



## Thomas More Chambers

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### **Upcoming changes to the Job Retention Scheme**

This Article should be read in conjunction with our earlier articles, [The Coronavirus Job Retention Scheme – FAQs by Employers](#) dated 14 April 2020 and [The Coronavirus Job Retention Scheme – Update](#) dated 20 April 2020.

#### **Introduction**

On 12 June 2020, the Government updated the guidance on the Job Retention Scheme to provide details as to how the Scheme will change from 1 July 2020. The new and updated guidance can be read here: <https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme>.

On the same date, the Government published an update to [Steps to take before calculating your claim](#) to provide information to employers as to how to calculate furlough claims moving forward.

This Article addresses the changes that are being introduced to the Job Retention Scheme from 1 July 2020.

#### **Additional guidance**

HMRC has also published and updated extensive additional guidance for employers. This includes:

- How to calculate [claims under the scheme](#);



- Examples to assist [with making these calculations](#);
- Examples to assist with calculating for a [period of flexible furlough](#).

## **Main features**

The Job Retention Scheme will be extended to 31 October 2020. The Scheme will end on that date.

From 1 July 2020 a new concept, the “flexible furlough” comes in to effect. In essence, employees and workers will be able to work part time for their employers whilst being furloughed for the hours that they do not work. Employers will have to pay normal pay for the hours that the employees or workers actually work.

From 1 August 2020 employers will have to start to contribute to the costs of furlough payments to employees and workers. These contributions increase, on a monthly basis, from 1 September and 1 October.

## **Who is eligible to be furloughed from 1 July 2020**

From 1 July 2020 only employees and workers who have been previously furloughed and for whom employers have successfully claimed a grant will be eligible for furlough. This means that they must have been previously furloughed for a period of at least three weeks at any time between 1 March and 30 June 2020. The guidance makes the point that for the minimum three week consecutive period to be completed by 30 June, the last day on which an employee could have started furlough for the first time was 10 June.

There is no requirement that an employee or worker must be on furlough on 30 June in order to be eligible for furlough between 1 July and 31 October. Providing an employee has been furloughed for at least three weeks between 1 March and 30 October they are eligible.

One exception to these qualification requirements are employees returning from statutory parental leave after 10 June 2020 (maternity, paternity, shared parental, adoption and parental bereavement leave). Such employees will be eligible to be furloughed after 10 June



even if they are being furloughed for the first time, provided that their employer has submitted a furlough claim for any other employee for at least a three week consecutive period between 1 March and 30 June. Employees returning from statutory parental leave must meet normal eligibility criteria (as set out in the original Job Retention Scheme guidance).

All other eligibility criteria continue to apply unchanged.

### **New cap on number of furloughed employees and workers**

From 1 July 2020 a cap is imposed on the number of employees and workers who may be furloughed. That cap is the highest number of employees furloughed and claimed for by the employer before 30 June 2020.

This cap has some potential to cause problems for employers who have been rotating furloughed employees and workers and who, for example, may wish to bring back all employees and workers after 1 July on a part time basis benefiting from the flexible furlough adaptation. Such an approach will not be possible as the number of employees and workers on flexible furlough would exceed to total number of employees and workers furloughed at any one time between 1 March and 30 June.

### **What is a flexible furlough?**

From 1 July 2020, employers can bring furloughed employees and workers back to work for any amount of time and any shift pattern, while still claiming the grant under the scheme for the hours not worked. Employers must pay employees and workers in full for the hours that they actually work.

The employer must record certain matters and retain these details for six years under the flexible furlough scheme. This must include: the hours actually worked by the employee; the usual hours the employee would have worked; and the number of hours the employee has been furloughed during the relevant claim period.



Employers retain the ability to fully furlough employees and workers or to rotate employees on and off furlough. The rules in relation to minimum furlough periods, however, change (see below).

When fully furloughed, the no work rule will apply as before to furloughed employees and workers.

### **Changes to minimum furlough periods**

Until 1 July 2020, the minimum period for which an employee or worker remains unchanged at three consecutive weeks. This minimum period applies to all furlough periods that commenced before 1 July even if they conclude after 1 July.

From 1 July 2020 there is no minimum furlough period, they can last for any amount of time (see, however, the new seven day minimum claim period detailed below).

### **Claim periods**

The updated guidance introduces material changes to the claim periods over which employers can successfully claim for the wages of furloughed employees and workers.

For claims for furloughed employees and workers up to 30 June 2020, the last day that employers can submit claims is 31 July.

For claims for furloughed employees and workers for days on or after 1 July 2020, the first time that employers will be able to make claims will be 1 July. Claims for July cannot be made before that date.

Claims for any period starting before 1 July must end on or before 30 June. This is the case even where an employee furloughed in June continues to be furloughed full time in July. In such cases, employers will need to make separate claims to cover the days in June and the days in July that they want to claim for. The guidance makes the point that this may lead to claim periods differing from the pay periods that employers use.



Claim periods starting on or after 1 July must start and end within the same calendar month. Claim periods for any specific employee or worker must last at least seven days unless the employer is claiming for the first few days or the last few days in a calendar month. The guidance states that the employer can only claim for a period of fewer than seven days if the period that the employer is claiming for includes either the first or last day of the calendar month and the employer has already claimed for the period ending immediately before it.

The reason for claims periods being limited to calendar months is due to the fact that the amounts that can be claimed by employers under the Job Retention Scheme will be changing on a monthly basis (see below). Whilst understandable, it introduces a level of complexity into making claims that did not exist before and increases the likelihood of error.

The guidance states that the employer must match the claim period to the dates that it processes its payroll, if it can. Clearly in many cases that is not going to be possible (as acknowledged earlier in the guidance).

Employers can only make one claim for any period. Employers must, therefore, include all furloughed or flexibly furloughed employees in one claim even if it pays them at different times. The guidance states that if employers make more than one claim, the subsequent claim cannot overlap with any other claim that the employer makes. Where employees and workers 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. The guidance includes several flow diagrams to assist employers on this issue.

The guidance states that employers can claim before, during or after it processes its payroll. Employers can usually make their claim up to 14 days before their claim period end date and do not have to wait until the end of a claim period to make its next claim.

The guidance, however, warns that, when claiming for employees who are flexibly furloughed, employers should not claim until they are sure of the exact number of hours that they will have worked during the claim period. In other words, employers should only claim when they are certain about the number of hours their employees and workers are working during the relevant claim period. As the guidance makes clear, if an employer



claims in advance and the employee works for more than hours than is set out in the claim, the employer will have to pay back some of the grant to HMRC.

### **Calculating the amount that can be claimed for employees and workers on flexible furlough**

The approach to be taken to calculate the amount that can be claimed for employees and workers on flexible furlough is set out in \*\*\*\*.

Where, after 1 July 2020, an employee or worker is flexibly furloughed the employer is required to determine the “usual” hours that the employee or worker normally works for the relevant claim period, subtract the number of hours that he or she actually works during the relevant claim period and claim for the balance as furloughed hours.

Whilst the basic formula for determining flexible furlough grants is relatively simple, the actual process is somewhat complex. Employers are required to work out the employee’s “usual” hours and record the actual hours worked as well as the furloughed hours for each claim period.

There are two principal calculation methods for determining an employee’s usual hours which depend upon whether the employee works fixed or variable hours. There is also a third approach for employees or workers who are paid per task or piece of work done.

Where an employee is on fixed hours, the starting point for determining the usual hours are the number of hours that the employee or worker was contracted for each pay period, or part of a pay period, at the end of the last pay period ending on or before 19 March 2020. Employers must then apply a formula to work out the average usual hours per day for the relevant claim period. The guidance provides examples as to how to work out usual hours for employees who are contracted to work for a fixed number of hours.

The employer should use the variable hours method for employees who are either:

- a. not contracted to a fixed number of hours; or



- b. whose pay depends on the number of hours they work.

Where an employee or worker's pay varies according to the amount of time worked, the number of hours will be shown on their payslips.<sup>1</sup> A record of the number of hours worked prior to lockdown should, therefore, exist.

For variable hour employees and workers, the "usual" hours will be calculated based on the higher of either:

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

As with fixed hour employees, employers must then apply a formula to work out the average usual hours per day for the relevant claim period. The guidance provides examples as to how to work out usual hours for employees who are contracted to work on a variable hour basis.

### **Addressing errors in claims**

The relative complexity involved in calculating flexible furlough claims coupled with the additional complexities involved in the new claim period approach materially increases the chances of employers either overclaiming or underclaiming for periods of furlough after 1 July 2020. The Government has recognised this in its guidance on claiming for wages. It includes a section on what employers should do if they make an error when making furlough claims. This includes a provision for notifying HMRC where there has been an overpayment so that a reduction can be made in a subsequent furlough claim.

### **Changes in furlough payments July to October**

From 1 August 2020 the Government will gradually reduce the level of the furlough grant on a monthly basis up to the date of termination on 31 October 2020.

The changes are as follows:

<sup>1</sup> Pursuant to section 8, Employment Rights Act 1996.



Up to 31 July 2020 the Government will pay 80% of wages up to a cap of £2,500 per month for the hours the employee or worker is on furlough, as well as employer National Insurance Contributions (ER NICS) and pension contributions for the hours the employee is on furlough. For employees or workers on flexible furlough, the employer will have to pay in full for the hours worked.

For August, the Government will pay 80% of wages up to a cap of £2,500 for the hours an employee or worker is on furlough and employer will pay ER NICS and pension contributions for the hours the employee or worker is on furlough.

For September, the Government will pay 70% of wages up to a cap of £2,187.50 for the hours the employee or worker is on furlough. Employers will pay ER NICS and pension contributions and must top up employee and worker wages to ensure that they receive 80% of their wages up to a cap of £2,500 for the time they are on furlough.

For October, the Government will pay 60% of wages up to a cap of £1,187.50 for the hours the employee or worker is on furlough. Employers will pay ER NICS and pension contributions and must top up employee and worker wages to ensure that they receive 80% of their wages up to a cap of £2,500 for the time they are on furlough.

Throughout this period employers will continue to be able to choose to top up employee and worker wages above the 80% total and £2,500 cap for the hours not worked at their own expense if they so wish.

The Government has produced a table (set out below) setting out the changes on a monthly basis.

Wages caps are proportional to the hours an employee is furloughed. For example, an employee is entitled to 60% of the £2,500 cap if they are placed on furlough for 60% of their usual hours.



## Table of changes

	July	August	September	October
Government contribution: employer NICs and pension contributions	Yes	No	No	No
Government contribution: wages	80% up to £2,500	80% up to £2,500	70% up to £2,187.50	60% up to £1,875
Employer contribution: employer NICs and pension contributions	No	Yes	Yes	Yes
Employer contribution: wages	-	-	10% up to £312.50	20% up to £625
Employee receives	80% up to £2,500 per month			

## Conclusion

The tapering of relief granted under the Job Retention Scheme between August and October coupled with the introduction of the flexible furlough concept in July is designed to wean employers off the benefits of the Job Retention Scheme on a gradual basis in order to minimise the numbers of subsequent job terminations. It will only be after the Scheme has concluded at the end of October that a clear assessment as to how successful this radical programme has been in reducing job losses during the pandemic and lockdown can be made.

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