been hoping to receive the grant for their March payroll but it looks like this will not be possible. So the grant does not cover 3 months of payroll from the announcement on 20<sup>th</sup> March.

### Do I have to guarantee employment to get the grant?

No. You can make the furloughed employees redundant at any time. The usual redundancy procedures will need to be followed.

### What happens to holiday pay and other benefits?

Furloughed employees continue to have their employment rights as before. For example they are entitled to Statutory Sick Pay and Maternity and other parent rights. Some zero hours or flexible workers may be entitled to more money through Statutory Sick Pay than this grant.

Unfair dismissal and redundancy rules will still apply if you terminate their employment. Holiday pay entitlements will continue to accrue – see below for more details.

### How is the grant calculated if an employee is on SSP or maternity/paternity leave etc.?

If an employee is on sick leave or self-isolating because of sickness (not the general Public Health orders to remain at home) they should get Statutory Sick Pay. Once this finishes they can be furloughed.

If an employee is on maternity leave or adoption, paternity or shared parental pay they will continue to receive these allowances for the normal periods. After it finishes they can be furloughed. If you pay enhanced contractual pay to employees on maternity leave etc that counts as “wages” (even though those employees are not technically furloughed) and can be claimed – subject to the caps.

An employee on unpaid leave before 28 February 2020 can not be furloughed. You can still change someone from unpaid leave to furloughed after 28 February – so they can take advantage of this grant.

### How do I get the grant?

You need to notify the furlough to employees and keep a copy of this notice. If an employee's agreement is needed to reduce their salary they may be able to bring a claim against you if you do not get their consent.

Consultation may also be needed – depending on the numbers of employees and whether you are considering redundancy. This will delay the furloughing of employees and reduce the amount that can be claimed. In practice this is going to be difficult for employers to comply with. Some businesses may decide they need to take the risk in order to get as much out of the grant as possible.

You calculate the amount you claim using the actual payroll amounts you would usually run. HMRC can choose to audit it in the future. You can claim once every three weeks – no matter when the employee is furloughed. All amounts received must benefit the employee. You cannot charge any fees or admin costs of running the grant.

Once ready you put:

- your ePAYE number
- number of employees furloughed
- when the furlough started and ended
- the amount claimed - which must be for at least 3 weeks to encourage self-isolation

into the HMRC portal – still to be set up.

### **Are there restrictions on publicly funded businesses?**

If your business continues to receive public funding for staff costs then you should pay employees in the usual way with that funding – and not furlough them. This applies to public and private businesses receiving public funding for staff costs.

### **Is there any effect on Share Schemes and other Incentivisation Agreements?**

Furloughing employees may have unintended consequences on employees; eligibility for EMI option schemes and similar tax approved schemes. Employees on furlough may not meet the relevant technical requirements. Representations have been made to HMRC on this.

In most cases, furloughing an employee should not trigger “Leaver” provisions but you should check that it is not caught by any “non-contributory” provisions in the documents.

### **What do I do next?**

You should review your employees’ contracts, offer letters and terms and conditions to decide whether you need to obtain their consent to reduce their salary. If you are topping up the payments so employees still receive their full salary and benefits then you should be able to take a light touch approach.

You will also need to decide if you need to consult with employees. Some businesses may decide that they do not have time to obtain consent and go through a consultation process and that redundancy or insolvency would be the only alternative.

Once you have decided on your approach you need to notify employees in writing that they have been furloughed.

When the portal is up and running you can submit the information taken from the next pay roll following the start of the furlough. This is not expected to be available until late April. Payments are therefore unlikely to be received until May. HMRC will make the payments to you via BACS payment to a UK bank account.

## Do furloughed employees accrue annual leave?

Employees on furlough have the same employment rights as previously, including holiday accrual. It is likely that you will be able to require your employees to take accrued holiday during the furlough leave in the usual way.

## Can I ask furloughed employees to take their annual leave now?

Yes, provided they are not sick. Employers can ask employees to take holiday at a particular time, provided they give sufficient notice. Unless this is specifically dealt with in the employment contract, the notice to take annual leave should be at least double the amount of holiday leave the employee is asked to take.

## Can employees cancel booked holiday time?

When an employee has to cancel their holiday plans and wants to retract their holiday request, the employer can choose whether to allow them to do so. Many employers prefer employees to take as much of their holiday as possible during the crisis when there is a reduction in work and are entitled to refuse a request to cancel holiday.

If an employee has to cancel their holiday because they are sick, or because they have been advised to self-isolate, the position is different - the employee has the right to postpone its holiday.

## How much holiday can be rolled forward?

The Working Time Regulations 1998 have been amended so that where it is not reasonably practicable for a worker to take some, or all, of the holiday to which they are entitled due to COVID-19, they will now be able to carry it over into the next two holiday years. The aim is to ensure staff can continue working in the national effort against COVID-19 without losing out on annual leave entitlement.

This amendment means that instead of insisting that workers take their full holiday entitlement in this current leave year, up to four weeks leave can be carried forward for up to two years.

This extension of the ability to roll holiday days applies only to the minimum four weeks annual leave - not the full 5.6 weeks annual leave or any additional contractual holiday. As an employer you can agree for this to be carried forward in any event.

## Does the two year roll over extension apply to all employees?

No. The ability to roll over holidays for the next two leave years only applies if it wasn't reasonably practicable for a worker to take some or all of their annual leave as a result of the effects of COVID-19 - whether the effects are on the worker, the employer or the wider economy or society.

However expect requests from most employees as it may be difficult to distinguish between what is COVID-19 affected and what is not.