

Guidance on the Coronavirus Job Retention Scheme

(Last revised 17 June 2020)

The Coronavirus Job Retention Scheme (CJRS) is a temporary scheme open to UK employers from 1 March 2020. Employers can access the scheme at any time during this period but the scheme will close to new entrants on 30 June meaning the last day that employers can place staff on furlough and claim under the scheme is 10 June 2020.

It is intended to support employers whose operations have been severely affected by coronavirus (Covid-19). On 12 May the duration of the scheme was extended to the end of October 2020, with some new measures of flexibility to be introduced from 1 July 2020

For the latest government advice on the scheme go to:

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

The scheme is now closed to new entrants but detailed information on the scheme, what staff are entitled to under the scheme, and the new rules around flexible working are set out below.

Who can access the scheme?

An employer who cannot maintain their workforce because their operations have been severely affected by Covid-19 can 'furlough employees and apply for a grant that covers 80% of their usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage'. This level of support will be available until 31 July 2020.

The amount paid by the government will then taper off in the following way:

- from 1 August, employers will have to pay employee's national insurance contributions and pension contributions, and can no longer reclaim them through the CJRS
- from 1 September, the government will only reimburse 70% of salary (up to a maximum of £2,190). Employers are required to top-up to 80% (or more, depending on what the employer agreed with the employee)
- from 1 October, the government will only reimburse 60% of salary (up to a maximum of £1,875), and employers will continue having to top up to 80% (or more).

The government has announced that the scheme will close on 31 October 2020.

An employer can access the CJRS anytime during the scheme's operation (currently to the end of October); an online portal for employers to use to make applications is available on the government website.

Will higher education (HE), further education (FE), and adult and community education (ACE) employers be able to access the scheme?

(For guidance on the impact of Covid-19 on prison education see separate UCU prisons Covid-19 updates at: <https://www.ucu.org.uk/prisons>)

Initial government guidance on the CJRS stated 'Where employers receive public funding for staff costs, and that funding is continuing, we expect employers to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.'

A message from the minister of state for universities (England), Michelle Donelan, on 8 April 2020 stated '*I know there may be large numbers of staff who are on short-term, casual or hourly paid contracts, as well as those employed by outsourced services. They will of course be anxious about how they will manage financially. In most circumstances I expect employers will be able to continue paying staff. But where this is not the case, workers can rely on the package of support announced by the chancellor, including the Coronavirus Job Retention Scheme, which will help pay staff wages and keep people in employment.*'

(<https://www.researchprofessionalnews.com/rr-news-uk-views-of-the-uk-2020-4-donelan-message-from-the-universities-minister/>)

The government has since released specific guidance on how the CJRS will apply to different parts of the education sector, including FE, Adult Education, Apprenticeships, and HE. This guidance is summarised below and is available in full at:

<https://www.gov.uk/government/publications/coronavirus-covid-19-financial-support-for-education-early-years-and-childrens-social-care/coronavirus-covid-19-financial-support-for-education-early-years-and-childrens-social-care#sector-specific-guidance>

Further education, apprenticeships, and adult education

The guidance reiterates the earlier point regarding public funding:

'Where the provider is continuing to receive public funding through any of these routes they should continue delivering this provision where feasible, including through remote delivery. They should not furlough staff whose salaries are paid

from continuing Education and Skills Funding Agency (or any other public) income. This applies to both teaching and non-teaching staff.'

Conditions under which FE employers may access the scheme and consider furloughing staff are outlined as follows:

'We recognise that many providers rely on funding from a mix of public sources and other income streams such as fees, employer contributions and commercial income. Where public income has reduced or non-public income has ceased or reduced, it may be appropriate for providers to seek support from the Coronavirus Job Retention Scheme to furlough staff. Providers should only furlough employees if they meet the following conditions:

- the employee works in an area of business where services are temporarily not required and whose salary is not covered by public funding
- the employee would otherwise be made redundant or laid off
- the employee is not involved in delivering provision that has already been funded
- (where appropriate) the employee is not required to deliver provision for a child of a critical worker and/or vulnerable child
- the grant from the Coronavirus Job Retention Scheme would not duplicate other public grants received and would not lead to financial reserves being created

If it is difficult to distinguish whether staff are funded through continuing public funding, for the purposes of meeting the first 3 conditions listed above, then the total proportion of teaching and non-teaching staff (based on gross payroll) that are retained (for example, not furloughed) should, as a minimum, be equivalent to the continuing public income, as a proportion of all income that the provider usually receives. For example, if the only source of public funding is through a grant, and non-grant income makes up 25% of total income, then this should be the total maximum proportion of staff (based on gross payroll) that could be furloughed.

Where providers consider furloughing staff, they should ensure that they take a fair and reasonable approach to part-time, sessional and temporary staff, reflective of good HR practice and legal requirements.'

For adult education and apprenticeships, the following is added:

'Where a provider receives Adult Education Budget (AEB), or apprenticeship funding, as part of a direct contract for services with ESFA, and is at risk financially, they may be eligible for support (subject to meeting additional criteria) as part of DfE's response to the Cabinet Office's Procurement Policy Note 02/20. Support provided through that mechanism would count as public funding for the purposes of conditions covering the Coronavirus Job Retention Scheme.'

Higher education

Latest government guidance regarding HE states:

'During and after the coronavirus (COVID-19) outbreak, our aim is for Higher Education (HE) providers to continue to:

- deliver HE provision
- support the needs of students, both on and off campus.

We will work with HE providers to help them access the range of measures on offer to:

- support financial viability and sustainability
- safeguard jobs (including those staff on casual, hourly paid or fixed-term contracts).

We have confirmed that the Student Loans Company is planning to make Term 3 tuition fee payments as scheduled.

We expect that in most circumstances, HE providers will be able to continue paying their staff as usual because HE delivery has largely moved online, and staff are maintaining key services, including those for students remaining on campus.'

Before considering accessing the CJRS to furlough staff, HE providers are encouraged to consider whether they are eligible to access the Coronavirus Business Interruption Loan Schemes (CLBILS) and/or the COVID-19 Corporate Financing Facility (CCFF). If neither of those schemes is appropriate, HE employers will be eligible to access the CJRS under the following conditions:

'HE providers should only furlough employees and seek support through the Coronavirus Job Retention Scheme if they meet the following conditions:

- the employee works in an area of business where services are temporarily not required and whose salary is not covered by public funding
- the employee would otherwise be made redundant or laid off
- the employee is not involved in delivering provision that has already been funded
- (where appropriate) the employee is not required to deliver provision for a child of a critical worker and/or vulnerable child
- the grant from the Coronavirus Job Retention Scheme would not be duplicative to other public grants that the HE provider receives and would not lead to financial reserves being created.

Any grant from the CJRS should not duplicate other sources of public funding where these are being maintained, such as UK home student tuition fees. However, we do recognise the complexity of HE revenue and the role that cross-subsidy plays. If it is difficult to distinguish whether staff are funded through public or commercial income for the purposes of meeting the first 3 conditions as listed above, and some staff

will be funded through multiple sources, as a guiding principle, HE providers should not seek to furlough a higher proportion of their wage bill than could reasonably be considered to have been generated through commercial income, including from non-public research grants and contracts.'

With reference to the impact on Covid-19 on research in HEIs, the guidance states:

'Where research work has been paused (for example, where grant holders have requested a no-cost extension to UK Research & Innovation grants) and therefore providers are not able to receive payments towards staff costs for a period, resulting in a loss of income due to ceased or reduced delivery of research programmes, providers should consider their eligibility and apply for the wide range of financial support that HM Treasury has already announced for businesses, including the Coronavirus Job Retention Scheme in line with the above conditions.'

In respect of all/any furloughing in FE, adult education, apprenticeships, and HE, the Government guidance includes the following *'The DfE is considering appropriate measures to monitor the use of these schemes in order to detect any duplication of funding, and will be considering potential options to recover misused public funding as required.'*

What is furloughing?

Furlough is not a legal term and it is not defined legally in the CJRS. Government guidance indicates that a furloughed worker is a worker who will remain on their employer's payroll but will not be provided with work because of the Covid-19 outbreak, as opposed to a worker who has their contract terminated.

Furloughed employees must have been on the employer's PAYE payroll¹ on 19 March 2020, and can be on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts.

Are all employees and workers covered by the scheme?

In the UK there is a distinction between 'employees' and 'workers'; with the latter having fewer rights. While the scheme uses the term 'employee' the government guidance suggests that everyone covered by a PAYE arrangement would be included, the intention being to apply the scheme to as broad a range of individuals as possible, and on this basis workers (including agency workers and those on zero hour contracts) paid through PAYE will be covered. It is possible however, that some UCU members on casualised contracts,

¹ The PAYE or 'Pay As You Earn' system is a method of paying income tax and national insurance contributions, whereby your employer deducts tax and national insurance contributions from your wages or occupational pension before paying those wages or pension.

those genuinely self-employed or on bogus self-employment engagements will only be eligible for assistance through the separate self-employment scheme - if this arises members should contact their UCU branch directly.

Government guidance makes clear that employees on fixed-term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme.

Staff employed on or before 19 March 2020 can be furloughed, and employees who were employed as of 28 February 2020 and on payroll, and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if their employer re-employs them and puts them on furlough.

Employees on fixed-term contracts can be re-employed and furloughed if either their contract expired after 28 February 2020 and they were on their employer's PAYE payroll on or before 28 February 2020, or their contract expired after 19 March 2020 and they were on their employer's PAYE payroll on or before 19 March 2020.

If an employee's fixed-term contract has not yet expired, it can be extended, or renewed and they can be furloughed if they were on their employer's PAYE payroll on or before 19 March 2020.

'Employees that started and ended the same contract between 28 February 2020 and 19 March 2020 will not qualify for this scheme. This is not specific to employees on fixed-term contracts, the same would apply to employees on all other contracts.'

Employees on unpaid leave can be furloughed if they started unpaid leave after 28 February 2020. If an employee went on unpaid leave on or before 28 February, they cannot be furloughed until the date on which it was agreed they would return from unpaid leave.

Until 1 July, the minimum period an employee can be furloughed is three weeks. From 1 July, there will be no minimum period for furloughing staff.

Initial government guidance on CJRS has been updated to clarify coverage of employees on sick-leave or who are self-isolating. Employees who are shielding in line with public health guidance can be placed on furlough, as can employees who are off on long-term sick leave.

The updated guidance confirms that the scheme is not intended for short-term absences from work due to sickness (there was a three-week minimum furlough period) and that *'short term illness/ self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees.'*

In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.'

People who are working and who go off sick for a short period should receive contractual sick pay as normal or, in the absence of contractual sick pay, may be entitled to statutory sick pay (SSP). Once they return to work, they will be eligible to be furloughed as any other employee.

Employees who are unable to work because they have caring responsibilities resulting from Covid-19 (e.g. employees who need to look after children) can be furloughed.

Updated guidance also confirms that employees transferred under TUPE can be put on furlough. *'A new employer is eligible to claim under the CJRS in respect of the employees of a previous business transferred after 19 March 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.'*

If an employee has more than one employer, they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

For employees with multiple contracts with the same employer the situation is more complicated. Official guidance states that if an employee has more than one employer they can be furloughed for each job - *Each job is separate, and the cap applies to each employer individually. Employees can be furloughed in one job and receive a furloughed payment but continue working for another employer and receive their normal wages* - but this suggests more than one job with different employers, rather than different jobs with the same employer. It is not clear whether an individual with multiple contracts with a single employer will be covered by the scheme - given that the scheme is to operate via PAYE the answer may depend on matters such as whether such an individual has a different payroll number for their second or third job. It may be that as a furloughed employees could originally do no work for the employer, people with multiple contracts will have to be furloughed for all or none of them.

Furloughed staff can undertake volunteer work (as long as this work does not provide services or generate revenue for the employer).

To put staff on furlough an employer needs to either reach collective agreement with their recognised trade unions over arrangements for furloughing, including changes to contractual terms and conditions, or needs to agree with individual employees that they will be furloughed. Individual agreements will need to be confirmed in writing (see advice to branches and members below).

Bringing Back Furloughed Employees to work part-time

NEW: From 1 July, staff already furloughed no longer need to avoid doing any work for the employer, but can work for some of the week and be furloughed for the rest, in

proportions decided between employee and employer. So, from 1 July, employers will claim a pro rata'd amount of 80% of salary, based on the proportion of hours not worked out of normal working hours. To calculate the normal working hours for those with fixed hours/pay, you simply take the number of hours worked in the pay period before 19 March 2020. To calculate the normal working hours for those with variable pay, you take the higher of (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.

Employers do not have to bring staff back to work, but from 1 July employers can choose to bring back staff on a part-time basis and claim support for the part of the week that was unworked.

What is covered?

Currently, if an employee is furloughed their employer can apply for a grant that covers 80% of their usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage.

Individual employees will remain liable for their own tax, national insurance and employee pension contributions (deducted through PAYE).

For full-time and part-time salaried employees, the employee's salary before tax as in their last pay period prior to 19 March 2020 should be used to calculate the 80%.

If, based on previous Government guidance, an employer had calculated a claim based on an employee's salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020) the employer can choose to still use that calculation for your first claim.

Where an employee's pay varies -

If the employee has been employed for 12 months or more, the employer can claim the highest of either:

- the same month's earnings from the previous year
- average monthly earnings for the 2019-2020 tax year

If the employee has been employed for less than 12 months, the employer can claim for 80% of their average monthly earnings since they started work until the date they are furloughed.

If they have been employed for less than a month, the employer should work out a pro rata for their earnings so far, and claim for 80%.

Employers are free to top-up the 80% to protect staff from financial detriment.

All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

However, the level of government support will be reducing from 1 August 2020 until the scheme ends on 31 October 2020 in the following way:

- from 1 August, employers will have to pay employee's national insurance contributions and pension contributions, and can no longer reclaim them through the CJRS
- from 1 September, the government will only reimburse 70% of salary (up to a maximum of £2,190). Employers are required to top-up to 80% (or more, depending on what the employer agreed with the employee)
- from 1 October, the government will only reimburse 60% of salary (up to a maximum of £1,875), and employers will continue having to top up to 80% (or more).

Advice for UCU branches

Note: The last day to register for employees to be furloughed under the government scheme is 10 June 2020. It is therefore important that any on-going discussions that rely on the scheme's support to protect jobs are completed before this date.

(To be read in conjunction with *UCU covid-19 branch bargaining guidance*:

https://www.ucu.org.uk/media/10841/Covid-19-crisis-branch-bargaining-guidance/pdf/ucu_covid19_bargaining-guide.pdf)

UCU's position is that all staff should have their wages protected during the crisis, whether or not they can undertake their normal duties. The CJRS enables employers to claim 80% of wages for employees who are unable to work during the crisis and who are 'furloughed' (this will reduce to 70% in September and 60% in October). The public funding that colleges, universities, local government and prison education providers receive has not been directly affected and there is therefore no immediate reason not to meet expected staff costs as normal, whether or not employers can access the CJRS in respect of all staff.

The CJRS does not address the systematic misuse of casualised contracts in our sectors but it may be accessible to employers to help to protect the income of our most vulnerable members; however, the applicability of the scheme to our sectors (see above) should not affect the employer's commitment to paying staff through the crisis, including those on casualised contracts.

It is not usual for employment contracts to contain a lay-off clause, and in the majority of cases therefore, furloughing will require a variation of terms and conditions of employment; furloughing therefore requires agreement between the employer and affected staff.

The CJRS is not intended to override the contract of employment and therefore basic contractual principles still apply. Furthermore, there will be no statutory right to require that an individual must be furloughed. If an employer is considering accessing the scheme UCU expects them to negotiate the process with their recognised trade unions, noting that furloughing can only take place with either a collective agreement with recognised trade unions, or individual agreements with each furloughed employee/worker. Note: new registrations under the scheme must be completed by 10 June 2020.

HMRC guidance for employers says:

Agreeing to furlough employees

Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.

HMRC guidance for employees says:

If you and your employer both agree, your employer might be able to keep you on the payroll if they're unable to operate or have no work for you to do because of coronavirus (COVID-19). This is known as being 'on furlough'.

Where there are no trade unions recognised, employers would need to get individual consent. Where trade unions are recognised a collective agreement can be reached and individual consent is not required in addition.

Where UCU is recognised branches can reach a collective agreement on behalf of the bargaining unit for which UCU is recognised – this could be a joint agreement involving other recognised trade unions to cover all staff groups. Once a collective agreement is reached there is no need for individual agreement from employees (this is no different in legal terms to the kind of collective agreements we reach about other terms and conditions). In current circumstances it is in the interests of both unions and employers for a collective agreement to be reached. UCU regional offices can provide a template collective agreement which branches can use/adapt.

Branches should seek agreement on how furloughed employees will be identified and to ensure that any collective agreement sets out the factors to be considered in any selection process, if it is envisaged that some employees will remain in work. It may be appropriate in the first instance to invite volunteers who are willing to be furloughed, and only revert to a selection process if there are not enough volunteers, or indeed too many.

Branches should also seek agreement on the terms on which employees will be furloughed.

NB. If contracts of employment include provisions that entitle an employer to lay-off an employee without pay or on reduced pay (unlikely but not impossible for UCU members' contracts), it will be important to persuade employers to use the CJRS rather than lay employees off. Although there is no legal mechanism to force an employer to do this, the provisions on furlough leave have been specifically introduced in order to deter employers to lay-off staff without pay or make redundancies.

- how employees can be identified for furlough

Where staff can work from home, they should be provided with support to do so, whether at full capacity or not. Where it is not reasonably possible for a member of staff to undertake their normal duties at home, the employer may wish to seek agreement on alternative duties that can be undertaken at home. Where such duties are not covered by an individual's employment contract, alternative duties should only be undertaken with explicit written agreement from the individual concerned.

Where normal duties cannot be undertaken at home, alternative duties are not agreed, and the conditions outlined in Government guidance on the CJRS and the education sector are fulfilled (see earlier section above), the employer may consider asking the employee if they would be willing to be furloughed.

The employer should negotiate with the recognised unions as to which groups of staff may be eligible and suitable to be furloughed (see above on reaching collective agreement)

UCU branches should agree with their employer the process by which individual staff will be contacted and offered furlough, and the terms on which a member of staff will be furloughed. An employer cannot require employees to do any work for them while furloughed.

- the terms on which employees will be furloughed

Although the CJRS only covers 80% of wages (or £2500, whichever is the lower) (reducing to 70% and 60% in September and October respectively) employers should guarantee no financial detriment for furloughed staff (i.e. cover 100% of normal pay). This commitment to 100% of wages should continue even where the government support reduces in September and October if staff remain on furlough.

The employer should also commit to making employer occupational pension contributions in the normal way during furlough.

For staff whose pay varies, the basis for calculating their pay under the CJRS is:

If the employee has been employed for 12 months or more, the employer can claim the highest of either:

- the same month's earnings from the previous year
- average monthly earnings for the 2019-2020 tax year

If the employee has been employed for less than 12 months, the employer can claim for 80% (reducing to 70% and 60% in September and October respectively) of their average monthly earnings since they started work until the date they are furloughed.

If they have been employed for less than a month, the employer should work out a pro rata for their earnings so far, and claim for 80% (reducing to 70% and 60% in September and October respectively).

If expected salary would be higher than that calculated above, the branch should seek an agreement that wages will be topped up to the full amount of expected salary for the period, even if, for example, expected wages are based on non-contractual agreements made before the crisis started.

Branches should seek employer agreement that:

- furloughed employees will maintain all contractual rights including continuity of employment, accrual of annual leave, sick pay, maternity leave and pay, and redundancy rights
- furloughed employees will suffer no detriment as a result of being furloughed (for example in accessing progression, promotion, training, development, e.g. access to online resources)
- continued employment of furloughed staff is not dependent on the employer being able to access funds through the government scheme.

- **trade unions reps and furloughing**

Government guidance makes clear that union reps can continue with their trade union duties and activities:

'Whilst on furlough, employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers. However in doing this, they must not provide services to or generate revenue for, or on behalf of [their employer] or a linked or associated organisation'

Advice for members

UCU advice is that employers should facilitate working at home wherever possible.

However, where staff are unable to undertake their normal duties, the employer may wish to consider temporary redeployment to alternative duties. There should be no compulsion to undertake alternative duties and you should only do so if you are willing and able, and on the condition that you continue to receive your full pay. If your employer tries to force you to undertake alternative duties that you are unhappy about, contact your UCU branch directly.

If staff are unable to undertake any work at home, then UCU are seeking a commitment from employers to maintain full pay for the duration of the covid-19 crisis. This includes staff on casualised contracts.

If, because of the nature of their role, an employee has no work due to the covid-19 crisis, and the conditions outlined in Government guidance on the CJRS and the education sector are fulfilled (see earlier section above), their employer may ask them if they agree to being furloughed so that the employer can access funding through the Coronavirus Job Retention Scheme.

If your employer wants to designate you as a furloughed employee, they will either need your agreement, or a collective agreement with the recognised trade unions, to do so. If you are approached about this, please contact your branch directly.

UCU members and branches are advised to agree to furloughing if, and only if:

- the employer agrees to pay 100% of wages throughout the furlough period
- the employer agrees to pay all employer contributions to all occupational pension schemes (individuals will remain liable for their employee contribution – through PAYE)
- the employer confirms in writing that individuals will suffer no detriment by agreeing to be furloughed including:
 - continuity of employment, sick pay, maternity leave and pay, and redundancy rights
 - continued accrual of annual leave during furlough
 - access to progression, promotion, and training & development opportunities
- that employment is guaranteed following furlough
- if on a variable hours contract, that wages during furlough will be calculated in a fair and transparent manner, taking into account any previous assurances of hours.

(Last revised: 17 June 2020)