

Strictly Private and Legally Privileged

Flexible Furlough Scheme - Guidance Note and Key Dates

The guidance provided in this note is based on information available as at 9am on 1 July 2020 and should be read alongside the latest government guidance and Treasury Directions ("Third Direction") dated 25 June 2020.

The guidance given will be subject to change as the Directions given by government on the Covid-19 situation continue to develop. You should therefore ensure that you keep up to date with latest advice from the government. For information on the Coronavirus Job Retention Scheme generally, please see our separate Guidance Note.

This Guidance Note is of a general nature and is not a substitute for professional advice. The information given is based on government guidance and applying general employment law principles. The government guidance is not binding and can be amended or changed at any time. No responsibility will be accepted for the consequences of any action taken or refrained from as a result of the information given in this note.

Q1: What is the Flexible Furlough scheme?

The Flexible Furlough scheme ("FFS") is a modification of the original Coronavirus Job Retention Scheme ("CJRS") which means the majority of the terms and conditions which apply in the CJRS are the same. However, from 1 July, employers are able to bring employees back to work for a proportion of their usual hours and still be able to claim under the CJRS. This means furloughed employees should be paid as normal for any hours that they work for their employer, and their employer can claim under the FFS for a proportion of unworked hours.

Q2: Who is flexibly furloughed?

Under the Third Direction, all employees are defined as "flexibly-furloughed" regardless of whether they are carrying out no work (i.e. fully furloughed) or working some hours (i.e. partly working, partly furloughed).

Q3: Which employers will be able to claim under the scheme?

Employers are eligible to claim for furloughed employees if they have:

- Furloughed that employee for at least 3 consecutive weeks between 1 March and 30 June 2020 and their claim for that employee was made in accordance with the first two Directions of the CJRS
- A UK PAYE scheme started on or before 19 March 2020
- Enrolled for PAYE online

- Submitted a report under the Real Time Information ("RTI") reporting system for that employee on or before 19 March 2020
- A UK bank account

For more information as to whether your organisation is eligible, please click [here](#).

Q4: What is the maximum amount of employees we can claim for?

The number of employees that can be claimed for post 1 July cannot exceed the maximum number in any one claim made for furlough periods prior to 1 July. This 'cap' is described in the Third Direction as the "high watermark number". However, employees who are returners from family leave or military reservists are the exception to this and can be included when calculating the high watermark number.

Q5: What are the eligibility criteria for employees being placed on flexible furlough?

In order to be able to claim for employees under the FFS, the employee must have previously been furloughed for at least 3 consecutive weeks between 1 March and 30 June and the employer must have previously made a successful claim under the CJRS for that employee. Employees who are shielding or off sick on long-term sick leave cannot now be furloughed unless they have been on furlough for 3 weeks prior to 1 July. There is an exception to this rule where the employee is returning from maternity or other family related leave or is a military reservist, see Q12 below.

Q6: How do we flexi-furlough an employee and when do we need to do it by?

You will need to agree the new flexible furlough arrangement with the employee (or reach collective agreement with a trade union). You must:

- Confirm the flexible furlough agreement in writing (email is fine) including specifying the terms and conditions on which the employee will either do no work or not work their usual hours in full. This means you could agree the arrangement orally and then confirm it in writing to the employee. However, best practice is to ask your employees to consent/agree to the changes in writing and to keep a copy of the written consent/agreement for at least 5 years. This should include the hours they will work and the hours of furlough. We can provide you with a template furlough agreement letter.
- Keep records of how many hours your employees work and the number of hours they are furloughed (i.e. not working). Oddly, in this case you must keep your records for at least 6 years.
- As with furlough generally, keep records of the amount claimed and claim period for each employee, the claim reference number and the calculations used.

You must still comply with employment law i.e. you must not discriminate or treat employees unfairly when taking up the flexible furlough option. See Q10 below for more details.

The Third Direction states the flexi-furlough agreement must be made prior to the beginning of the furlough period that the CJRS claim relates to. As this suggests it is not possible to retrospectively enter into a flexi-furlough agreement. It is therefore important to have a flexi-furlough agreement in place before the employee does any work if you want to claim under the CJRS for any period in which the employee is going to carry out work. This does not preclude a subsequent variation of a flexi-work agreement, for example, the hours spent working are increased or reduced.

Q7: How many hours can staff on flexible furlough work for their employer?

Employees can work for any amount of time and any work pattern under the flexible work pattern, subject to their contractual terms and agreement from the employee, as above.

From the current guidance, it seems that employers and employees can vary the hours worked on a weekly basis.

In practice the way to go about this is to stipulate in the flexible working agreement that the hours/days might vary (which should allow employers to simply notify employees of any changes (in writing)). Our template furlough agreement includes such a provision. If you do not do so then it is likely that you will need to enter into a new flexible working agreement to deal with the change.

Q8: Can employees on flexible furlough work for another employer or do volunteer work for another employer/organisation?

Yes, provided:

- they do not generate revenue for; or
- provide services

to their employer or any linked/associated/connected organisation in doing so. Working for another employer may not be permitted under their contract of employment so consent may have to be given by their employer.

Q9: Can employers furlough staff who are currently working?

Yes, employees who are working full-time or on reduced hours can be placed on furlough provided that:

- The employee has been placed on flexible furlough for a period of 3 weeks prior to 30 June; and
- The number of employees that the employer will be claiming for does not exceed the number claimed for under any claim prior to 1 July (see Q4 above).

Q10: Can employers place some staff on flexible furlough, keep some on full furlough leave and bring some back full time?

Yes, but be mindful of your decision making as regards the employees in question. Consider whether it is possible for employees to return on a part-time basis because they are clinically vulnerable or have caring responsibilities. Employees who are

classified as clinically extremely vulnerable employees should remain on full-time furlough. Also consider whether this poses a risk to your organisation if this decision was one which could be regarded as unfair or discriminatory in any way.

Q11: Can employers continue to rotate employees on furlough?

It is likely they can continue to be rotated on and off furlough (provided that employees are eligible for furlough after 1 July) but the guidance does not confirm this. Subject to any further clarification, as there is no minimum furlough period after 1 July, this allows employers more flexibility to rotate employees on a weekly basis if they wish i.e. have them on "full-time" furlough for one and "flexi-furlough" for the other.

However, employers should once again be aware that the number of employees claimed for in a single claim period starting from 1 July cannot exceed the maximum number of employees claimed for under any claim ending by 30 June (subject to the exception for statutory family leave). Therefore, an employer which has rotated only some staff before 1 July will not be able to put all of its employees on flexible furlough in order to allow **all** of its staff to return to work on a part time basis.

Q12: Can employees who have returned from a period of statutory family friendly leave be furloughed?

Yes, parents on statutory family friendly leave who return to work can be furloughed even after 10 June (this was the deadline for furloughing an individual for the first time). However, there are rules about when you can make a claim for employees who have returned from maternity leave early so you should take specific legal advice on this before any action is taken.

Statutory family friendly leave includes: maternity, paternity, adoption, shared parental and parental bereavement leave, but not any non-statutory leave that the employer may provide in addition.

Military reservists returning to work after a period of mobilisation after 10 June can also be furloughed, even if the employer is furloughing them for the first time.

Q13: What happens with holiday during flexible furlough?

An employee's holiday entitlement will continue on the basis of their usual hours, not any reduced hours under the FFS. Accordingly, if the employee takes a period of holiday, they should be paid at their normal full rate of pay for holiday.

The guidance confirms that if an employee takes holiday during a period of flexible furlough, this should be treated as furloughed hours rather than working hours. This will allow employers to claim the HMRC on holiday, but they will still need to 'top up' any holiday pay to the employee's usual holiday rate. The guidance states that employees should not be placed on furlough simply because they are on holiday for that period.

From a practical point of view, employers should still encourage staff to take holiday during periods of furlough to avoid too many holiday requests towards the end of the

year or payments in lieu of holiday in the event of the employment being terminated, in particular the cost of any redundancies.

Where the remuneration of those on flexible furlough varies (e.g. because they have no normal working hours or their hourly rate varies) their holiday pay may be slightly reduced if they take a period of annual leave whilst on furlough. This is because employee's holiday pay is calculated by reference to their average remuneration, and so the part time working week will form part of the average remuneration calculation.

Q14: How should an employee's normal hours and pay be calculated for an employee on flexible furlough?

Full details and worked examples are available in new guidance setting out [steps to take prior to making a claim](#), but in summary:

- For salaried employees who are contracted to work a fixed number of hours, their normal hours will be calculated on the basis of their contracted hours for the last pay period ending on or before 19 March 2020.
- For an employee who works variable hours, this will be calculated on the higher of:
 - the average number of hours worked in the 2019/2020 tax year; or
 - the corresponding calendar period in the tax year 2019/2020.

When calculating these hours, employers should include any hours leave for which the employee was paid their full contracted rate (such as holiday) and any non-discretionary overtime.

The Third Direction sets out how employers calculate the amounts that they can claim under the CJRS for those on flexible furlough. However the calculations are very complicated and depend on whether the employee has a fixed or variable rate of pay. If an employee is fully furloughed for the entire CJRS claim period, then the calculations are less complicated. Please take specific advice and review the guidance to see which calculation applies to your furlough arrangements.

Q15: What is the minimum claim period?

Flexible furlough agreements can last any amount of time (up to the end of October) but the period that an employer can claim for must be for a minimum claim period of 7 calendar days. The exception to this is if the employer is claiming for the first or last few days of the calendar month, and has already claimed for the period ending immediately before it (described as 'orphan periods' in the Third Direction). Orphan periods must amount to no more than six consecutive days at the start or end of a calendar month. There is another exception for making claims for returning employees (i.e. military reservist or family leave returners), please take specific advice if this exception applies.

Employers cannot submit claims which overlap calendar months, a CJRS period is a period that begins and ends in the same CJRS calendar month. If the proposed period

of furlough starts in one month, and ends in the next, then the employer must submit two claims.

Q16: How will placing an employee on flexible furlough affect an employer's ability to make staff redundant?

HMRC guidance for employees continues to state that an employer can still make an employee redundant whilst the employee is on furlough or afterwards. However the Third Direction states that "Integral to the purpose of CJRS is that amounts paid to an employer pursuant to a CJRS claim are used by the employer to *continue the employment* of employees in respect of whom the CJRS claim is made..." (emphasis added).

It is unclear whether this wording suggests that employers are prevented from claiming under the CJRS whilst an employee is on notice or would affect an employer carrying out a redundancy consultation process during furlough. This is an area of uncertainty and concern, but given earlier guidance information which suggests that employers can make claims even if an employee is made redundant or on notice, we believe this is unlikely to be HMRC's intention. Given that employers are in any event required to pay employee's full pay during the notice period, if they were unable to claim the rebate it could well mean that many businesses would be insolvent leaving the government to pick up the redundancy costs as well as the cost of any statutory notice period not worked.

As one of the purposes of redundancy consultations is to focus on ways that an employer can avoid redundancies, we do not believe this wording is intended to preclude employers from consulting with employees whilst they are on furlough. We are also mindful of the fact that one of the 'integral' objectives of the CJRS was to help employers whose operations have been severely affected by COVID-19 to survive. The rebate assists businesses to survive, which in turn, assists in the preservation of jobs.

There has been a flurry of media reports about this concern since the Direction was published, but the general consensus on this, including enquiries of HMRC, is the same as ours.

However, employers should be aware that given the objective is to keep individuals employed, it is clear that the CJRS cannot be used for a PILON payment for any employee who is on notice, whatever the reason for termination.

While against this background the risk of a clawback by HMRC may be low, this is an area upon which there may be subsequent clarification from the government. Therefore, any employer who is concerned should check what the current position is before embarking on redundancy exercises.

Q17: Has the claims process changed?

The majority of the claims process has not changed but there are some significant changes, as follows:

- Claim periods must start and end within the same calendar month and must be a minimum of 7 days, unless they relate to the days at the start or end of a month.
- Claims up until 30 June must be made by 31 July. Where an employee's furlough continues into July, the employer will need to make a claim up until 30 June and a new claim from 1 July.
- When claiming for employees who are on flexible furlough, employers should only submit their claims when they are sure of the exact number of hours worked during the claim period.
- New guidance has been published setting out the steps to take before calculating CJRS payments, which is available [here](#).

Q18: What are the problems?

Other than the uncertainties listed above, flexible furlough poses the following administrative issues:

- HMRC guidance (available [here](#)) states employers can only make one claim for any period which means they must include all furloughed or flexibly furloughed employees in one claim (even if employees were put on furlough at different times within the period or are paid at different times). This is likely to be administratively difficult to manage.
- The same guidance also states that when claiming for employees who are flexibly furloughed, employers should not claim until they are sure of the exact number of hours the employee will have worked during the claim period. This is likely to make it more difficult to submit their claim and receive funds before payroll.
- The calculation for claims under the FFS are complicated.

Key dates on the wind-down of the CJRS	
10 June	Final date for furloughing an employee for the first time
1 July	CJRS only available to employers who have previously made a claim. Start of flexible furlough option.
31 July	Deadline for making claims for furlough periods prior to 30 June.
1 August	Employer contributions begin. Employers will be expected to cover pension contributions and NICs for unworked hours.
1 September	Employer contributions increase to 10% of unworked hours up to a maximum of £312.50.

16 September	Deadline for starting collective consultations for redundancies affecting 100+ employees on 31 October.
1 October	Deadline for starting collective consultation for redundancies of between 20 - 99 employees on 31 October. Employer contributions increase to 20% on unworked hours up to a maximum of £625.
31 October	Furlough scheme ends.