



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 purpose of the Scheme is to provide grants to employers to ensure that they can retain and continue to pay staff, despite the effects of the Covid-19 pandemic.

On 15 April the Government published the first Treasury Direction, the formal legislative rules for the Scheme. A second Direction was published on 22 May, extending the Scheme and clarifying certain rules. A further Direction is expected by the end of June.

The Scheme went live on 20 April, although it covered claims going back to 1 March.

Under the Job Retention Scheme, the Government will provide a grant to employers to cover 80% of a furloughed employees 'reference salary', up to £2,500 per month. At present, employers must furlough employees for a minimum of three weeks during which time the employee cannot undertake any work for the employer. Employees working reduced hours are not currently covered by the Scheme.

The Scheme is tied to PAYE. Employers can only claim for employees who were a payroll which was notified to HMRC through a real time information (RTI) submission on or before 19 March 2020. Employees who were on a payroll on or before 28 February or 19 March but who stopped working after those dates can be re-employed and furloughed.

On 12 June, the Government published details of a flexible furlough scheme that will run from 1 July to 31 October. Under the revised rules employers will be able to bring workers back on reduced hours while still claiming a grant for any usual hours not worked. Only employees who have been furloughed for a full three weeks before 30 June can be furloughed after 1 July, unless they are returning from family-related leave. From August employers will need to make contributions towards the costs of furloughed employees.

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 employees 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 an employee on reduced pay.

It is for employers to decide whether to furlough an employee. 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 some cases, the current Government guidance does not provide an indication of how the Scheme will interact with these rights.

This is a fast-moving issue and all information should be read as correct at the time of publication (16 June 2020).

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. The impacts are being felt particularly hard by low paid workers and precarious workers as well as by women and BAME workers.¹

On 26 March 2020, the UK Government and devolved administrations passed a series of regulations to impose a lockdown. These regulations required the closure of many business premises and prohibited workers who could work from home from attending the workplace. While the lockdown measures are steadily being eased, many of the restrictions remain in place.²

Coronavirus Job Retention Scheme

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

The Scheme was initially welcomed by both the [Trades Union Congress](#) (TUC) and the [Confederation of British Industry](#) (CBI). There has since been a large volume of commentary on the Scheme, some of which has highlighted gaps and inconsistencies.³

The Scheme was originally set to cover the period from 1 March to 31 May. It has formally been extended to cover the period until 30 June.

On 12 June, the Government updated its guidance and [published new information](#) on how the Scheme will operate from 1 July to 31 October. From July, employers will be allowed to bring workers back on reduced hours while claiming under the Scheme for hours not worked. From August, the grant will no longer cover employer National Insurance and pension contributions. From September employers will be required to pay 10% of a furloughed employee's salary and from October they will be required to pay 20%. The Scheme is set to end on 31 October 2020.

The statutory basis for the Scheme is provided for in section 76 of the [Coronavirus Act 2020](#). This provides that HMRC shall, in relation to Covid-19, have such functions as directed by the Treasury. The [first Treasury Direction](#) made under this power was published on 15 April. A [second Treasury Direction](#) was published on 22 May. This extended the Scheme to 30 June and clarified and altered certain rules.

The Government has also published a range of guidance for employers and employees. The guidance was first published on 26 March and has been updated and changed multiple times.

¹ See [Coronavirus: Impact on the labour market](#), Commons Library Briefing Paper CBP-8898, 5 June 2020.

² See [Coronavirus: Returning to work](#), Commons Library Briefing Paper CBP-8916, 4 June 2020.

³ See e.g. Lord John Hendy QC, [The gaps in the government's coronavirus income protection plans](#), Institute of Employment Rights, 6 April 2020. (Lord Hendy is an employment barrister and a Labour Peer in the House of Lords).

Other steps taken to support businesses and workers

The CJRS is one of a number of measures the Government has introduced to provide financial support to businesses and workers.

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.

On 26 May the Government also launched the [Statutory Sick Pay Rebate Scheme](#) to allow small employers to reclaim two weeks' worth of SSP payments made to employees who are self-isolating or shielding. Background can be found in the Library Briefing, [Coronavirus Bill: Statutory Sick Pay and National Insurance Contributions \(CBP-8864\)](#), covers this in detail.

The Government has announced a [Self-employment Income Support Scheme](#), which provides support for the self-employed. Information can be found in the Library Briefing, [Coronavirus: Self-employment Income Support Scheme \(CBP-8879\)](#).

A note on terminology...

A many different pieces of Government guidance that are referred to throughout this paper.

- "Guidance for employers" means the [general guidance for employers on the CJRS](#).
- "Guidance on eligibility" means the [guidance on employees who are eligible under the CJRS](#).
- "Guidance on preparing claims" means the [guidance on steps to take before calculating claims](#).
- "Guidance on calculating claims" means the [guidance on calculating what employers can claim](#).
- "Guidance for making claims" means the [guidance on how to submit claims to the online portal](#).
- "Guidance for employees" means the [general guidance for employees on the CJRS](#).
- "Government guidance" refers collectively to the documents above.
- "First Treasury Direction" means the [Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#) (15 April 2020).
- "(Second) Treasury Direction" means the [Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#) (22 May 2020).
- "Treasury factsheet" means the [Coronavirus Job Retention Scheme Factsheet](#) (29 May 2020).

The Treasury Direction says that 'employees' are eligible under the CJRS. The definition of 'employee' in the Direction is broader than the definition of 'employee' used in employment law. Likewise, this paper uses the term 'employee' to describe those who eligible under the Scheme.

2. Rules of the Scheme

Q1. Where are the rules of the Scheme set out?

The statutory basis for the Scheme is section 76 of the [Coronavirus Act 2020](#). This is a general provision that provides the Treasury with the power to direct HMRC's functions in relation to Covid-19.

On 15 April 2020, the Government published the [first Treasury Direction](#) made under this power. This set out the rules HMRC was required to follow when deciding whether to make a payment to an employer.

On 22 May 2020, the Government published the [second Treasury Direction](#) which sets out the rules that are current in force.

On 29 May 2020, the Government published a [Treasury Factsheet](#) which sets out the rules that will apply from 1 July to 30 October 2020.

In addition, there is also a range of Government guidance. On 26 March 2020, the Government published two pieces of guidance, one for employers and one for employees. These were updated numerous times and have been split off into new guidance. Today, there are six main pieces of guidance for employers as well as some ancillary guidance.

On 12 June 2020, the Government updated most of its guidance and published some new guides detailing [the rules of flexible furloughing](#).

Main guidance

- [Check if you can claim for your employees' wages through the Coronavirus Job Retention Scheme](#)
This guidance sets out which employers are eligible, how to furlough employees and the rules they need to follow.
- [Check which employees you can put on furlough to use the Coronavirus Job Retention Scheme](#)
This guidance sets out which employees can be furloughed.
- [Steps to take before calculating your claim using the Coronavirus Job Retention Scheme](#)
This guidance sets out how employers should decide a 'claim period', what to include as 'wages' and how to determine the 'usual hours' for employees who are flexibly furloughed.
- [Calculate how much you can claim using the Coronavirus Job Retention Scheme](#)
This guidance sets out how to calculate 80% of wages and the NICs and pension contributions that employers can claim.
- [Claim for wages through the Coronavirus Job Retention Scheme](#)
This links to the online portal through which employers make a claim. It sets out what information employers need to submit.
- [Reporting employees' wages to HMRC when you've claimed through the Coronavirus Job Retention Scheme](#)
This sets out how employers should submit PAYE information to HMRC for wages paid to furloughed employees.

Additional guidance

- [Changes to the Coronavirus Job Retention Scheme](#)
- [Find examples to help you calculate your employees' wages](#)
- [Check if your employer can use the Coronavirus Job Retention Scheme](#)
- [Holiday entitlement and pay during coronavirus \(COVID-19\)](#)

Q2. What is the status of the Treasury Directions?

The Treasury Directions are made under the statutory power conferred by section 76 of the [Coronavirus Act 2020](#). They have legal force and are the documents that HMRC is bound to follow when making decisions about issuing grants under the Scheme.

The Directions did not have to be subject to Parliamentary approval. However, the Directions are a form of legislation and are subject to the ordinary rules on statutory interpretation.

The Direction can be amended or superseded by new Directions.⁴

Q3. What are the differences between the first and second Treasury Directions?

As well as extending the CJRS to 30 June 2020, in many sections the wording in the [second Treasury Direction](#) is different from the [first Treasury Direction](#).

As highlighted in various parts of this paper, commentators had suggested that parts of the first Treasury Direction were inconsistent with the Government guidance. The Treasury had maintained that the first Direction was consistent with the guidance.

In some places, the wording of the second Direction clarifies certain rules. In other places, the rules have been changed.

The key changes include:

- New wording on when employers can furlough employees who are eligible to receive statutory sick pay (para. 6.3)
- New wording on what sort of agreement employers need to reach with an employee before putting them on furlough and whether it needs to be in writing (para. 6.7)
- New wording on the types of training that employees can undertake while on furlough (para. 6.8)
- New wording and a detailed new paragraph on the meaning of 'regular pay' that can be claimed under the CJRS (paras. 7.4 & 7.19)
- Changes to the rules on employee transfers making employees transferred under TUPE after 28 February eligible under the Scheme even if they were not on a payroll notified to HMRC on or before 19 March (paras. 9.1 to 9.4)

⁴ [The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#) ('Treasury Direction'), para. 14.1.

Q4. What is the relationship between the Treasury Direction and the guidance?

The Government guidance was first issued on 26 March and was updated three times before the [first Treasury Direction](#) was published.

When the first Treasury Direction was published, a number of commentators noted that there appeared to be contradictions between the Direction and the guidance. The guidance was later updated but a number of apparent inconsistencies remained. Unite the Union took the first step towards bringing a judicial review on the basis that there were inconsistencies between the guidance and Direction on whether those who are eligible for statutory sick pay (SSP) could be furloughed.⁵

The Treasury maintained that there were no inconsistencies between the Direction and the guidance. Lord Agnew, a Treasury Minister, said in response to a Parliamentary Question:

HMRC will act at all times in accordance with the HM Treasury Direction. HMRC's interpretation of the Direction is set out in their published guidance, and it is HMRC's view that the published guidance is consistent with the Direction. It is HMRC's expectation that employers should consider the guidance in the first instance when seeking to understand the operation of the scheme and HMRC's interpretation of the Direction.⁶

As noted above, the wording in parts of the [second Treasury Direction](#) has been changed to more clearly bring it in line with the guidance.

Government guidance can, in certain circumstances, be used by courts as a persuasive authority in the interpretation of a statutory provision.⁷ However, where there are inconsistencies that cannot be reconciled, the language of the legislation will prevail.

Daniel Barnett and Max Schofield, barristers at Outer Temple Chambers and 3BP Barristers, have suggested that employers who relied on earlier versions of Government guidance that are not reflected in the Treasury Direction might be able to bring a claim for Judicial Review.⁸

⁵ Cloisters, [Coronavirus Job Retention Scheme and statutory sick pay: Robin Allen QC and Daniel Dyal retained by Unite the Union](#), 28 April 2020.

⁶ [PO HL3019 \[on Coronavirus Job Retention Scheme\]](#), 6 May 2020.

⁷ [Chief Constable of Cumbria v Wright and Anor \[2007\] WLR 1407](#) at [17].

⁸ Daniel Barnett and Max Schofield, [The Coronavirus Job Retention Scheme: Claiming Against HMRC](#), 3BP Barristers, 17 April 2020.

3. Eligible employers

Q5. Which employers are eligible?

The [Treasury Direction](#) says that any employer who has set up a PAYE scheme and notified this to HMRC through a real time information (RTI) submission by 19 March 2020 can make claims to the CJRS.⁹

The [guidance for employers](#) says that any organisation with a UK payroll is eligible, including businesses, charities, recruitment agencies (if they have agency workers on PAYE) and public authorities.

Individuals who employ someone (such as a nanny) can also put them on furlough and claim under the Scheme if that person is on PAYE.

TUPE

The Treasury Direction now says that where employees are employed by one employer on 28 February but transferred to a new employer after that date under [TUPE rules](#), they can be furloughed by the new employer even if an RTI submission was not made before 19 March.¹⁰

This now reflects the position in the [guidance on eligibility](#).

The first Treasury Direction, and the guidance for employers that was in place at the time, only covered employees transferred after 19 March.

Administrators

The [guidance for employers](#) says that where a company has gone into administration the administrator can furlough workers and make a claim under the Scheme. The first, and to date the only, court case relating to the CJRS concerned furlough by administrators.¹¹

Public sector organisations

The guidance for employers says that public sector organisations are not expected to furlough workers. This is because staff will still be required to provide essential public services and as in most cases funding for staff costs will continue. However, the guidance says this is not a hard rule.

The Local Government Association published correspondence it received from the Government which says:

As such the Government expects that LAs will continue to pay their staff as usual. Where staff are not able to carry out their usual work, the Government expects Local Authorities and all other public sector employers to make every effort to redeploy employees to assist with the coronavirus response. This could include redeployment within the existing organisation, or to support another part of the public sector. However, as the guidance sets out there may be a small number of cases where the scheme may be appropriate.

PAYE & RTI

Real time information (RTI) is a mechanism used by employers to notify HMRC of PAYE deductions each time the employee is paid.

See [Running payroll \(GOV.UK\)](#).

⁹ Treasury Direction, para. 3.2.

¹⁰ Treasury Direction, paras. 9.1-9.8.

¹¹ [Carluccio's Limited \(in administration\) \[2020\] EWHC 886 \(Ch\)](#). See commentary in David Reade QC and Daniel Northall, [Carluccio's: the High Court issues guidance on the relationship between furlough, contractual variation and the administration of insolvent companies](#), LinkedIn, 14 April 2020 (accessed 21 April 2020).

Whilst these judgements are for Local Authorities to make, the Government expects that these circumstances would be limited to where the employee:

1. Works in an area of the business where services are temporarily not required, and their salary is not covered by public funding
2. Cannot be redeployed elsewhere in the organisation to support the coronavirus response
3. Would otherwise be made redundant or laid off.¹²

The Cabinet Office has published [guidance](#) which says that contingent workers engaged by central government departments, including those working through umbrella and personal service companies, should continue to be paid 80% of their rate even if they are unable to work because of Covid-19.

The Department for Education has published [guidance for employers in the education sector](#). It says that where education providers receive part of their funding from public funds and part from private income, they can furlough employees whose pay, as a proportion of the total wage bill, reflects the proportion of their funding that is private. The guidance provides the following example:

If a provider's average monthly income is 40% from DSG [public funds] and 60% from other income, the provider could claim CJRS support for up to 60% of their paybill.

This would be done by furloughing staff whose usual salary / combined salaries come to no greater than 60% of the provider's total paybill.¹³

The Treasury Direction itself places no restrictions on the ability of public sector employers from furloughing employees.

Q6. What can employers claim?

The [Treasury Direction](#) says that employers can claim 80% of an employee's 'reference salary' up to £2,500 per month.¹⁴ In addition, employers can claim Employer National Insurance contributions (NICs) and auto-enrolment pension contributions that are payable on this reduced rate of pay.

The Government has published a number of [examples for how to calculate 80% of an employee's reference salary](#).

Under the Direction an employer can only reclaim 'qualifying costs'.¹⁵ Qualifying costs include earnings paid by an employer to its employee but only if:

- The employee is paid more than £2,500 per month; or
- The employee is paid 80% of their reference salary as defined under the Direction.¹⁶

¹² Local Government Association, [LGA workforce: coronavirus job retention scheme](#).

¹³ Department for Education, [Coronavirus \(COVID-19\): financial support for education, early years and children's social care](#), 22 April 2020.

¹⁴ Treasury Direction, para. 8.2.

¹⁵ Treasury Direction, para. 5(b).

¹⁶ Treasury Direction, para. 7.1.

The effect of this provision is that if an employer has paid an employee less than 80% of their reference salary they will not be able to claim those costs under the Scheme. As discussed in Question 33, the rules for determining what constitutes 'reference salary' are complicated, although they have been made clearer in the second Treasury Direction.

Jolyon Maugham QC, a barrister at Devereux Chambers, has argued that this provision is a "bear trap" for employers. He argues that if an employer miscalculated an employee's reference salary and paid them less than 80%, they would not be able to claim this under the Scheme. By contrast, if an employer chose to be safe and paid an employee £2,500, they would not be able to reclaim the full cost if 80% of their employee's reference salary was actually less than this amount.¹⁷

This rule also creates potential complications for employers who pay enhanced maternity pay or other family-related pay (see Question 20).

Q7. Do employers need to prove they cannot otherwise pay their employees?

In previous versions of the Government guidance there was uncertainty over whether employers could only furlough workers if they would otherwise have to make them redundant.

The [Treasury Direction](#) makes it clear that this is not a requirement. An employer can furlough workers provided "the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease."¹⁸

The [guidance for employers](#) also says that "all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus."

Q8. When will the Scheme come into effect?

The new [online portal](#) for making claims went live on 20 April 2020.

The current [Treasury Direction](#) says Scheme will cover the period from 1 March to 30 June 2020.¹⁹

A further Treasury Direction will be needed to extend the Scheme until 30 October and formally set out the [new rules for flexible furloughing and employer contributions](#) (see further Question 41).

Q9. How will employers make a claim?

Claims can be made through the new online portal.

The [guidance on making claims](#) sets out the various pieces of information an employer will need to submit through the portal. It also sets out specific rules for employers who are making claims for more than 100 employees.

¹⁷ Jolyon Maugham QC, [Does the Job Retention Scheme apply to casual workers](#), *Waiting for Godot*, 18 April 2020 (accessed 20 April 2020).

¹⁸ Treasury Direction, para. 6.1(c).

¹⁹ Treasury Direction, para. 12.

4. Eligible employees

Q10. Which employees are covered by the Scheme?

The [Treasury Direction](#) says that employers can claim for all employees who were on their payroll on 19 March and notified to HMRC through an RTI submission before that date.

Meaning of 'employee'

The term 'employee' is defined expansively by reference to tax law.²⁰ It captures many workers who would not normally be 'employees' for the purposes of employment law.²¹ The [guidance on eligibility](#) explains:

As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE: office holders (including company directors), salaried members of Limited Liability Partnerships (LLPs), agency workers (including those employed by umbrella companies), and limb (b) workers.

However, the Scheme excludes those who are not paid through PAYE even if they would be found by an Employment Tribunal to be 'limb (b) workers' or even 'employees' for the purposes of employment law.²² David Cabrelli and Jessica D'alton, Professor of Labour Law and legal researcher at the University of Edinburgh, have argued that this will exclude many atypical workers who are falsely classified as self-employed for tax purposes.²³

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 \(CBP-8879\)](#).

Employees on a PAYE scheme on or before 19 March

The Treasury Direction provides that an employee will be covered if they were on a PAYE payroll on or before 19 March. However, there is an additional requirement that the employer must have notified HMRC of this through an RTI submission. The Government guidance reflects this.

This requirement could exclude employees who were hired in February or March if an RTI submission was not made until the end of March.

David Reade QC and Daniel Northall, barristers at Littleton chambers, explain:

However, making eligibility contingent on the existence of an RTI submission for the furloughed employee may have unintended consequences. For example, there may be no RTI submission for employees put onto payroll in late February 2020 if their pay was not processed for the first time until the March payroll. On the assumption the March payroll was processed at or around the end

²⁰ Treasury Direction, paras. 13(1)(e), 13.2 and 13.3.

²¹ [Employment status](#), Commons Library Briefing Paper CBP-8045, 28 March 2018.

²² See e.g. [Autoclenz Ltd v Belcher \[2011\] UKSC 41](#).

²³ David Cabrelli and Jessica D'alton, [Furlough and Common Law Rights and Remedies](#), UK Labour Law Blog, 8 June 2020 (accessed 11 June 2020).

of the month, the RTI submission is likely to fall after the cut-off of 19 March. Similarly, new directors whose payroll is processed annually may have an RTI submission falling after 19 March.²⁴

Q11. Does the Scheme cover foreign nationals?

Yes. The [guidance for employers](#) confirms that payments under the Scheme are not public funds and that claims can be made for employees on all categories of visa.

Further information can be found in the Library Briefing, [Coronavirus: Calls to ease No Recourse to Public Funds conditions \(CBP-8888\)](#).

Q12. Does the Scheme cover director-employees?

Yes. Directors who are salaried and paid via PAYE, including those who work through personal service companies (PSCs), fall within the expanded definition of 'employee'. The [guidance on eligibility](#) says that directors can be furloughed by the company. In most cases, this decision would be made by the company board. However, a company can only claim for a directors salary which does not include dividends.

The [Treasury Direction](#) provides that directors can carry out certain tasks such as filing accounts or making CJRS claims for company employees and this will not count as 'work' that is prohibited under the Scheme.²⁵

The Low Income Tax Reform Group (LITRG) has produced detailed [guidance on the CJRS](#) for those who work through PSCs.

Q13. Does the Scheme cover employees who have left their job?

The [guidance on eligibility](#) says that an employee who was on a payroll notified in an RTI submission on or before 28 February or 19 March but who stopped working after those dates can be re-hired and furloughed by their former employer. This includes employees who were dismissed, those whose fixed-term contracts expired and those who left voluntarily.

Employees do not have a right to be re-employed. This is a decision for the employer. Darren Newman, an employment law commentator, notes that 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.²⁶

Q14. Does the Scheme cover new starters?

The Scheme only covers employees who were on a PAYE payroll that was notified to HMRC by an RTI submission on or before 19 March.

As noted in Question 10, this would exclude those hired after this date or those who whose entry onto the payroll was not notified to HMRC.

²⁴ David Reade QC and Daniel Northall, [The Treasury Direction: Answers or more Questions?](#), LinkedIn, 16 April 2020 (accessed 20 April 2020).

²⁵ Treasury Direction, para. 6.6.

²⁶ Darren Newman, [New Starters and the Coronavirus Job Retention Scheme](#), A Range of Reasonable Responses, 6 April 2020 (accessed 20 April 2020).

Jim Harra, the Chief Executive of HMRC, explained in [evidence to the Treasury Committee](#) that the reason for the cut-off date was to prevent fraudulent claims:

I appreciate that this cut-off date will be hard for some people and some people will fall on the wrong side of that line. There are very good reasons, as you said, why we have that date. I appreciate what you say about the kinds of evidence that people could produce, but what we have to do here is get a scheme set up very rapidly; time really has been the enemy of perfection in this. Normally, if we were going to be asked to set up something of this scale, we would probably have taken a year or two to go through consultation and come up with something that really helped everyone.²⁷

The Treasury has reiterated that it will not be extending the Scheme to cover new starters. In response to a Parliamentary Question in May, Treasury Minister Jesse Norman said:

The Coronavirus Job Retention Scheme is open to any individual who was on an employer's PAYE payroll on or before 19 March 2020 and for whom HMRC received an RTI submission notifying payment in respect of that employee on or before the 19 March 2020. Processing claims for the Coronavirus Job Retention Scheme where HMRC did not have RTI data by 19 March would significantly slow down the system while risking substantial levels of fraud. It would also require greater resource for HMRC when they are already under significant pressure to deliver the system designed.

Those not eligible for the scheme may have access to other support which the Government is providing, including a package of temporary welfare measures and up to three months' mortgage payment holidays for those who may be in difficulty with mortgage payments.²⁸

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 CJRS. However, new starters will not normally be covered by the statutory protection from unfair dismissal and can 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.²⁹

²⁷ Treasury Committee, [Oral evidence: Economic impact of coronavirus](#), HC 271, 8 April 2020, Q92.

²⁸ [PQ4387 \[on Coronavirus Job Retention Scheme\]](#), 15 May 2020.

²⁹ Karen Baxter and Bethan Carney, [Coronavirus – FAQ for employers](#), Lewis Silkin LLP, 16 April 2020, p. 16 (accessed 18 April 2020).

5. 'Furloughed employee'

Q15. What is a 'furloughed employee'

Employers can only make a claim for employees who are designated as 'furloughed'. This is a new concept in UK employment law.

The [Treasury Direction](#) provides that an employee is furloughed if:

- They have been instructed by their employer to stop working;
- They have (or will) stop working for at least 3 weeks; and
- They were instructed to stop working because of circumstances arising as a result of coronavirus.³⁰

The Direction does not define the term 'work', although it does list certain activities that do not constitute work, including director's duties, work-related training and trustees fulfilling statutory duties.

The [guidance on eligibility](#) says that work is anything that provides services or generates revenue for an organisation. Union and non-union representatives can carry out their duties and it will not count as 'work'.

The Treasury Direction says that furloughed employees can undertake training to improve their work performance so long as it does not provide a service or generate revenue for their employer.³¹ It should be noted that if an employer asks a worker to undertake training this could count as 'work' for the purposes of the National Minimum Wage.³²

Q16. How do employers furlough employees?

Employers must furlough their employees in accordance with existing employment law. In most cases this will require a variation to the employment contract (see Question 25).

The [Treasury Direction](#) also sets some conditions on how an employer must furlough staff in order to be eligible to claim from the Scheme:

- Enter into a furlough agreement with the employee which sets out the main terms and conditions that will apply during furlough;
- Incorporate the agreement into the employee's contract; and
- If the agreement itself is not in writing, give the employee written confirmation of the agreement.³³

The first Treasury Direction had appeared to contradict Government guidance by requiring that the agreement itself be in writing. This apparent contradiction is now resolved as the second Treasury Direction, like the guidance, only requires written confirmation.

Acas has published a [template furlough agreement](#) that can be used.

The agreement or confirmation must be kept until 30 June 2025.

³⁰ Treasury Direction, para. 6.1.

³¹ Treasury Direction, para. 6.8.

³² Department for Business, Energy and Industrial Strategy (BEIS), [National Minimum Wage and National Living Wage: Calculating the minimum wage](#), April 2020.

³³ Treasury Direction, para. 6.7.

Q17. Does the Scheme cover employees working reduced hours?

At present the Scheme does not cover employees working reduced hours. As noted in Question 15, employers can only claim for employees who cease working for at least three weeks at a time.

The [guidance for employers](#) says that from 1 July employers will be allowed to ask furloughed employees to work reduced hours. Employers will be required to pay employees for hours worked. They will continue to be able to claim under the CJRS for any 'usual hours' the employees does not work (see Question 42).

Q18. Can employees on sick leave be furloughed?

The relationship between sick leave and furlough has given rise to a significant amount of uncertainty.

The [first Treasury Direction](#) said that an employees who were liable to receive statutory sick pay (SSP) could not be furloughed until their SSP period had come to an end. This appeared to exclude many workers from the Scheme, including those who were shielding. However, the [guidance on eligibility](#) said that employers could furlough employees who were shielding or on long-term sick leave.

Unite the Union took the first steps towards bringing a judicial review, seeking clarification of this apparent inconsistency.³⁴ The Treasury maintained that shielding employees could be furloughed.³⁵

The [second Treasury Direction](#) contains new wording. While it still says that employees who are due to be paid SSP cannot be furloughed until their SSP period ends, it now says that employers and employees can agree to end a period of SSP.³⁶

Under sick pay legislation employees who are shielding or self-isolating are "deemed incapable for work."³⁷ It is unclear whether it is open to employers and employees to simply agree otherwise.

In any case, it would appear to be the settled view of the Treasury and HMRC that employees can be taken off sick leave and furloughed and that grants will be paid to employers who make a claim to the Scheme in such circumstances.

Q19. Can employees on unpaid leave be furloughed?

The [Treasury Direction](#) provides that a claim cannot be made to the Scheme for any period where an employee was on unpaid leave. An employee cannot be furloughed until the period of leave has ended.³⁸

This wording is slightly different from the [first Treasury Direction](#) which only applied to unpaid leave that began before 28 February 2020.

³⁴ Cloisters News, [Coronavirus Job Retention Scheme and statutory sick pay: Robin Allen QC and Daniel Dyal retained by Unite the Union](#), Cloisters, 28 April 2020.

³⁵ [PO47253 \[on Coronavirus Job Retention Scheme\]](#), 21 May 2020.

³⁶ Treasury Direction, para. 6.3.

³⁷ Reg. 2(1)(c), [Statutory Sick Pay \(General\) Regulations 1982 \(SI 1982/894\)](#).

³⁸ Treasury Direction, para. 6.4.

Q20. Can employees on family-related leave be furloughed?

Employees can be furloughed while also on family-related leave. The right to take family-related leave (maternity leave, paternity leave etc.) is governed by existing employment legislation.

Employees on family related leave will be entitled to statutory payments, like statutory maternity pay. The [Treasury Direction](#) says that employers cannot claim these statutory payments through the CJRS.³⁹ Employers can [already reclaim most of the cost of statutory payments from HMRC](#).

The [guidance on eligibility](#) says that if an employee has a contractual entitlement to enhanced pay during family-related leave, the employer can furlough them and claim this pay from the CJRS.

However, it is not clear how this applies to employees who receive a reduced rate of enhanced pay (e.g. 50% of pay). The Treasury Direction says that employers can only claim from the CJRS if they continue to pay their furloughed employees at least 80% of their reference salary. Some commentators have questioned whether this rule would exclude employees on reduced rates of enhanced pay.⁴⁰

Q21. Can employees be furloughed by multiple employers?

Yes. The [guidance for employees](#) says that each employer is treated separately. Employees can be furloughed by more than one employer or furloughed by one while still working for another.

Q22. Can employees do volunteer work while on furlough?

Yes. The [Treasury Direction](#) provides that to be furloughed an employee only needs to cease working for their employer. The [guidance for employers](#) says that employers can help employees find volunteer work.

Q23. Can employees work for new employers while on furlough?

Yes. The [Treasury Direction](#) provides that to be furloughed an employee only needs to cease working for their employer. The [guidance for employers](#) says that employees can work for new employers if this is permitted by their employment contract. Any clauses prohibiting an employee from undertaking work for another employer (such as clauses that prohibit working for a competitor) would continue to apply.

Q24. Can employees come on and off furlough?

Yes. The [Treasury Direction](#) provides that an employee must stop working for their employer for 21 consecutive days. The [guidance for employers](#) says that employees can be furloughed multiple times provided that each period of furlough lasts for at least 3 weeks.

³⁹ Treasury Direction, paras. 8.6 to 8.7.

⁴⁰ Daniel Dyal, [Furlough Furore: the Treasury Direction and the Coronavirus Job Retention Scheme](#), Cloisters, 17 April 2020.

6. Selecting workers for furlough

Q25. Do employers have an automatic right to furlough workers?

The decision to furlough is one for the employer. However, as noted in Question 16, the [Treasury Direction](#) says that an employer must obtain the agreement of an employee before they can furlough them. It will likely not be difficult to obtain this agreement given that in many cases the alternative to furlough would be redundancy.

The Treasury Direction notes that the agreement will need to set out the main terms and conditions that apply during furlough and that it should be incorporated into the employment contract.

One of the issues that will need to be agreed is the pay the employee is entitled to during furlough. As a general matter, employees are entitled to be paid in full if they are ready, able and willing to work, even if there is no work for them to do.⁴¹ As such, in most cases the employer will need the employee to agree to reduced pay if they are only going to pay them 80% of their reference salary.

Alan Bogg and Michael Ford QC, Professors of Law at the University of Bristol, have argued that UK employment law is not well suited to contractual variations in times of crises.⁴²

Q26. Can employees demand to be furloughed?

No. The [Treasury Direction](#) provides that it is for employers to instruct employees to stop working and to make a claim under the Scheme.

Employees 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. Such employees would need to rely on existing employment law rights, like the law on discrimination, to challenge any selection decisions.

Q27. Can agency workers and zero-hours workers be furloughed?

Agency workers and those on zero-hours contracts who are on PAYE fall within the expanded definition of 'employee'. The [guidance on eligibility](#) says that agency workers should be furloughed by the agency or an umbrella company if they are engaged through one.

The fact that the decision to furlough rests with 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.

⁴¹ [Beveridge v KLM UK Ltd \[2000\] IRLR 765](#).

⁴² 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).

Alan Bogg and Michael Ford QC 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.⁴³

Jolyon Maugham QC has argued that complexities of calculating the reference salary for casual workers could encourage employers to stop providing work instead of furloughing them.⁴⁴

Stuart Brittenden, a barrister at Old Square Chambers, has suggested that it may be possible to use the implied term of trust and confidence (which is implied into all employment contracts) to argue that employers have an obligation to take all reasonable steps to furlough eligible employees.⁴⁵ However, David Cabrelli and Jessica D'alton have noted that it is unclear whether implied terms apply to 'limb (b) workers', the category that many zero-hours and agency workers fall into.⁴⁶

Q28. What about extremely vulnerable employees?

The [guidance on eligibility](#) says that clinically extremely vulnerable employees who are shielding can be furloughed. However, as discussed in Question X, it is unclear whether the [Treasury Direction](#) allows those who are entitled to SSP to be furloughed. Public Health England's [guidance on shielding](#) says that employees who are clinically extremely vulnerable should be furloughed and that SSP is available as a safety net if that is not possible.

Q29. How should employers select which employees to furlough?

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

The Treasury Direction and the Government guidance does not set out how an employer should select the employees that it furloughs.

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

Acas [guidance on furloughing](#) highlights that when deciding which employees to furlough employers must take care not to discriminate on the basis of protected characteristics.

⁴³ 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).

⁴⁴ Jolyon Maugham QC, [Does the Job Retention Scheme apply to casual workers](#), Waiting for Godot, 18 April 2020 (accessed 20 April 2020).

⁴⁵ Stuart Brittenden, [The implied term of trust and confidence & the Coronavirus Job Retention Scheme](#), Old Square Chambers, 14 April 2020 (accessed 20 April 2020).

⁴⁶ David Cabrelli and Jessica D'alton, [Furlough and Common Law Rights and Remedies](#), UK Labour Law Blog, 8 June 2020 (accessed 11 June 2020).

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.⁴⁷

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

Alan Bogg and Michael Ford QC 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.⁴⁸

Q30. Do employers have to consult employees?

Employers need an employee'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 employee's representatives.⁴⁹ The [guidance for employers](#) notes that as the alternative to furlough will often be redundancy, employers with sufficient numbers of staff may have to collectively consult.

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.⁵⁰ If no agreement is in place, negotiations can be triggered by a request from 2% of the workforce.⁵¹

⁴⁷ Daniel Dyal, [Covid-19: Furlough and job retention: Key issues for Employment Lawyers \(UPDATED 11.04.2020\)](#), Cloisters, 11 April 2020 (accessed 20 April 2020).

⁴⁸ 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).

⁴⁹ Section 188, [Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

⁵⁰ Reg. 20, [Information and Consultation of Employees Regulations 2004 \(SI 2004/3426\)](#).

⁵¹ Reg. 7, ICE Regulations 2004; Reg. 16, [Employment Rights \(Miscellaneous Amendments\) Regulations 2019 \(SI 2019/731\)](#).

Q31. Can employers make redundancies while the Scheme is in effect?

The CJRS does not alter existing employment law rights and obligations. As such, employers can dismiss employees provided this is in accordance with general employment law.

Employees with two years' continuous service are protected from unfair dismissal. Limb (b) workers and employees without two years' service can be dismissed in accordance with the terms of their contract.

A dismissal will be unfair unless: a) it was for a potentially fair reason listed in the legislation; and b) it was fair in the circumstances.⁵²

Redundancy is a potentially fair reason for dismissal. Redundancy can occur if there is a closure of a business, a closure of a workplace of a diminished need for employees to undertake work.⁵³

The key question in this context will be whether it is fair for an employer to dismiss employees as redundant when the CJRS is available to provide employers with financial support to retain their staff. The answer to this question will vary depending on the facts of the case.

This is covered in detail in the Library Insight, [Coronavirus: Protections from redundancy](#).

Where an employer is proposing to make more than 20 redundancies, they will need to undertake collective consultation (see Question 48).

⁵² Section 98, *Employment Rights Act 1996*.

⁵³ Section 139, *Employment Rights Act 1996*.

7. Meaning of 'reference salary'

Q32. What payments are covered by the Scheme?

The [Treasury Direction](#) says that employers can claim 80% of an employee's 'reference salary' up to £2,500 per month. As discussed, employers must be paying their employees at least this minimum amount in order to be eligible to make a claim. If an employer is paying an employee less than 80% of their reference salary they may not be able to claim for this under the Scheme.

Employers can also claim the Employer NICs and automatic enrolment pension contributions that are payable on the employee's reduced rate of pay, although this will change from 1 August (see Question 47).

The Direction sets out complex rules for calculating 'reference salary' (discussed below). These rules are different from the [rules used to calculate 'a week's pay'](#) in employment law.

Q33. How is reference salary calculated?

The rules in the [Treasury Direction](#) on calculating reference salary are extremely complex.⁵⁴

The [guidance on calculating claims](#) sets out how employers should calculate 80% of reference salary for different types of employees. It also contains an online calculator. The definition of what types of pay count as 'wages' can be found in the [guidance on preparing claims](#).

Fixed rate employees

The Direction distinguishes between those who are fixed rate employees and those who are not. Fixed rate employees will generally include all those who are paid an annual salary.

A fixed rate employee's reference salary is the 'regular' salary that they were paid in the last pay period before 19 March 2020.

'Regular' salary excludes any non-monetary benefits and discretionary payments such as bonuses.⁵⁵ However, non-discretionary payments, such as contractual overtime or commission, can be included.⁵⁶

Variable rate employees

The Treasury Direction provides that the reference salary of those who are not fixed rate employees (those whose pay varies) is the higher of:

- Their average monthly wages in the 2019-20 tax year; or
- Their wages in the same month in the previous tax year.

Again, only 'regular' payments, as defined above, can be included in this calculation.

The Government has published a range of [examples of how to calculate the reference salary of fixed rate and variable rate employees](#).

⁵⁴ Treasury Direction, paras. 7.1 to 7.19.

⁵⁵ Treasury Direction, paras. 7.3 to 7.5.

⁵⁶ Treasury Direction, para. 7.19.

Q34. What about employees returning from statutory leave?

The [Treasury Direction](#) contains specific rules for calculating reference salary when a fixed rate employee was on family-related leave during the last pay period before 19 March 2020. Rather than basing reference salary on what they were paid, it should be based on the salary they would have been entitled to be paid had they not been on leave.⁵⁷

The [guidance for preparing claims](#) explains:

For employees on fixed pay, claims for full or part time employees furloughed on return from family-related statutory leave should be calculated against their salary, before tax, not the pay they received whilst on family-related statutory leave. The same principles apply where the employee is returning from a period of unpaid statutory family-related leave.

The general rules for calculating reference salary applies to variable rate employees who are furloughed after a period of family-related leave.

Q35. Do employers have to top up the wages?

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

However, as noted in Question 25, 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. Unless the contract is varied, an employer would be in breach of contract by only paying 80%.

From 1 September 2020, employers will be required to contribute towards the wages of furloughed employees (see Question 47).

Q36. Will employee NICs and pension contributions have to be deducted?

The [guidance for employers](#) says the payments made to employees with grants issued under the Scheme will be subject to the usual deductions, including income tax, student loan repayments, employee National Insurance contributions and auto-enrolment pension contributions.

Q37. Do furloughed employees have to be paid the National Minimum Wage?

The [guidance on preparing claims](#) says that furloughed employees 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 an employee undertakes training then this will constitute work for the purposes of the 1998 Act and the employee must be paid the NLW / NMW. The implication is that the employer must top up the grant to the relevant minimum rate. Workers cannot contract out of their right to be paid the NLW / NMW.⁵⁸

⁵⁷ Treasury Direction, paras. 7.10 and 7.13.

⁵⁸ Section 49, [National Minimum Wage Act 1998](#).

8. Other employment issues

Q38. Does being furloughed affect maternity rights?

The Treasury Direction does not alter existing rules on maternity leave and statutory maternity pay (SMP). However, concerns had been expressed that 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 15th week before the expected week of childbirth will be eligible for SMP. Her normal weekly earnings must be above £120. 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 £151.20. Some women will have a contractual right to enhanced maternity pay.⁵⁹

'Normal weekly earnings' are calculated by reference to the eight weeks preceding the 'qualifying week' (the 15th week before the expected week of childbirth).⁶⁰ Groups including [Maternity Action](#) had expressed concern that a woman who is furloughed 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 she receives it.

On 23 April the Government made regulations to address this issue.⁶¹ These provide that when an employee's 'normal weekly earnings' are being calculated for the purposes of SMP (or other statutory payments) and the employee was furloughed at any point during the eight week reference period, their earnings should be calculated as if they were paid at their full rate of pay rather than at a reduced rate.

Employers can already reclaim most of the cost of SMP from the Government.⁶² The [guidance for employers](#) says that those who pay enhanced maternity pay can claim this as 'wages' under the Scheme.

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

Q39. 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

⁵⁹ See [Key Employment Rights](#), Commons Library Briefing Paper CBP-7245, 23 November 2018, (Section 9).

⁶⁰ Regs. 20-21, [Statutory Maternity Pay \(General\) Regulations 1986 \(SI 1986/1960\)](#).

⁶¹ Reg. 3, [Maternity Allowance, Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay \(Normal Weekly Earnings etc.\) \(Coronavirus\) \(Amendment\) Regulations 2020 \(SI 2020/450\)](#).

⁶² Section 167, [Social Security Contributions and Benefits Act 1992](#).

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.⁶³

The generally accepted position is that the contract of employment continues to apply during periods of furlough and the employment relationship is not terminated. David Cabrelli and Jessica D'alton have suggested that furlough could be characterised as a 'partial suspension' of the contract which could impact on certain common law rights.⁶⁴

Nonetheless it appears settled that being furloughed should not itself affect continuity of employment.

A separate question concerns the continuity of an employee whose employment was terminated after 28 February or 19 March but who was then re-employed to be furloughed.

Under the 'temporary cessation of work' rule, continuity of employment can be preserved where an employee is made redundant following a reduction in the amount of work but is later re-hired.⁶⁵ 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.⁶⁶

Q40. Does being furloughed affect annual leave?

The EU's [Working Time Directive \(Directive 2003/88/EC\)](#) sets out a right for all workers to 4 weeks annual leave. In the UK, this is implemented by the [Working Time Regulations 1998](#). This sets out a right to 4 weeks annual leave as well as a right to an additional 1.6 weeks annual leave.

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.

In the context of the CJRS, three key questions that have arisen:

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

Taking annual leave during furlough

The Government [guidance on annual leave during Covid-19](#) says that workers can continue to request to take annual leave while on furlough. It also says that an employee being on annual leave will not break the three week minimum furlough period.

No commentator appears to be contesting this position.

⁶³ Section 212, *Employment Rights Act 1996*.

⁶⁴ David Cabrelli and Jessica D'alton, [Furlough and Common Law Rights and Remedies](#), UK Labour Law Blog, 8 June 2020 (accessed 11 June 2020).

⁶⁵ See e.g. [Fitzgerald v Hall Russell & Co Ltd \[1970\] A.C. 984](#).

⁶⁶ 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).

Requiring workers to take annual leave during furlough?

A more difficult question is whether employers can require workers to take annual leave while they are on furlough.

Under the WTR, employers can require workers to take annual leave on particular days, either by notice or through the contract. For example, many workers will be required by their employment contract to use eight days of their annual leave on bank holidays.⁶⁷

David Reade QC and Daniel Northall, barristers at Littleton chambers, note that if employers can require workers to take annual leave during furlough this could lead to difficult outcomes:

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.⁶⁸

The [Government guidance](#) says that employers can require workers to take annual leave during furlough, although it notes that employers should consider whether workers could enjoy a proper period of rest and relaxation.

CJEU case law 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.⁶⁹

Alan Bogg and Michael Ford QC have argued that as a matter of EU law workers cannot be required to take annual leave during furlough as, in the current circumstances, furlough is more akin to 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.⁷⁰

⁶⁷ 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.

⁶⁸ David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020).

⁶⁹ [Stringer and ors v HMRC \(C-520/06\) \[2009\] ICR 932](#).

⁷⁰ 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).

In the *Transocean* case the UK Supreme Court held that workers could be required to take annual leave during periods when they would not have been working.⁷¹ However, Declan O'Dempsey, a barrister at Cloisters, argues that this case was not concerned with the nature of the leave:

The qualitative nature of the leave in *Transocean* was perhaps not significant because that was not a case in which a serious argument that the essence of the right was being undermined could have been mounted. However in cases where there are legal, health, and practical restrictions on what a worker foreseeably can and cannot do during their leave which mean that they will not be able to enjoy a period of rest, relaxation and leisure, a strong argument can be made that the *Transocean* analysis cannot be regarded as the ultimate word.⁷²

The Government guidance is, ultimately, just guidance. The question of whether an employer can legally require a worker to take leave while on furlough will need to be determined on the facts of each case.

Rate of pay during annual leave

Under the WTR, holiday pay is paid at the rate of 'a week's pay'. This is calculated using a 52-week reference period.⁷³

The [Government guidance on annual leave](#) says that workers who take annual leave during furlough must be paid in accordance with the WTR. This means that employers will need to top up the CJRS grant for 80% of reference salary to the rate required under the WTR.

However, under EU law a worker must be paid their 'normal remuneration' for four weeks of annual leave. If a worker took annual leave after being furloughed and on reduced pay for some time, this could affect the 'week's pay' calculation. In such circumstances, it is not clear whether this would be compatible with the EU definition of 'normal remuneration'.

Reade and Northall have previously argued 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.⁷⁴

⁷¹ [Russell v Transocean International Resources Ltd](#) [2011] UKSC 57.

⁷² Declan O'Dempsey, [Guidance on making staff take holiday during the Coronavirus outbreak](#), Cloisters, 19 May 2020 (accessed 15 June 2020).

⁷³ BEIS, [Holiday Pay: Guidance on calculating holiday pay for workers without fixed hours or pay](#), April 2020.

⁷⁴ David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020).

9. Furlough from 1 July 2020

Q41. What changes will come into effect from July?

The Government has [announced a number of changes to the CJRS](#) that will take effect from 1 July 2020. Most of the Government guidance has been updated to include information on these changes. However, a further Treasury Direction will be needed to amend the official rules.

The key changes that will come into effect include:

- From 1 July employers will be able to flexibly furlough employees;
- From 1 August the grant will no longer cover employer National Insurance and auto-enrolment pension contributions;
- From 1 September the grant will only cover 70% of reference salary and employers must top up the extra 10%; and
- From 1 October the grant will only cover 60% of reference salary and employers must top the extra 20%.

To date, the Government has not proposed to extend the Scheme beyond 31 October 2020.

Q42. What is flexible furlough?

As noted in Question 16, under the current rules employees must be furloughed for a minimum of 3 weeks and cannot undertake any work for their employer while on furlough.

The [guidance for employers](#) explains that under the flexible furlough system employers will be allowed to bring employees back for any amount of time and on any work pattern while still claiming under the Scheme for any usual hours they do not work. It is also open to employers to keep employees fully furloughed.

Q43. Which employees can be flexibly furloughed?

The [guidance for employers](#) says that from 1 July employers will only be able to furlough an employee they have already successfully claimed a grant for. This means that the employee must have been furloughed for at least one full three week period prior to 1 July. The last date by which an employee would need to have been furloughed was 10 June.

The Government has announced that [parents returning from family-related leave after 10 June will be exempted from this rule](#), as long as their employer has previously made use of the CJRS.

The guidance for employers also says that if an employee who has already been furloughed for three weeks at least once is placed on furlough again before 1 July, they must be furloughed for the full three weeks, even if this runs into July.

Finally, the guidance for employers says that the total number of employees furloughed in one claim period after 1 July cannot exceed the maximum number of employees furloughed in a single claim period before 30 June. For example, if an employer had previously made two claims for 40 and 10 employees respectively, the maximum number of employees they can furlough in one claim period after 1 July is 40.

Q44. How do employers flexibly furlough an employee?

As noted in Question 16, in order to furlough employees an employer must enter into a furlough agreement. If the agreement itself is not in writing the employer must give the employee written confirmation.

The [guidance for employers](#) says that employers wishing to flexibly furlough employees will need to enter into a “new written agreement.” It is unclear whether the agreement itself will need to be in writing or whether, as per the current rules, it only needs to be notified in writing.

Q45. How do employers make flexible furlough claims?

There are three main steps employers will need to take when making a flexible furlough claim:

- 1 Decide a claim period;
- 2 Calculate an employee’s worked hours and furloughed hours; and
- 3 Calculate the employee’s reference salary for furloughed hours.

Claim period

The [guidance on preparing claims](#) sets out new rules for claim periods. Employers will need to determine the length of their claim period (the number of days they are claiming a grant for). Claim periods can be a minimum of seven days and a maximum of one month. The guidance says that employers should choose a period that matches their payroll.

The guidance says that employers can make a claim before, during or after running payroll and that claims can be made up to 14 days before the end of a claim period. Claims should not be made until employers know exactly how many hours a flexibly furloughed employee will work.

Claim periods cannot run over into a new month. If an employer wishes to claim for a period from 27 July to 9 August, there will need to be two claim periods: 27 July to 31 July and 1 August to 9 August. In such cases, a claim period can be shorter than the minimum seven days.

Calculating worked hours and furloughed hours

If an employee is flexibly furloughed, employers will need to calculate how many hours they worked and how many they were furloughed. This is done by reference to an employee’s ‘usual hours’.

The method of calculating ‘usual hours’ is set out in the [guidance for preparing claims](#).

For employees with fixed hours (hours set out in the contract) the starting point is the number of hours they were contracted to work in the last pay period before 19 March 2020.

For employees whose hours vary, the starting point is the higher of:

- The average hours worked in the 2019-20 tax year; or
- The number of hours worked in the same calendar period in the 2019-20 tax year.

This number must then be divided by the number of calendar days in the 'repeating work pattern' (usually seven days) and multiplied by the number of calendar days in the claim period. This number, rounded up to the next whole number, is the employee's 'usual hours'.

Once 'usual hours' have been calculated an employer simply deducts the number of hours worked in the claim period to arrive at the number of furloughed hours.

The Government has published a range of [short examples](#) and [one detailed worked example](#) of how to undertake this calculation.

David Whincup, a lawyer at Squire Patton Boggs, has argued that this method is excessively complicated and leads to anomalous results.⁷⁵

Calculate the employee's reference salary

Once an employer has calculated worked hours and furloughed hours they must work out 80% of the employee's reference salary. This is done in using the existing rules (see Question 33).

An employer must then multiply this figure with the number of furloughed hours divided by the employee's usual hours. This gives the figure the employer can claim from HMRC.

Again, the Government's [worked examples](#) shows how this is done.

Q46. How will flexibly furloughed workers be paid?

Employees must be paid in accordance with their employment contract, as amended by any new flexible furlough agreement.

In most cases, employees will be entitled to full pay for hours worked. As at present, the question of whether an employer is required to top up the CJRS grant to full pay for furloughed hours will depend on what is agreed in the furlough agreement.

Q47. What financial contributions will employers have to make?

From 1 August 2020, employers will be required to contribute towards the costs of furloughed employees. The [guidance on changes to the Scheme](#) sets out the contributions employers will be required to make.

In July, no employer contribution will be required.

From 1 August, the CJRS grant will still cover 80% of reference salary but it will no longer cover employer NICs and pension contributions. These costs will need to be covered by employers.

From 1 September, the CJRS grant will only cover 70% of the reference salary of furloughed employees (up to £2,187.50 per month). Employers will need to top up the employee's wages to at least 80%.

From 1 October, the CJRS grant will only cover 60% of the reference salary of furloughed employees (up to £1,875 per month). Employers will need to top up the employee's wages to at least 80%.

⁷⁵ David Whincup, [Major miscalculation in guidance to flexible furlough pay scheme \(UK\)](#), Employment Law Worldview, 15 June 2020 (accessed 16 June 2020).

Q48. What will happen when the Scheme ends?

The Scheme is set to end on 31 October 2020. The Government has not given any indication that there will be an extension beyond this date.

Employers will need to consider whether they can retain some or all of their employees after the Scheme ends. Some employers will need to consider whether they can shoulder the employer contributions that will take effect and steadily increase from 1 August 2020.

In some circumstances, employers will need to make redundancies.

Collective redundancy consultation

The [guidance on making claims](#) acknowledges that once the Scheme has ended employers will need to decide between retaining staff and making redundancies.

If an employer believes that it cannot retain staff once the Scheme ends and is considering making redundancies, the obligation to undertake collective consultations may apply. The obligation applies when an employer is proposing to dismiss 20 or more employees within a period of 90 days.⁷⁶

Employers proposing to make between 20 and 99 redundancies must begin consulting 30 days before the first dismissal. Employers proposing to make 100 or more redundancies must begin consulting 45 days before the first dismissal. An employer must also notify the Department of Business, Energy and Industrial Strategy. The consultation process can be shorter if employers have a “special circumstances” defence.

Acas has detailed guidance on [handling large-scale redundancies](#).

The term ‘propose’ does require a degree of intention, although Tribunals have found employers deciding between two alternative courses of action to be ‘proposing to dismiss’.⁷⁷

The Government’s decision on 17 April to extend the Scheme beyond 31 May came after concerns were expressed by a number of large businesses that they would have to begin a collective consultation process (17 April was 45 days from 31 May).⁷⁸

Further detail can be found in the Library Insight, [Coronavirus: Protections from redundancy](#).

⁷⁶ Section 188, *Trade Union and Labour Relations (Consolidation) Act 1992*.

⁷⁷ [Scotch Premier Meat Ltd v Burns \[2000\] IRLR 639](#).

⁷⁸ [“Coronavirus: Airport handlers warn ministers of 10,000 jobs axe ‘within hours’”](#), *Sky News* [online] 17 April 2020 (accessed 28 April 2020).

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