



How will the Coronavirus Job Retention Scheme operate as it is extended from 1 November 2020?

The Coronavirus Job Retention Scheme was due to close on 31 October 2020 and be replaced by the Job Support Scheme from 1 November 2020. However, the Government has announced that the Coronavirus Job Retention Scheme will remain open until 31 March 2021 and the introduction of the Job Support Scheme has been postponed.

The Government will cover 80% of furloughed employees' wages for the hours they do not work, up to a maximum of £2,500 per month. The employer will be responsible for paying the employer national insurance contributions (NICs) and pension contributions. Employers will not be required to contribute to employees' wage costs other than NICs and pension contributions (but they can choose to top up employees' wages at their own expense).

The ability to flexibly furlough employees will continue, so employees will be able to work part time. Employers must pay employees in full for the hours they work.

Employers are not required to have previously used the Coronavirus Job Retention Scheme to be eligible to claim during the extended period. All employers with a UK bank account and PAYE scheme will be eligible.

Employees are eligible to be furloughed under the extended scheme if they were on the employer's payroll on 30 October 2020 and the employer has made a real time information (RTI) submission to HMRC in respect of the employee on or before that date.

The minimum claim period of seven consecutive days will continue to apply.

Can an employer place an employee on furlough leave if they are off sick?

The guidance published by HM Revenue and Customs (HMRC) on the Coronavirus Job Retention Scheme states that, while the scheme "is not intended for short-term absences from work due to sickness", employers can furlough employees who are off sick if they have "business reasons" for doing so. The employee should not receive statutory sick pay (SSP) while they are furloughed. If an employee falls ill during a period of furlough, there is no obligation on the employer to end the period of furlough and move the employee onto SSP (although the employer can choose to do so).

To be included in a claim following the extension of the Coronavirus Job Retention Scheme from 1 November 2020, an employee must have been on the employer's payroll on 30 October 2020 (or 23 September 2020 if they are rehired and furloughed, after the termination of their employment)



Can an employer rehire and furlough employees they had made redundant before the extension of the Coronavirus Job Retention Scheme was announced?

The Coronavirus Job Retention Scheme was due to close on 31 October 2020. However, on that date, the Government initially announced that the scheme would remain open during December 2020, then on 5 November 2020 announced that it would be extended until 31 March 2021.

If an employer had made employees redundant, expecting the scheme to come to an end on 31 October 2020, they can rehire them and claim for them under the scheme provided that the redundancies took place after 23 September 2020.

The employee must have been on the employer's payroll on 23 September 2020, with the employer making a real time information (RTI) submission to HM Revenue and Customs in respect of the employee between 20 March 2020 and 23 September 2020. (The general position for eligibility for the employer to make a claim under the scheme from 1 November 2020 is that the employee must have been on the payroll on 30 October 2020.)

The scheme also covers employees who are rehired if their employment terminated for a reason other than redundancy after 23 September 2020.

Does placing employees on furlough prevent the employer from making them redundant?

Placing an employee on furlough does not prevent the employer from making them redundant. However, for claim periods from 1 December 2020, an employer will not be able to claim under the Coronavirus Job Retention Scheme during an employee's notice period (whether statutory or contractual notice), including where they have been given notice of redundancy.

For claim periods in November 2020, HM Revenue and Customs (HMRC) guidance for employers on the Coronavirus Job Retention Scheme states that the employer can claim under the scheme for employees who are serving a statutory notice period. (There has been inconsistency in the HMRC guidance on this point as the guidance for employee's states that, prior to 1 December 2020, employers can claim under the scheme while the employee is serving a statutory or contractual notice period. The guidance for employers no longer mentions contractual notice periods.)

The HMRC guidance for employers confirms that employers should follow the normal rules on notice and consultation if making furloughed employees redundant.

When can annual leave be carried over due to the coronavirus crisis?

To provide employers and employees with more flexibility in relation to annual leave requests, the Government has amended the Working Time Regulations 1998 (SI 1998/1833) to allow workers to carry over up to four weeks' annual leave into the next two holiday years, where it has not been reasonably practicable for them to take it as a result of the effects of coronavirus (COVID-19) (this includes the effects on the worker, the employer, the wider economy or society).



The amended Regulations would cover, for example, the situation where the employer does not allow an employee to take annual leave during the crisis due to an increased workload or lack of cover. However, where an employee chooses not to take leave because they are unable to go on holiday due to travel restrictions, this is arguably not a situation where it is not reasonably practicable for them to take it. The Government has published guidance on Holiday entitlement and pay during coronavirus (COVID-19), which includes guidance on factors to consider when deciding what is reasonably practicable.

Where employees are furloughed, the employer must pay them at their normal full rate of pay for a period of annual leave, rather than any reduced furlough rate. Therefore, employers may decide to refuse requests for annual leave from furloughed employees where they cannot afford to top up the employee's pay. In this situation, the employee should be allowed to carry over up to four weeks' leave, if it is not reasonably practicable for them to take it during the leave year.

Case law has established that the purpose of annual leave is to enable employees to rest from carrying out work and enjoy a period of relaxation and leisure (*KHS AG v Schulte* [2012] IRLR 156 ECJ), so an employee may argue that they should be allowed to take their annual leave after the furlough period, carrying it over if necessary. The government guidance on holiday entitlement during coronavirus states that employers should consider if "restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time". Ultimately, it will be for tribunals and courts to decide whether an employee should be allowed to carry over leave under the amended Regulations. The safest option may be for employers to allow furloughed employees to carry over annual leave that they do not take while furloughed.