

Update: 9/7/2020

## COVID-19: Flexible Furloughing

### Summary of the changes to the Scheme from July

- Furloughed employees can work part time from 1 July and still be classed as on furlough for the rest of their normal working hours.
- Only employees who a successful claim has been made for a minimum three-week furlough period between 1 March 2020 and 30 June can be placed on furlough from 1 July.
- Claims for the period ending on 30 June must be made by 31 July 2020.
- Employers can claim from the Job Retention Scheme for a portion of wages for the employee's furloughed hours.
- There is no minimum furlough period, but there is a minimum claim period of one week.
- There is a maximum limit on the number of employees who can be claimed for in any claim period.
- Starting in August, employers will need to contribute to the wage costs of furloughed workers.

### The background to flexible furlough

Flexible furlough is a new style of furlough under the Job Retention Scheme. It replaces the scheme that was put in place in March 2020 as part of the Government's response to the coronavirus and provides financial assistance for employers who incur costs as a result of the pandemic.

The Scheme will run until the end of October 2020. From 1 July 2020, new rules will apply which are aimed at both winding the scheme down while assisting employers to implement a combination of furlough and work. The key difference between the original scheme and the flexible scheme is that, during "full" furlough, an employee is not permitted to do any work for the employer. During flexible furlough, workers are permitted to undertake part-time work while still being on furlough for the remainder of their normal working hours. Employers will pay employees in full for the hours worked and can make a claim to the scheme for capped wages in respect of the furloughed hours.

The Government published guidance flexible furlough on 12 June 2020. A third Treasury direction is anticipated which will provide the legal structure to the scheme. The first and second Treasury directions apply to the full furlough scheme.

It is hoped that previous difficulties caused by anomalies between the guidance and the first direction (which caused the need for the second, clarifying, direction) will not be repeated. This guide has been created from the existing Government guidance but may be subject to adjustment consequent to the release of the third direction.

### Employers who can use the scheme

Employers must have a PAYE scheme which was registered on HMRC's real time information system on or before 19 March 2020. In addition, employers must have made a qualifying claim to the Scheme on or before 31 July 2020. A qualifying claim is a claim made in accordance with the original Treasury directions in respect of an employee who ceased all work for the employer for a minimum of 21 calendar days on or before 10 June 2020.

The third direction includes a new statement as to the purpose of the Scheme. It says: "Integral to the purpose of CJRS is that the 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 whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission".

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This is interesting for two reasons. First, the reference to continuing employees' employment. This could be read as excluding from the Scheme any claims in relation to payment made to an employee during their notice period while on furlough. However, there is no reference in the direction to the Scheme being aimed at avoiding redundancies and the Government guidance still states that employees can be made redundant while on furlough. Clarification may be forthcoming in this regard. Until this clarification comes, it appears that employers may continue to make employees redundant during furlough, where the need arises and proper procedures are carried out.

The other point to raise about the purpose relates to the wording "measures taken to prevent or limit its further transmission". This is likely aimed at ensuring alignment with the existing guidance that employees who are shielding may be furloughed where there may be work available for them. While the Government has said they do not expect many public sector employers to furlough employees, there is no complete bar on this. The guidance says "In a small number of cases, for example where organisations are not primarily funded by the Government and whose staff cannot be redeployed to assist with the coronavirus response, the Scheme may be appropriate for some staff."

## **Employees who qualify for flexible furlough**

The flexible furlough scheme is only open to employees who have previously been furloughed at some point since the start of the scheme; the employer must have previously successfully made a claim under the scheme for them. This means that employees who are to be placed on flexible furlough must have qualified for furlough under the original scheme including having been on the employer's payroll on or before 19 March 2020 and having been notified to HMRC on a Real Time Information submission on or before 19 March 2020. The last date, therefore, that an employee could have started furlough for the first time in order to qualify for flexible furlough was 10 June 2020. This would allow for the minimum three week furlough period to have been fulfilled by 30 June which is the date that the original scheme closed to new entrants.

It is therefore not permitted to put an employee on furlough from 1 July if they had not previously completed a period of furlough for a minimum of 3 weeks between 1 March 2020 and 30 June 2020 and if the employer had not made a successful claim for them by 31 July.

There are some exceptions to this rule. The following individuals can be placed on furlough (including flexible furlough) for the first time after 10 June 2020:

- those who started maternity, paternity, adoption, shared parental and parental bereavement leave before 10 June 2020 and return after that date
- those whose active period of service as a military reservist started before 10 June and ended after 10 that date
- those who were subject to a TUPE transfer after 10 June may be furloughed by the new employer for the first time, provided they were furloughed by the previous employer for the minimum 3-week period between 1 March and 30 June.

In relation to both the first and second point above, the employee must have been made a payment of earnings by the employer in the tax year 2019-20 which is shown in a return under Schedule A1 of the PAYE Regulations, that is made on or before a day that is a relevant CJRS day, and the employer must not have reported a cessation of their employment.

An employee does not need to be on a period of full furlough immediately prior to agreeing flexible furlough. This may be the case in many situations; however, it is also possible to seek to agree flexible furlough with an employee who was on furlough for the month of April, then returned to work throughout May, June and July. This employee would qualify for flexible furlough even though they have been back in work for some months.

## Using part-time working arrangements

The flexible furlough scheme allows employers to agree part-time working arrangements with employees where they have work to provide them, while recording the employee as furloughed for the remainder of their normal working hours. Guidance confirms that any part-time arrangement, including any amount of time or shift pattern, can be agreed; employers have utmost flexibility to assess what will work for them.

Clearly, flexible furlough will not be an option for employers who have no work to provide to their staff. Such employers may choose to keep their employees on full furlough for as long as they deem necessary subject to the closure of the scheme in its entirety at the end of October 2020.

Part-time working arrangements may be useful for employers who are able to re-open their business for all employees but on shorter hours than previously. It may also be useful where previous working hours are maintained but there is not enough work for all employees, but the employer wishes to offer work to everyone meaning that each employee can return on reduced hours.

## Putting flexible furlough into practice

The first step for employers is to assess whether flexible furlough will work for them. Current operating restrictions including social distancing may dictate when businesses can re-open, and demand for work will also dictate how much of the workforce needs to return, and for how many hours.

The availability of employees will also be a factor; some may be unable to return from furlough due to childcare issues, shielding status or sickness absence, for example.

Other employees may have valid reservations about returning to work, even on a part-time basis, based on their circumstances, although there is no authorised medical reason, or practical issues such as childcare. This may be the case with employees who fall into the vulnerable category which includes pregnant employees, those who are over 70. If it is not possible for such employees to work from home, they may prefer to remain on full furlough.

Once a business determines they wish to use flexible furlough, they need to assess how many employees they wish to return and the specifics of the part-time arrangement. The affected employees should then be notified of the intention to implement flexible furlough.

It may be helpful to discuss with employees in advance what arrangements may work well for them so that a suitable solution for both employer and employee is found. This is likely to be part of the discussion needed to seek to agree flexible furlough with each employee.

## Agreeing flexible furlough with employees

In line with the steps needed to put employees on furlough in the first place, employers will need to agree flexible furlough with employees. This will be the case whether the employee is on furlough and will return to part-time hours, and where the employee has been furloughed before, has returned to work on full-time hours and will now be furloughed again on a part-time basis.

Employers should consider whether they will need to undertake collective consultation when implementing flexible furlough. This is needed where it is proposed to dismiss employees where they do not agree to the amended terms. However, in the circumstances, it may be that there is no proposal to dismiss at the time that the amended terms are offered because it is anticipated that agreement will be reached. However, if agreement is not reached, it may then be the point at which the employer proposes to dismissal. However, where large numbers of employees are affected, it may be appropriate to undertake collective consultation in any case.

The requirement to undertake collective consultation also applied to the initial decision, when the scheme was announced, to implement furlough. However, because of the urgent need to implement furlough that was present at that time, employers may have been able to rely on the “special circumstances” defence meaning that collective consultation could not be carried out. It may not now be possible to use that defence given the less urgent need to implement flexible furlough, and the lead in time that is available.

The original furlough agreement is not likely to be suitable to cover a period of flexible furlough. The requirements of the initial agreement included an instruction to cease all work for the period of furlough which will obviously not be appropriate.

The third Treasury direction provides that for an employee to be flexibly furloughed:

- the employer and employee must have agreed (a collective agreement between the employer and a trade union will be sufficient) that the employee:
  - will do no work in relation to their employment
  - will not work for the full amount of the employee's usual hours in relation to their employment
- the agreement (including any collective agreement) must:
  - specify the main terms and conditions on which the employee will do no work in relation to their employment, or will not work for the full amount of the employee's usual hours in relation to their employment
  - be made before the beginning of the period to which the claim relates
  - be incorporated (expressly or impliedly) in the employee's contract
  - be made in writing, or confirmed in writing by the employer (which can be by electronic means such as email)
  - be retained by the employer until at least 30 June 2025.

The agreement may subsequently be varied to reflect any change to the part-time arrangement agreed during the period to which the claim relates.

The new flexible furlough agreement should detail the part-time arrangement that the employee will undertake.

The third Treasury direction states that agreement can either be agreed in writing, or confirmed in writing by the employer. The former would require a signature by the employee; the latter does not but will confirm a prior discussion with the employee where they have their agreement.

## **Dealing with employees who refuse to work part time**

If an employee refuses to work on a part-time basis under flexible furlough, the first step would be to explore the reasons for refusal. As mentioned above, the refusal may be based on concerns about coming back to work at all, rather than specifically because of the part-time element. Employees who are shielding (for as long as advice to shield continues) or who have childcare issues may not be in a position to come back to work at all for now.

Requiring an employee to return to work, even on a part-time basis, who cannot due to childcare reasons, may run the risk of an indirect sex discrimination claim on the basis that women are traditionally the primary care givers and so such a requirement would disproportionately affect them. Childcare issues are likely to be temporary so employers should attempt to find a resolution until such a time as the issue no longer exists; for example:

- extending homeworking
- implementing homeworking
- flexible hours to work around childcare issues, etc.

Those who refuse simply because they wish to return full-time instead of part-time may give rise to consideration for dismissal, where the employer does not have enough work to offer full-time hours, on the basis of a refusal to accept a change to terms and conditions. However, a proper procedure would be required to ensure a fair dismissal.

### **Minimum period of furlough**

There is no minimum period of furlough after 1 July. This means that there is no longer a requirement to have employees on furlough for a period of three weeks in order to make a claim to the Scheme. This will make furlough much more flexible, with employers able to meet unexpected periods of increased or decreased demand a lot quicker while still being covered by the Scheme.

However, any period of furlough that commenced before 30 June 2020 must be for a minimum three week period, even if this extends beyond 1 July. For example, an employee placed on furlough on 28 June must complete a three week minimum furlough period before they can be placed on flexible furlough. This is also, of course, subject to the employee having previously been furloughed for at least three weeks between 1 March and 30 June.

### **Maximum number of furloughed employees**

From July, a maximum limit to the number of employees to be furloughed in one claim period will apply. The maximum number that can be furloughed in any claim period cannot be higher than the maximum number that have been claimed for in any claim period ending on or before 30 June. The Government guidance gives the following as an example.

"An employer had previously submitted three claims between 1 March 2020 and 30 June, in which the total number of employees furloughed in each respective claim was 30, 20 and 50 employees. Then the maximum number of employees that employer could furlough in any single claim starting on or after 1 July would be 50."

### **Rotating employees on and off furlough**

Some employers may have chosen to implement a rotation system of furlough whereby employees were alternately furloughed and then required to work. Employers may continue to do this with flexible furlough; for example, the employee will work full-time for a period, followed by a period of part-time work, followed again by a period of full-time work and so on.

However, the maximum number of furloughed employees in a claim period cannot be more than the maximum in any claim period which ended 30 June 2020.

### **Working during flexible furlough**

Furlough, under the original rules, required that employees on furlough do not carry out any work for the employer. This is obviously one of the main changes to the rules in that employees may now carry out part-time work and be furloughed for the remainder of their normal working hours.

As with the original furlough arrangement, employees on furlough can undertake training during the hours they are recorded as being on furlough. This will not count as work for the purposes of calculating working hours. National Minimum Wage rates will apply for any training done during furlough.

However, the employee is still prohibited from doing any work for the employer during the hours that are recorded as furlough. The same restrictions apply in that no work can be done for organisations linked or associated to the employer either.

There is also nothing to stop the employee working for another employer during their furloughed hours, except for any contractual restrictions that apply.

## Annual leave and flexible furlough

Annual leave will continue to accrue as normal during flexible furlough, though employers may agree with employees to vary entitlement as part of the furlough agreement. This will commonly be seen in a reduction to the entitlement in excess of the statutory minimum of 5.6 weeks.

Government guidance states that if an employee is flexibly furloughed and takes annual leave, the hours of annual leave should be counted as furloughed hours and not working hours. This means that the employer may include these hours in their claim to the Scheme, but must top up pay to 100% because annual leave during furlough must be paid at normal pay.

Guidance also states that employees should not be placed on furlough for a period simply because they are on holiday for that period. If this rule were not in place, employers may arbitrarily place an employee who is about to go on annual leave on furlough in order to be able to recoup the permitted percentage of their wage costs through the scheme.

## Calculating an employee's usual working hours

Where flexible furlough is used, employers will need to input the usual working hours of the employee when making a claim, as well as the number of hours worked, and the number of hours recorded as furlough in that claim period.

Determining the usual hours is done in different ways depending on whether the employee is a fixed-hours employee or non-fixed hours employee.

### Fixed hours

The concept of “repeating work pattern” has been created for these purposes and is needed for the calculation.

The repeating shift pattern is the regular working pattern a contract requires an employee to undertake in a periodic cycle in the course of the employee's employment that specifies:

- the number of hours the employee must work over the course of the cycle before the next cycle begins
- the number of calendar days in the cycle, including non-working days.

Employers will need to look at the contractual position in place in the last salary period ending on or before 19 March 2020. Where the contract requires that an employee performs a certain number of hours per week, the repeating work pattern will be seven days. Because non-working days are included, it will still be seven days regardless of the fact that the employee may not be contracted to work every day.

Where the employee works fixed hours, you should:

- start with the hours your employee was contracted for at the end of the last pay period ending on or before 19 March 2020
- divide by the number of calendar days in the repeating work pattern, including non-working days
- multiply by the number of calendar days in the pay period (or partial pay period) you are claiming for
- round up or down if the result isn't a whole number.

If an employee with fixed hours was on annual leave, off work sick or on family-related statutory leave at any time during the last pay period ending on or before 19 March, the usual hours should be calculated as if the employee had not taken that leave.

The following examples are given in Government guidance.

*Example 1*

An employee is contracted to work for 37 hours in each week, across 5 working days. The employee is paid weekly. The employer looks to make a flexible furlough claim for the period between 1 July 2020 to 10 July 2020 (10 calendar days). There are two pay periods partially in this claim period:

- 29 June to 5 July
- 6 July to 12 July.

The employer calculates the usual hours for the days in each pay period that are in the employer's claim.

The employer is calculating on a pay period basis so they must round the nearest number of usual hours for each pay period up or down to the nearest whole number.

The employer first calculates the usual hours for the days they are claiming for in the pay period 29 June to 5 July as follows:

- start with 37 hours (the hours your employee was contracted for at the end of the last pay period ending on or before 19 March 2020)
- divide by 7 (the number of days in the repeating working pattern, including non-working days)
- multiply by 5 (the number of calendar days in the pay period (or partial pay period) the employer is claiming for - this is a partial pay period) = 26.43
- round up or down to the nearest whole number if the outcome isn't a whole number = 26.

The employer next calculates the usual hours for the days they are claiming for in the pay period 6 July to 12 July as follows:

- start with 37 hours (the hours your employee was contracted for at the end of the last pay period ending on or before 19 March 2020)
- divide by 7 (the number of days in the repeating working pattern, including non-working days)
- multiply by 5 (the number of calendar days in the pay period (or partial pay period) the employer is claiming for - this is a partial pay period) = 26.43
- round up or down to the nearest whole number if the outcome isn't a whole number = 26.

*Example 2*

An employee is contracted to work on a shift pattern of four consecutive 12-hour days and then have four days off. This working pattern repeats every 8 days. The employee is paid calendar monthly. The employer looks to make a flexible furlough claim for the period 1 July 2020 to 31 July 2020 (31 calendar days). The pay period and the claim period align.

The employer calculates the usual hours for the July pay period by following the steps above:

- start with 48 hours (the hours your employee was contracted for in their repeating working pattern at the end of the last pay period ending on or before 19 March 2020 - which in this example, is 12 hours multiplied by 4 days)

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- divide by 8 (the number of days in the repeating working pattern, including non-working days)
- multiply by 31 (the number of calendar days in the pay period (or partial pay period) the employer is claiming for) = 186
- the outcome of the third point is a whole number, so does not need to be rounded up to the next whole number.

## Non-fixed (variable) hours

The “usual hours” for an employee who works variable hours will be calculated based on the higher of either:

- the average number of hours worked in the tax year 2019 to 2020 (the averaging method), or
- the corresponding calendar period in the tax year 2019 to 2020 (the calendar period method).

When calculating the figure, employers should include:

- any hours of leave for which the employee was paid their full contracted rate (such as annual leave)
- any hours worked as “overtime”, but only if the pay for those hours was non-discretionary.

Payments for overtime worked are non-discretionary when you are contractually obliged to pay the employee at a set and defined rate for the overtime that they have worked.

If an employee works on a flexible work time (“flexi-leave”) arrangement, employers should not include hours that the employee worked but was not paid for because they accrued paid time off which they could take later. Hours that the employee worked and then took as paid time off, which they had accrued by working additional hours at some other time, are to be counted.

The calculation for variable hours workers, when using the averaging method above, is:

- start with the number of hours actually worked (or on paid annual leave or flexi-leave) in the tax year 2019 to 2020 before the employee was furloughed, or the end of the tax year if earlier
- divide by the number of calendar days the employee was employed by you in the tax year 2019 to 2020, up until the day before they were furloughed, or the end of the tax year if earlier
- multiply by the number of calendar days in the pay period (or partial pay period) you are claiming for
- round up or down if the result isn't a whole number.

None of the following should be included as calendar days:

- periods of statutory sick pay related leave
- periods of family-related statutory leave
- periods of reduced rate paid leave following a period of statutory sick pay-related leave
- periods of reduced rate paid leave following a period of family-related statutory leave.

The calculation for variable hours workers, when using the calendar period method above, is:

- identify the pay periods in the 2019 to 2020 tax year that correspond to at least one calendar day in the pay period (or partial pay period) you are claiming for
- if the pay period (or partial pay period) you are claiming for starts and ends on the same calendar days as the identified pay period in the tax year 2019 to 2020, use the number of hours they actually worked in that pay period

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- If the pay period (or partial pay period) you are claiming for does not start and end on the same calendar days as the identified pay periods in the tax year 2019 to 2020, you'll need to add together a proportion of the hours worked in each of the pay periods you've identified.

*Example:*

An employee is paid calendar monthly and has a calendar monthly pay period. The employer is looking to make a claim for the July 2020 pay period.

The employee works variable hours so the employer needs to work out the usual hours based on the higher of either:

- the average number of hours worked in the tax year 2019 to 2020, or
- the corresponding calendar period in the tax year 2019 to 2020.

The employer works out the usual hours based on the corresponding calendar period in the tax year 2019 to 2020. The employer would need to look at the hours worked in July 2019.

The employer will also need to work out the average number of hours worked in the tax year 2019 to 2020.

## Calculating an employee's furloughed hours

To calculate the number of furloughed hours in a claim period, the employer should subtract the number of hours the employee actually worked in the claim period from their usual working hours.

In addition, the following hours are taken as furloughed hours:

- annual leave
- leave taken on account of time worked under a flexible work-time arrangement (flexi-leave)
- family-related statutory leave
- reduced rate paid leave following a period of family-related statutory leave.

## Calculating reference salary of furloughed employees

For salaried employees' pay, employers should consider what the employee earned in the last pay period prior to 19 March 2020.

The situation for those with variable or irregular pay is different. If the employee has been employed (or engaged by an employment business) for a full 12 months prior to the claim, you can claim for the higher of either:

- the same month's earning from the previous year, or
- average monthly earnings from the 2019-20 tax year.

Pay will include:

- regular wages you pay to employees
- non-discretionary payments for hours worked, including overtime
- non-discretionary fees
- non-discretionary commission payments
- piece rate payments.

It does not include:

- payments made at the discretion of the employer or a client, where the employer or client was under no contractual obligation to pay, including:
  - any tips, including those distributed through troncs
  - discretionary bonuses
  - discretionary commission payments
- non-cash payments
- benefits in kind
- benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay.

## Determining the maximum cap on furlough pay

Employers can claim wage costs back from the Scheme to a maximum of £2500 per month. That figure relates to a whole month in which no work is done and will be subject to adjustment, ie reduction for employees who work according to a part-time arrangement from July 2020. This figure equates to £576.92 per week.

Daily maximum figures are also set which will assist employers whose claim period is not a week or a month. In this case, employers should multiply the daily maximum amount by the number of calendar days the employee is furloughed for in the claim. It should be borne in mind that, because the Scheme will provide reduced wage cover in September (70%) and October (60%), the figures given below represent the maximum that the employee will need to receive; the amount that can be recovered from the Scheme will be lower:

- March 2020: maximum £80.65 per day
- April 2020: maximum £83.34 per day
- May 2020: maximum £80.65 per day
- June 2020: maximum £83.34 per day
- July 2020: maximum £80.65 per day
- August 2020: maximum £80.65 per day
- September 2020: maximum £83.34 per day
- October 2020: maximum £80.65 per day.

## Calculating 80% of employee's usual wage

Furloughed employees must receive at least 80% of their wage. This applies for the entirety of the Scheme and is not affected by the reduction in the amount that the employer can recover from the Scheme from September. Even when the employer is only able to recover 70%, and subsequently 60%, of wages from the Scheme, the employee must still receive 80% of pay meaning the employer will need to contribute the rest.

For fixed salary employees, the following calculation applies:

- start with the wages payable to your employee in their last pay period on or before 19 March; if you're claiming for a full pay period, skip to the final point
- divide by the total number of days in the pay period
- multiply by the number of furlough days in the pay period
- multiply by 80%.

For variable salary employees, employers should calculate 80% of the higher of either:

- the average wages payable in the tax year 2019 to 2020 (the averaging method), or
- the wages earned in the corresponding calendar period in the tax year 2019 to 2020 (the calendar period method).

However, if the employee was not employed in the corresponding calendar period in the tax year 2019 to 2020, the averaging method to calculate 80% of wages must be used.

To perform a calculation under the averaging method, the following calculation applies:

- start with the amount of wages that were payable to the employee in the tax year up to the day before they were furloughed
- divide it by the number of days from the start of the tax year - including non-working days (up to the day before they were furloughed, or 5 April 2020, whichever is earlier)
- multiply by the number of furlough days in this pay period
- multiply by 80%.

To perform a calculation under the calendar period method, the following calculation applies:

- start with the amount they earned in the same period last year
- divide by the total number of days in this pay period, including non-working days.
- multiply by the number of furlough days in this pay period
- multiply by 80%.

If an employee started work on or after 6 April 2019, the days before their employment started should not be included in the calculation.

To work out 80% of an employee's average earnings for an employee who started working on or after 6 April 2019:

- start with the amount of wages that were payable to the employee in the tax year up to the day before they were furloughed
- divide it by the number of days they've been employed since the start of the tax year - including non-working days (up to the day before they were furloughed or 5 April 2020, whichever is earlier)
- multiply by the number of furlough days in this pay period
- multiply by 80%.

Every day, including non-working days, after the employee commenced employment is counted in making this calculation.

## Calculating minimum furlough pay

An employee's minimum furlough pay is the lesser of:

- 80% of their usual wage
- the maximum wage amount.

Where employees are flexibly furloughed, employers should:

- start with the lesser of:

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- 80% of their usual wages
- the maximum wage amount
- multiply by the employee's furloughed hours
- divide by the employee's usual hours.

The result is the minimum amount that the employee must be paid for the time they are recorded as being on furlough. Employers may choose to pay more than this, but are not required to.

## **Employer contributions to furlough pay**

In July, employers who have employees working on flexible furlough will need to pay the employee for all hours worked, together with employer National Insurance and pension contributions. The Scheme can still be used to cover 80% pay for furloughed hours to a maximum of £2500 per month, as well as National Insurance and pension contributions. However, the monthly cap will proportionately decrease to match the amount of time spent on furlough. Employers who have employees on full furlough in July will continue to be able to apply for 80% wage cost cover to a maximum of £2500. Claims for an individual employee on flexible furlough will, in reality, never reach the £2500 per month cap because that's the limit for a full month of no work.

From August, employers will have to contribute to the wage costs of workers who are on furlough. Employers can still recover 80% of wages to a maximum of £2500 per month. The contribution towards wage costs will come in the requirement to pay National Insurance and employer pension contributions for furloughed hours. Employers will have to pay employees for any hours worked, together with employer National Insurance and pension contributions for those hours.

In September, contribution to actual wages will begin. Furloughed employees must still receive 80% of their wages to a maximum of £2500 per month but this will be made up of 70% funding from the Scheme to a maximum of £2187.50 per month, and 10% to a maximum of £312.50 per month from employers. Employers will continue to pay employees for any hours worked, together with employer National Insurance and pension contributions.

In October, the Scheme will provide 60% of wage costs to a maximum of £1875 per month. Employers will have to make up the other 20% to a maximum of £625 per month, and cover all employer National Insurance and pension contributions.

The Scheme will close at the end of October.

Employers must remember that the national minimum wage applies to the working hours of the employee.

For periods ending on or before 31 August 2020, employers can claim a grant for the full amount of the minimum furlough pay.

For periods starting on or after 1 September, employers will need to calculate the grant amount as follows:

- start with the amount of minimum furlough pay
- divide by 80
- depending on which month you're claiming for, multiply by:
  - 70 for September
  - 60 for October.

## Preparing for the claim

Employers will need to do the following.

- Decide on the length of the claim period. Government guidance states: "You should match your claim period to the dates you process your payroll, if you can. You can only make one claim for any period so you must include all your furloughed or flexibly furloughed employees in one claim even if you pay them at different times. If you make more than one claim, your subsequent claim cannot overlap with any other claim that you make. Where employees have been furloughed or flexibly furloughed continuously (or both), the claim periods must follow on from each other with no gaps in between the dates."

Claims cannot straddle calendar months from July, so the claim periods must start and end within the same calendar month. Separate claims must be submitted where the pay period contains days which fall into more than one calendar month.

- Determine the employee's reference salary.
- Calculate 80% of the employee's wage, bearing in mind which elements may be included and which may not. These rules are the same as under the original furlough arrangement.
- Calculate the employee's usual working hours for the claim period, together with the number of hours the employee has worked/will work in that period, and the remaining number of hours, in the context of the usual hours, that they will not/did not work. Employers do not need to calculate usual and furloughed hours if the employee is fully furloughed, ie did no work for you during the claim period.
- Determine the applicable cap on furlough pay (this will differ depending on the month the pay relates to).
- Calculate the minimum furlough pay.
- Calculate other wage costs that can be claimed, ie employer National Insurance and contributions (recoverable from the Scheme until the end of July).

## Making a claim

Employers should continue to use HMRC's portal to make a claim for wages under the Job Retention Scheme.

Claims for all employees who are furloughed in that claim period must be made at the same time. For example, where employees are paid monthly and have been on full furlough since April, for example, employers may have been making a claim for their wages once a month. They may now have some employees who are on flexible furlough and they intend to make a claim once every week (the minimum claim period). The employer would have to claim for the fully furloughed employees at the same time as making the claim for the flexibly furloughed employees once a week because it is not possible to make multiple claims that cover the same claim period; one single claim must be made.

When submitting the claim, employers should access the portal and have the following information to hand:

- the company's PAYE reference number
- the amount of staff furloughed
- the National Insurance numbers, names and payroll/employee numbers of those being furloughed
- the company's self-assessment or corporation tax unique taxpayer reference or company registration number
- the start and end dates for the period of furlough being claimed
- the amount that is being claimed
- the company's contact details, bank account number and sort code
- hours the employee has worked or will work in the claim period, and the hours the employee would usually be expected to work in that period.

If employers have fewer than 100 furloughed staff, they will be asked to enter details of each employee they are claiming for directly into the system; this will include their name, National Insurance number, claim period and claim amount, and payroll/employee number (optional).

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If there are 100 or more furloughed staff, the employer will be asked to upload a file with the information rather than input it directly into the system. HMRC will accept the following file types: .xls .xlsx .csv .ods.

The file should include the following information for each furloughed employee:

- name
- National Insurance number
- claim period and claim amount
- payroll/employee number (optional)
- the hours the employee has worked or will work in the claim period
- the hours the employee would usually be expected to work in that period.

A template file is available from the Government's website.

If employers use an agent who is authorised to act for them for PAYE purposes, they will be able to make a claim on the employer's behalf. If the employer uses a file-only agent (who files their RTI return but doesn't act for them on any other matters) they won't be authorised to make a claim and employers will need to make the claim themselves. The file-only agent can assist employers in obtaining the information they need to claim. If an agent makes a claim on the employer's behalf, the employer will need to tell them which bank account they would like the grant to be paid into. You can't make more than one claim during a claim period, so when preparing to make a claim, you need to decide the length of the claim period. This means you should include all the employees that you want to furlough for that claim period, because you won't be able to make another claim for the same period or one that overlaps, and you can't make changes to your claim once it is submitted. In deciding what your claim period is, it helps to think about how frequently you run your payroll.

Government guidance states that once a claim is made, it will be checked and the grant paid within six days.

## The claim period

Employers can decide on their own claim period but, from 1 July 2020, the minimum claim period is seven days. This means that employers cannot make a claim more frequently than every seven days (this does not mean that furlough periods must last for at least seven days, just that the employer cannot physically use the portal more often than once every seven days).

The claim period is defined in the third direction as a period that:

- begins and ends in the same CJRS calendar month (July to October inclusive)
- relates to either:
  - a period of seven or more consecutive days, or
  - an orphan period.

An "orphan period" is a period of no more than six consecutive days that either:

- begin on the first day of a CJRS calendar month, or
- end on the last day of a CJRS calendar month.

The above means that claim periods cannot overlap calendar months from 1 July, including periods concluding at the end of June. This does not prevent a furlough period from straddling two calendar months; it means that one claim will need to be made for the period until the end of the month and another claim made for the period starting

on the first day of the next month. Claims relating to the period ending at the end of June must be made by the end of July 2020.

This new rule may result in a few days at the start or the end of the month depending on how frequently an employer makes a claim - the “orphan period” referred to above. Despite the general seven day minimum claim period, a claim of fewer than seven days is permitted where the claim period includes either the first or last day of the calendar month, and the employer has already claimed for the period ending immediately before it.

A claim may not be made where it includes a day that is not permitted as a “CJRS day”. A permitted “CJRS day” is one that:

- falls in a period that is (or will be) covered by a claim period (“a relevant CJRS period”)
- does not fall in a period covered by a CJRS claim that:
  - begins on a different day to the day on which the relevant CJRS claim period begins
  - ends on a different day to the day on which the relevant CJRS claim period ends.

Claims relating to the cut-off exemption categories (family leave and reserve forces mobilisation returners) can also be for a period of fewer than seven days where:

- the day they return to work does not fall in an orphan period
- the employer reasonably considers that the claim in respect of the returner would be simplified if it were made for a period of less than seven consecutive days
- the employer makes a claim in respect of the employee for a claim period beginning immediately after the initial claim period
- the claim does not include any day that is not a permitted CJRS day.

This also applies to those transferred under TUPE laws, where an employer can make a first claim in respect of the transferred employee of no more than six consecutive days beginning with the day after the transfer, as long as a further claim is made in respect of the employee.

## Dealing with errors in claims

Errors made in a claim which have resulted in an overpayment by HMRC to the employer must be paid back to HMRC. HMRC's portal allows employers to inform of instances of overclaiming when they make their next claim; employers will be asked whether they need to reduce the amount they are claiming to take account of the previous “overclaim”. A corresponding amount will be deducted from the next claim and employers should keep a record of the adjustment for 6 years.

If employers need to notify of an error but do not intend to make any more claims, they should contact HMRC to find out how to pay back overclaimed amounts.

Employers who have made an error that results in an underclaimed amount should contact HMRC who will make additional checks.

## Reporting and recording requirements

Employers must keep records of the employees' usual hours worked and the actual hours worked during flexible furlough.

In addition, employers will need to report both the usual hours the furloughed worker would be expected to work in the claim period and the hours actually worked.

Government guidance sets out that employers should not make a claim to the Scheme until they are sure of the exact number of hours they will have worked during the claim period. If employers make a claim in advance and the employee works for more hours than were reported, the extra claimed for will need to be repaid back to HMRC.

In addition, employers should keep, for six years, a record of:

- the amount claimed and claim period for each employee
- the claim reference number for their records
- the calculations used in case HMRC need more information about the claim.