



## BRIEFING PAPER

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# FAQs: Coronavirus Job Retention Scheme

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## Summary

On 20 March 2020 the Government announced the Coronavirus Job Retention Scheme.

The purpose of the Scheme is to provide grants to employers to ensure that they can retain and continue to pay staff, despite the effects of the Covid-19 pandemic.

The Government first published guidance for employers and employees on 26 March. These have been updated multiple times. On 15 April the Government published the Treasury Direction to HMRC, the formal legislative guidelines for the Scheme. In certain areas, there appear to be inconsistencies between the Government guidance and the Treasury Direction.

Under the Job Retention Scheme, the Government will provide a grant to employers to cover 80% of employee's reference salary, up to £2,500 per month. The Scheme came into effect on 20 April but claims can be backdated to 1 March 2020. On 17 April the Chancellor announced that the Scheme will be extended until the end of June.

Employers can only claim for workers who are 'furloughed'. This is a novel term in UK employment law and describes a situation where an employee remains employed but is not provided with any work. Employees working reduced hours are excluded.

The Scheme is tied to PAYE. Employers can only claim for employees who were a payroll which was notified to HMRC through a real time information (RTI) submission on or before 19 March 2020. Employees who were on a payroll on or before 28 February or 19 March but who stopped working after those dates can be re-employed and furloughed.

The Job Retention Scheme is simply a mechanism through which employers can claim money from HMRC. It does not alter existing employment law rights and obligations.

Employers will normally be liable under the employment contract to pay employees their full wages, even if they cannot provide any work. In many cases, the employment contract would need to be varied to allow employers to furlough an employee on reduced pay.

It is for employers to decide whether to furlough an employee. This could cause problems for zero-hours workers and agency workers whose employers could simply reduce their work to zero without making a claim under the Scheme.

The Scheme also sits amongst a range of existing statutory employment rights. These include protections from discrimination, protections from unfair dismissal and rights to consultation in cases of collective redundancies. It also includes the rules on statutory sick pay, statutory maternity pay and holiday pay. In some cases, the current Government guidance does not provide an indication of how the Scheme will interact with these rights.

This paper covers a number of frequently asked questions on the Job Retention Scheme.

**This is a fast-moving area and the paper should be read as correct at the time of publication.**

**This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. A suitably qualified professional should be consulted if specific advice or information is required.**

# 1. Background

The Covid-19 pandemic continues to have a significant impact on economic activity in the UK, including on jobs and income. The impacts are being felt particularly hard by low paid workers and precarious workers as well as by women and BAME workers.<sup>1</sup>

On 26 March 2020, the Government made the [Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#). Similar regulations have been made for the other three nations. The regulations require businesses in a range of sectors to close their premises. They also make it an offence for a person to go to work if it is “reasonably possible” for that work to be done from home.

The Government’s [guidance on self-isolation](#) states that a person who shows symptoms of coronavirus illness must self-isolate for 7 days. Those in the same household as a symptomatic person must isolate for 14 days. Meanwhile the Government’s [guidance on shielding](#) strongly advises all those in the ‘extremely vulnerable’ category not to leave their home for 12 weeks.

## Coronavirus Job Retention Scheme

On 20 March 2020, the Chancellor announced the [Coronavirus Job Retention Scheme](#) (‘JRS’). Under the Scheme the Government will cover 80% of worker’s wages up to £2,500 per month.

The Scheme initially was initially set to cover the period from 1 March to 31 May. However, on 17 April the Chancellor announced that the Scheme would be extended until the end of June.<sup>2</sup>

The Scheme was initially welcomed by both the [Trades Union Congress](#) (TUC) and the [Confederation of British Industry](#) (CBI). There has since been a large volume of commentary highlighting on the Scheme, some of which has highlighted various gaps.<sup>3</sup>

The statutory basis for the Scheme is provided for in section 76 of the [Coronavirus Act 2020](#). This provides that HMRC shall, in relation to Covid-19, have such functions as directed by the Treasury. The Treasury Direction made under this power was published on 15 April.

The Government has also published [guidance for employers](#) and [guidance for employees](#) on the JRS. This guidance was first published on 26 March and has been updated and changed multiple times.

## Other steps taken to support businesses and workers

The JRS is one of a number of measures the Government has introduced to provide financial support to businesses and workers. The Chancellor said the JRS, along with the other support measures, is the “most

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<sup>1</sup> See [Coronavirus: Impact on the labour market](#), Commons Library Briefing Paper CBP-8898, 20 April 2020.

<sup>2</sup> HM Treasury, [Chancellor extends furlough scheme to end of June](#), 17 April 2020.

<sup>3</sup> See e.g. Lord John Hendy QC, [The gaps in the government’s coronavirus income protection plans](#), Institute of Employment Rights, 6 April 2020. (Lord Hendy is an employment barrister and a Labour Peer in the House of Lords).

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comprehensive and generous suite of interventions of any major developed country in the world.”<sup>4</sup>

The Library Briefing, [Support for businesses during the Coronavirus \(Covid-19\) outbreak \(CBP-8847\)](#), covers the business measures in detail, including the Business Introduction Loan Scheme, business rates holidays, VAT deferrals and more.

The Government has announced new insolvency measures to help businesses hit by the COVID-19 pandemic. These are covered in the Library Briefing, [Coronavirus: changes to insolvency rules to help businesses \(CBP 8877\)](#).

The Government has also reformed the rules on statutory sick pay to extend it to those who are self-isolating in prescribed circumstances and to make regulations to provide employers a rebate for SSP payments relating to Covid-19. The Library Briefing, [Coronavirus Bill: Statutory Sick Pay and National Insurance Contributions \(CBP-8864\)](#), covers this in detail.

The Government has also announced a [Self-employment Income Support Scheme](#), which provides similar support for the self-employed.

### A note on terminology...

A number of terms are used frequently throughout this paper.

- “Guidance for employers” means the Government’s [guidance for employers on the JRS](#).
- “Guidance for employees” means the Government’s [guidance for employees on the JRS](#).
- “Government guidance” refers collectively to the two documents above.
- “Treasury Direction” means the [Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#).

The Treasury Direction uses the term ‘employee’ when discussing those who are covered by the JRS. The definition of ‘employee’ in the Direction is broader than the definition of ‘employee’ used in employment law (see Question 11). Likewise, this paper uses the term ‘employee’ to describe those who eligible under the Scheme.

When discussing employment rights, such as protections from dismissal or the right to annual leave, the paper has sought to use the terms ‘employee’ and ‘worker’ as defined in employment law. For further details, see the Library Paper, [Employment Status \(CBP-8045\)](#).

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<sup>4</sup> [HC Deb 24 March 2020 vol. 674 c190](#).

## 2. Rules of the Scheme

### Q1. Where are the rules of the Scheme set out?

The statutory basis for the Scheme is section 76 of the [Coronavirus Act 2020](#). This is a general provision that provides the Treasury with the power to direct HMRC's functions in relation to Covid-19.

On 15 April 2020, the Government published the [Treasury Direction](#) made under this power. This sets out the circumstances in which HMRC must make payments to employers under the JRS.

The Government has published [guidance for employers](#) and [guidance for employees](#). These were first published on 26 March and were updated on 4 April, 9 April, 15 April, 17 April, 20 April and 23 April.

In addition, the Government has published a [step-by-step guide](#) for employers making a claim under the Scheme and an [online calculator](#) for calculating the reference salary that employers can claim.

### Q2. What is the status of the Treasury Direction?

The Treasury Direction is made under the statutory power conferred by section 76 of the [Coronavirus Act 2020](#). It has legal force and is the document that HMRC is bound to follow when making decisions about issuing grants under the Scheme.

The Direction did not have to be subject to Parliamentary approval. However, the Direction is a form of legislation and must be interpreted in accordance with the ordinary rules on statutory interpretation.

### Q3. What is the relationship between the Treasury Direction and the guidance?

The Government guidance was first issued on 26 March 2020 and was updated three times before the Treasury Direction was published. There are inconsistencies between the Treasury Direction and earlier versions of the Government guidance. There also appear to be inconsistencies between the Direction and the current Government guidance, even though the guidance was updated after the Direction was published.

Government guidance can, in certain circumstances, be used by courts as a persuasive authority in the interpretation of a statutory provision.<sup>5</sup> Where there are inconsistencies that cannot be reconciled, as a matter of law the Direction will prevail.

However, Jolyon Maugham QC, a barrister at Devereux chambers, has [shared on Twitter](#) correspondence from HMRC, which suggests that it only expects businesses to follow the Government guidance. While this may be indicative of how HMRC will approach claims in practice, it does not have any bearing on the meaning of the law.

Daniel Barnett and Max Schofield, barristers at Outer Temple Chambers and 3BP Barristers, have suggested that employers who relied on earlier

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<sup>5</sup> [Chief Constable of Cumbria v Wright and Anor \[2007\] WLR 1407](#) at [17].

versions of Government guidance that are not reflected in the Treasury Direction may be able to bring a claim for Judicial Review.<sup>6</sup>

#### **Q4. Can the Treasury Direction be amended?**

Yes. The Treasury Direction can be amended by further Directions issued under section 76 of the 2020 Act.<sup>7</sup> Indeed, the Direction will have to be amended to reflect the [Chancellor's announcement](#) on 17 April 2020 that the Scheme will cover the period until 30 June 2020 (under the current Direction the Scheme only covers the period until 31 May 2020).

#### **Q5. Will there be further legislation?**

The Government has not suggested that it will present any further legislation on the JRS. The Government guidance says on a number of occasions that the Scheme operates within the framework of existing employment law and does not change any legal rights or obligations that employers or employees may have.

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<sup>6</sup> Daniel Barnett and Max Schofield, [The Coronavirus Job Retention Scheme: Claiming Against HMRC](#), 3BP Barristers, 17 April 2020.

<sup>7</sup> [The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs \(Coronavirus Job Retention Scheme\) Direction](#) ('Treasury Direction'), para. 14.1.

## 3. Eligible employers

### Q6. Which employers are eligible?

The [Treasury Direction](#) says that any employer who has set up a PAYE scheme and notified this to HMRC through a real time information (RTI) submission by 19 March 2020 can make claims to the JRS.

The [guidance for employers](#) says that any organisation with a UK payroll is eligible, including businesses, charities, recruitment agencies (if they have agency workers on PAYE) and public authorities.

Individuals who employ someone (such as a nanny) can also put them on furlough and claim under the Scheme if that person is on PAYE.

#### TUPE

The Treasury Direction says that where employees are employed by one employer on 19 March but transferred to a new employer after that date under [TUPE rules](#), they can be furloughed by the new employer.<sup>8</sup> This is reflected in the guidance for employers.

If an employee is transferred under TUPE rules prior to 19 March it would appear that the new employer can only claim under the Scheme if they made an RTI submission by that date.

#### Administrators

The guidance for employers says that where a company has gone into administration the administrator can furlough workers and make a claim under the Scheme. The first, and to date the only, court case relating to the JRS concerned furlough by administrators.<sup>9</sup>

#### Public sector organisations

The guidance for employers says that public sector organisations are not expected to furlough workers. It says that this is because staff will still be required in the provision of essential public services and as in most cases funding for staff costs will continue. However, the guidance notes that this is not a hard rule.

The Treasury Direction does not place any restrictions on furloughing public sector workers.

### Q7. What can employers claim?

The [Treasury Direction](#) says that employers can claim 80% of an employee's 'reference salary' up to £2,500 per month.<sup>10</sup> In addition, employers can claim Employer National Insurance contributions (NICs) and auto-enrolment pension contributions that are payable on this reduced rate of pay.

#### PAYE & RTI

Real time information (RTI) is a mechanism used by employers to notify HMRC of PAYE deductions each time the employee is paid.

See [Running payroll](#) (GOV.UK).

<sup>8</sup> Treasury Direction, para. 9.3(d) and 10(b).

<sup>9</sup> [Carluccio's Limited \(in administration\) \[2020\] EWHC 886 \(Ch\)](#). See commentary in David Reade QC and Daniel Northall, [Carluccio's: the High Court issues guidance on the relationship between furlough, contractual variation and the administration of insolvent companies](#), LinkedIn, 14 April 2020 (accessed 21 April 2020).

<sup>10</sup> Treasury Direction, para. 8.2.

The Institute of Chartered Accountants in England and Wales (ICAEW) [provides the following illustration](#) of how a claim could work:

X Ltd employs Mr B at an annual salary of £42,000, so £3,500 per month. Mr B has opted out of auto enrolment.

Each month, Mr B currently receives net pay of £2,675 which is after deducting PAYE of £492 and employees NIC of £333. On this salary, the employer pays employers' NIC of £383.

The available grant for the employer is the lower of

(c) 80% of £3,500 = £2,800, and

(d) £2,500

Plus employers NIC, £245, on this amount

So X Ltd claims a grant of £2,500 plus £245 = £2,745.

However, the Treasury Direction has added a layer of complexity to the position set out in the Government guidance.

Under the Direction an employer can only reclaim 'qualifying costs'.<sup>11</sup> Qualifying costs include earnings paid by an employer to its employee but only if:

- The employee is paid more than £2,500 per month; or
- The employee is paid 80% of their reference salary as defined under the Direction.<sup>12</sup>

The effect of this provision is that if an employer has paid an employee less than 80% of their reference salary they will not be able to claim those costs under the Scheme. As discussed in Question 34, the rules for determining what constitutes 'reference salary' are very complicated.

Jolyon Maugham QC has written that this provision is a "bear trap" for employers. He argues that if an employer miscalculated an employee's reference salary and paid them less than 80%, they would not be able to claim this under the Scheme. By contrast, if an employer chose to be safe and paid an employee £2,500, they would not be able to reclaim the full cost if 80% of their employee's reference salary was actually less than this amount.<sup>13</sup>

This rule also creates potential complications for employers who pay enhanced maternity pay or other family-related pay (see Question 21).

### **Q8. Do employers need to prove they cannot otherwise pay their employees?**

In previous versions of the Government guidance there was uncertainty over whether employers could only furlough workers if they would otherwise have to make them redundant.

The [Treasury Direction](#) makes it clear that this is not a requirement. An employer can furlough workers provided "the instruction is given by

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<sup>11</sup> Treasury Direction, para. 5(b).

<sup>12</sup> Treasury Direction, para. 7.1.

<sup>13</sup> Jolyon Maugham QC, [Does the Job Retention Scheme apply to casual workers](#), Waiting for Godot, 18 April 2020 (accessed 20 April 2020).

reason of circumstances arising as a result of coronavirus or coronavirus disease.”<sup>14</sup>

The [guidance for employers](#) also says that “all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus.”

### **Q9. When will the Scheme come into effect?**

The new [online portal](#) for making claims went live on 20 April 2020.

The Treasury Direction says that Scheme will cover 1 March to 31 May.<sup>15</sup> This will need to be amended following the [Chancellor’s announcement](#) that the JRS will be extended to cover the period until 30 June 2020.

### **Q10. How will employers make a claim?**

Claims can be made through the new [online portal](#).

The Government has published a [step-by-step guide for employers](#) who are making a claim. This says employers will need to provide the following information:

1. The number of employees being furloughed
2. The dates employees have been furloughed to and from
3. Details of employees – the name and National Insurance Number of each furloughed employee
4. Your employer PAYE scheme reference number
5. Your Corporation Tax Unique Taxpayer Reference, Self-Assessment Unique Taxpayer Reference or Company Registration Number as appropriate for your entity
6. Your UK bank account details
7. Your organisation’s registered name
8. Your organisation’s address

The guide says that employers should make a claim shortly before running their payroll:

You cannot make more than one claim during a claim period – you should make your claim shortly before or during running payroll. You must claim for all employees in each period at one time as you cannot make changes to your claim.

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<sup>14</sup> Treasury Direction, para. 6.1(c).

<sup>15</sup> Treasury Direction, para. 12.

## 4. Eligible employees

### Q11. Which employees are covered by the Scheme?

The [Treasury Direction](#) says that employers can claim for all employees who were on their payroll on 19 March and notified to HMRC through an RTI submission before that date.

#### Meaning of 'employee'

The term 'employee' is defined expansively by reference to tax law.<sup>16</sup> It captures many workers who would not normally be 'employees' for the purposes of employment law.<sup>17</sup> The [guidance for employers](#) explains:

As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE: office holders (including company directors), salaried members of Limited Liability Partnerships (LLPs), agency workers (including those employed by umbrella companies), and limb (b) workers.

However, the Scheme excludes those who are not paid through PAYE even if they would be found by an Employment Tribunal to be 'limb (b) workers' or even 'employees' for the purposes of employment law.<sup>18</sup> Many workers in the gig economy will fall into this category.

The guidance says that limb (b) workers who are not on PAYE may be able to claim under the Self-employment Income Support Scheme if their trading profits are taxed through Income Tax Self-Assessment.

Further details on the SEISS can be found in the Library Briefing, [Coronavirus: Self-employment Income Support Scheme \(CBP-8879\)](#).

#### Employees on a PAYE scheme on or before 19 March

Earlier versions of the Government guidance said that the Scheme would only cover employees who were on an employer's PAYE payroll on or before 28 February 2020.

The Treasury Direction provides that an employee will be covered if they were on the payroll on or before 19 March. However, there is now an additional requirement that the employer must have notified HMRC of this through an RTI submission. The Government guidance reflects this.

While this extends eligibility for the Scheme, it could exclude employees who were hired in late February or March if an RTI submission was not made until the end of March.

David Reade QC and Daniel Northall, barristers at Littleton chambers, explain:

However, making eligibility contingent on the existence of an RTI submission for the furloughed employee may have unintended consequences. For example, there may be no RTI submission for employees put onto payroll in late February 2020 if their pay was not processed for the first time until the March payroll. On the assumption the March payroll was processed at or around the end

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<sup>16</sup> Treasury Direction, paras. 13(1)(e), 13.2 and 13.3.

<sup>17</sup> [Employment status](#), Commons Library Briefing Paper CBP-8045, 28 March 2018.

<sup>18</sup> See e.g. [Autoclenz Ltd v Belcher \[2011\] UKSC 41](#).

of the month, the RTI submission is likely to fall after the cut-off of 19 March. Similarly, new directors whose payroll is processed annually may have an RTI submission falling after 19 March.<sup>19</sup>

### **Q12. Does the Scheme cover foreign nationals?**

Yes. The [guidance for employers](#) confirms that payments under the Scheme are not public funds and that claims can be made for employees on all categories of visa.

Further information can be found in the Library Briefing, [Coronavirus: Calls to ease No Recourse to Public Funds conditions \(CBP-8888\)](#).

### **Q13. Does the Scheme cover director-employees?**

Yes. Directors who are salaried and paid via PAYE, including those who work through personal service companies (PSCs), fall within the expanded definition of 'employee'. The [guidance for employers](#) says that directors can be furloughed by the company. In most cases, this decision would be made by the company board. However, a company can only claim for a directors salary which does not include dividends.

The [Treasury Direction](#) provides that directors can continue to carry out their statutory duties and this will not constitute 'work'.<sup>20</sup>

The Low Income Tax Reform Group (LITRG) has produced detailed [guidance on the JRS](#) for those who work through PSCs.

### **Q14. Does the Scheme cover employees who have stopped working?**

The [guidance for employers](#) says that an employee who was on an employer's payroll on or before 28 February and notified through an RTI submission can be re-employed and put on furlough even if they subsequently stopped working. This includes employees who were made redundant or otherwise dismissed and employees who resigned. It also includes those whose fixed-term contract expired.

The right to re-employ and furlough was initially restricted to employees who were on the payroll before 28 February. However, the updated guidance says that employees who were on a payroll notified through an RTI submission on or before 19 March can also be re-employed and furloughed if they stopped working after that date.

Employees do not have a right to be re-employed. This is a decision for the employer. Darren Newman, an employment law commentator, notes that employers could be unwilling to re-engage workers:

But it is hopelessly unrealistic to expect that employers are going to reemploy people who have resigned or been dismissed purely so that they can be placed on furlough. To be blunt, what is in it for the employer? They incur the cost of administering the employee's furlough pay and face potential legal difficulties when the furlough period ends.<sup>21</sup>

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<sup>19</sup> David Reade QC and Daniel Northall, [The Treasury Direction: Answers or more Questions?](#), LinkedIn, 16 April 2020 (accessed 20 April 2020).

<sup>20</sup> Treasury Direction, para. 6.6.

<sup>21</sup> Darren Newman, [New Starters and the Coronavirus Job Retention Scheme](#), A Range of Reasonable Responses, 6 April 2020 (accessed 20 April 2020).

### Q15. Will the Scheme cover new starters?

The Scheme only covers employees who were on a PAYE payroll that was notified to HMRC by an RTI submission on or before 19 March.

As noted in Question 11, this would exclude those hired after this date or those who whose entry onto the payroll was not notified to HMRC.

Darren Newman notes that the underlying purpose of having a cut-off date is to prevent fraud:

The Government's view is that the only evidence of employment that works for them is the PAYE system. The scheme is being run and administered by HMRC and the PAYE records are something that HMRC can easily check. An employee starting in March will have all sorts of documentation showing that the appointment is a genuine one, but the system will not allow for HMRC sifting through letters of appointment and signed contracts of employment – it is PAYE that counts.<sup>22</sup>

If a new starter has accepted an employment contract, the employer would be contractually obliged to pay their wages, even though they would be unable to make a claim under the JRS. However, new starters will not normally be covered by the statutory protection from unfair dismissal and can be dismissed in accordance with the terms of the contract. Lewis Silkin LLP, the law firm, explains:

If a potential new joiner has not yet accepted the offer, it can be withdrawn because no contract is in place yet. If the new joiner has accepted an offer, the employer should check the offer letter and/or contract with the new joiner, and in particular what notice period has been agreed. The employer can terminate the contract before the new joiner was due to start by making a payment in lieu of notice. Failing to pay notice in this situation would give the individual a potential breach of contract claim. An employer only needs to pay notice for the period when the employee was due to be working and receiving pay, so it may be possible to give a new joiner notice which expires before they were due to start work and not make an actual payment.<sup>23</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> Karen Baxter and Bethan Carney, [Coronavirus – FAQ for employers](#), Lewis Silkin LLP, 16 April 2020, p. 16.

## 5. 'Furloughed employee'

### Q16. What is a 'furloughed employee'

Employers can only make a claim for workers who are designated as 'furloughed'. This is not a recognised term in UK employment law (although it is more commonly used in the USA).

The [Treasury Direction](#) provides that an employee is furloughed if:

- They have been instructed by their employer to stop working;
- They have stopped working for their employer for 3 weeks; and
- They were instructed to stop working because of circumstances arising as a result of coronavirus.<sup>24</sup>

The Direction does not define the term 'work'. There are a number of tests in employment law for determining what constitutes 'work', such as the tests used for calculating National Minimum Wage entitlements.<sup>25</sup>

The [guidance for employers](#) says that work is anything that provides services to or generates revenue for an organisation.

The guidance says that employees can undertake training while on furlough. However, the Direction is narrower, providing that employees can only undertake training that is "directly relevant" to their job.

The guidance notes that if an employer requires an employee to undertake training this will constitute 'work' for NMW purposes.

### Q17. How do employers furlough employees?

Employers must place their employees on furlough in accordance with existing employment law. This would likely require a variation to the employment contract, particularly if an employee's pay is going to be reduced (see Question 26).

The [Treasury Direction](#) says that an employee will only be furloughed if there is a written agreement between the employer and the employee that they will stop working:

An employee has been instructed by the employer to cease all work in relation to their employment **only if the employer and employee have agreed in writing** (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.<sup>26</sup>

The text of the Direction appears to contradict the [guidance for employers](#), which was updated after the Direction was published:

To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming through the scheme. [...]. **There needs to be a written record, but the employee does not have to provide a written response.**

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<sup>24</sup> Treasury Direction, para. 6.1.

<sup>25</sup> Department for Business, Energy and Industrial Strategy, [National Minimum Wage and National Living Wage: Calculating the minimum wage](#), April 2019.

<sup>26</sup> Treasury Direction, para. 6.7.

The difference could have big consequences for employers who did not obtain an employee's written agreement before they stopped working. This could include employers who already had a contractual right to lay off workers or employers who decided that the employment contract did not need to be varied if they topped up the employee's pay.

David Reade QC and Daniel Northall explain:

We understand that there are many employers who did not attempt to seek the agreement of the employees it furloughed, on the premise that it would continue to pay the relevant employees their full wages. It would then recoup the relevant proportion of those wage costs through the Scheme and meet the balance from its own funds. There will be others, like the administrators in *Re Carluccio's*, who attempted to obtain the agreement of all affected staff, but did not receive a response from everyone. Are such employers precluded from recovering wage costs under the Scheme where it does not have the employee's agreement in writing? On the face of the Direction the answer would appear to be yes, if it is to be applied in accordance with its terms.<sup>27</sup>

If this is the correct interpretation of the Direction, it is unclear whether employers can obtain a written agreement retrospectively.

Daniel Dyal, a barrister at Cloisters chambers, explains:

The optimistic view is that where no written agreement was originally obtained, it can now be obtained and have retrospective effect so that the employee meets the definition of furlough for the whole period. However, that is not what the Direction says. On a strict reading of the direction (see paragraph 6.7 particularly) an employee is not furloughed unless there is an agreement in writing to cease work and there is no indication that a written agreement can have retrospective effect.<sup>28</sup>

The Advisory, Conciliation and Arbitration Service (Acas) has published a [template furlough agreement](#).

### Q18. Does the Scheme cover employees working reduced hours?

No. The [guidance for employers](#) states:

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme.

Such workers must continue to be paid in accordance with their contract (subject to any variations regarding reduced hours).

### Q19. Can employees on sick leave be furloughed?

The [Treasury Directive](#) says that if an employee is currently receiving, or is liable to receive, statutory sick pay (SSP), they can only be furloughed when their SSP period ends.<sup>29</sup> SSP payments cannot be reclaimed under

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<sup>27</sup> David Reade QC and Daniel Northall, [The Treasury Direction: Answers or more Questions?](#), LinkedIn, 16 April 2020 (accessed 20 April 2020).

<sup>28</sup> Daniel Dyal, [Furlough Furore: the Treasury Direction and the Coronavirus Job Retention Scheme](#), Cloisters, 17 April 2020 (accessed 20 April 2020).

<sup>29</sup> Treasury Direction, para. 6.3.

the Scheme, although the Government has announced a [Coronavirus Statutory Sick Pay Rebate Scheme](#).<sup>30</sup>

Again, the text of the Direction appears to contradict the position in the [guidance for employers](#) which states that employees on sick leave can be furloughed if the decision is made on business reasons.

This could have consequences for extremely vulnerable employees who are liable to be paid SSP if they are shielding and cannot work from home.<sup>31</sup> Unless an employee has a right to enhanced sick pay in their contract, SSP is only paid at the [statutory rate](#) of £95.85 per week.

BDBF, the employment law firm, explains:

On the face of it, this rule appears to restrict the ability of employers to furlough shielding employees. Shielding employees are entitled to SSP. Therefore, if an employee is advised to shield for 12 weeks, they will be entitled to SSP for that initial 12-week period. Under the wording of the Direction, this initial SSP period would have to elapse before the furlough period could begin. We think this must be an unintended consequence of the Direction, since it is directly contrary to the Guidance.<sup>32</sup>

Maternity Action, a maternity rights charity, has also [highlighted on Twitter](#) that this rule could impact pregnant women, many of whom have been placed on sick leave.

A second question is whether a period of furlough ends if a furloughed employee becomes sick. The guidance for employers says that they can continue to be designated as furloughed. The Treasury Direction makes a similar provision but only for workers who become sick “again”.

David Read QC and Daniel Northall explain:

This qualification is, at best, ambiguous. It appears to indicate that a further period of sickness leading to an entitlement to SSP does not break the period of furlough, but the use of the word “again” suggests that this qualification only applies where there has been an earlier sickness which delayed the start of furlough. But what of the situation dealt with in the Guidance in which an employee falls sick for the *first time* during furlough?<sup>33</sup>

## Q20. Can employees on unpaid leave be furloughed?

The [Treasury Direction](#) provides that an employee who was on unpaid leave on 28 February cannot be furloughed until their leave ends.<sup>34</sup> The same position is set out in [guidance for employers](#).

Employees who began a period of unpaid leave after 28 February can be furloughed provided the other conditions are met.

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<sup>30</sup> [Coronavirus Bill: Statutory Sick Pay and National Insurance Contributions](#), Commons Library Briefing Paper CBP-8864, 20 March 2020.

<sup>31</sup> [Statutory Sick Pay \(General\) \(Coronavirus Amendment\) \(No. 3\) Regulation 2020 \(SI 2020/427\)](#).

<sup>32</sup> BDBF LLP, [Understanding the COVID-19 Job Retention Scheme – a guide for employers](#), 18 April 2020 (accessed 20 April 2020).

<sup>33</sup> David Reade QC and Daniel Northall, [The Treasury Direction: Answers or more Questions?](#), LinkedIn, 16 April 2020 (accessed 20 April 2020).

<sup>34</sup> Treasury Direction, para. 6.4.

### **Q21. Can employees on family-related leave be furloughed?**

Both the [Treasury Direction](#) and the [guidance for employers](#) imply that employees who are on family-related leave, such as maternity or shared parental leave, can be furloughed provided.

The guidance for employers says that employees who are entitled to family-related leave can continue to take it in the normal way. Statutory payments for family related leave, such as statutory maternity pay, cannot be claimed under the Scheme (such payments can [already be reclaimed from the Government](#)).<sup>35</sup> However, the guidance says that employers can claim enhanced contractual pay, such as enhanced maternity pay.

This could cause problems for employers who pay enhanced contractual pay at a reduced rates, such as 50% of pay. As noted in Question 7, employers can only claim under the Scheme if they are paying an employee at least 80% of their reference salary. This suggests that if enhanced contractual pay amounts to less than 80% of the employee's reference salary, the employer may not be able to claim for it.<sup>36</sup>

### **Q22. Can employees be furloughed by multiple employers?**

Yes. The [guidance for employees](#) says that each employer is treated separately. Employees can be furloughed by more than one employer or furloughed by one while still working for another.

### **Q23. Can employees do volunteer work while on furlough?**

Yes. The [Treasury Direction](#) provides that to be furloughed an employee only needs to cease working for their employer. The [guidance for employers](#) says that employers can help employees find volunteer work.

### **Q24. Can employees work for new employers while on furlough?**

Yes. The [Treasury Direction](#) provides that to be furloughed an employee only needs to cease working for their employer. The [guidance for employers](#) says that employees can work for new employers if this is permitted by their employment contract. Any clauses prohibiting an employee from undertaking work for another employer (such as a competitor) would continue to apply.

### **Q25. Can employees come on and off furlough?**

Yes. The [Treasury Direction](#) provides that an employee must stop working for their employer for 21 consecutive days. The [guidance for employers](#) says that employees can be furloughed multiple times provided that each period of furlough lasts for at least 3 weeks.

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<sup>35</sup> Treasury Direction, para. 8.7.

<sup>36</sup> See Daniel Dyal, [Furlough Furore: the Treasury Direction and the Coronavirus Job Retention Scheme](#), Cloisters, 17 April 2020 (accessed 20 April 2020).

## 6. Selecting workers for furlough

### Q26. Do employers have an automatic right to furlough workers?

The [Treasury Direction](#) does not create a right for employers to put employees on furlough.

The JRS is a mechanism through which employers can reclaim employee's wages from HMRC. It does not alter existing employment law rights and obligations.

As a general rule, workers have a right to be paid their full wages if they are ready, able and willing to work.<sup>37</sup> The employer has a contractual obligation to pay, even if no work is available. If an employer failed to provide work and unilaterally reduced pay this could amount to a breach of contract and an unlawful deduction from wages.

In some cases, employment contracts will contain a clause that gives an employer the right to send workers home without pay (called a lay off clause). However, these are rare in practice. As noted in Question 11, the Treasury Direction suggests that even if contracts contain lay off clauses an employee's written agreement is needed to furlough them.

Absent a lay off clause, an employer would need to vary the contract before it could furlough an employee on reduced pay.

The [guidance for employers](#) suggests that the contract should be varied by agreement. In many cases the alternative to furlough will be redundancy, so employees may be inclined to agree.

Alan Bogg and Michael Ford QC, Professors of Law at the University of Bristol, have argued that UK employment law is not suited to contractual variations in times of crises.<sup>38</sup>

### Q27. Can employees demand to be furloughed?

No. The [Treasury Direction](#) provides that it is for employers to instruct employees to stop working and to make a claim under the Scheme.

Employees who wish to be furloughed, which could include those with caring responsibilities or those who cannot work from home, do not have an explicit right to place themselves on furlough. Such employees would need to rely on existing employment law rights to challenge any selection decisions.

### Q28. Can agency workers and zero-hours workers be furloughed?

Agency workers and those on zero-hours contracts who are on PAYE fall within the expanded definition of 'employee'. The [guidance for employers](#) says that agency workers should be furloughed by the agency or an umbrella company if they are engaged through one.

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<sup>37</sup> [Beveridge v KLM UK Ltd \[2000\] IRLR 765](#).

<sup>38</sup> Alan Bogg and Michael Ford QC, [Legislating in Times of Crisis: The Coronavirus Job Retention Scheme](#), UK Labour Law Blog, 23 March 2020 (accessed 31 March 2020).

The fact that the decision to furlough rests with the employer is a particular problem for agency workers and zero-hours workers. For such workers, the right to pay is contingent on work being provided and generally the employer or agency is not under a contractual obligation to provide them with work. The employer or agency could reduce the worker's hours to zero without designating them as furloughed.

Alan Bogg and Michael Ford QC highlight that zero-hours workers and agency workers are ultimately dependent on their employers:

So, once the assignment has been ended, why should the agency bother to write to the workers and confirm they have been 'furloughed', as the Scheme requires? Unless it happens to be motivated by altruism, it is easier for it to rely on its existing contractual provisions and do nothing at all. That, after all, is often the economic point of these contractual arrangements for firms, giving agencies and end-users the flexibility to adjust quickly the supply of labour in accordance with demands.<sup>39</sup>

Jolyon Maugham QC has argued that complexities of calculating the reference salary for casual workers could encourage employers to stop providing work instead of furloughing them.<sup>40</sup>

However, Stuart Brittenden, a barrister at Old Square Chambers, has suggested that it may be possible to use the implied term of trust and confidence (which is implied into all employment contracts) to argue that employers have an obligation to take all reasonable steps to furlough eligible employees.<sup>41</sup>

## Q29. What about vulnerable employees?

The [guidance for employers](#) says that vulnerable employees who are shielding can be furloughed. However, as discussed in Question 19, the [Treasury Direction](#) suggests that those who are shielding cannot be furloughed as they are liable to be paid SSP.

## Q30. How should employers select which employees to furlough?

In many cases employers who are operating at reduced capacity will need to select which employees to furlough. This could create problems if either too few or too many employees want to be furloughed.

The Treasury Direction and the guidance for employers does not set out how an employer should select the employees that it furloughs.

When selecting which employees to furlough employers will be bound by general employment law.

Acas [guidance on furloughing](#) highlights that when deciding which employees to furlough employers must take care not to discriminate on the basis of protected characteristics.

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<sup>39</sup> Alan Bogg and Michael Ford QC, [Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2](#), UK Labour Law Blog, 31 March 2020 (accessed 31 March 2020).

<sup>40</sup> Jolyon Maugham QC, [Does the Job Retention Scheme apply to casual workers](#), Waiting for Godot, 18 April 2020 (accessed 20 April 2020).

<sup>41</sup> Stuart Brittenden, [The implied term of trust and confidence & the Coronavirus Job Retention Scheme](#), Old Square Chambers, 14 April 2020 (accessed 20 April 2020).

Daniel Dyal explains:

There are also many equality implications arising out of the Scheme. The guidance makes clear that the employer must apply the Scheme in a way that is consistent with equality law. Some of these implications are obvious and simple: it would be unlawful to dismiss rather than furlough an employee because he is of a particular race. But others are complex and difficult. For instance, if furloughing decisions take into account the number of hours particular employees are able to offer in current circumstances that could easily engage indirect sex discrimination considerations, which would need to be carefully thought through. Likewise furloughing decisions may need to take into account what tasks particular employees can do and from where. They will often then engage challenging disability discrimination issues, particularly in respect of reasonable adjustments, indirect discrimination and discrimination arising from disability.<sup>42</sup>

If an employee refuses to be furloughed and is dismissed, the fairness of the selection criteria will likely be a consideration in any subsequent unfair dismissal claim.

Alan Bogg and Michael Ford QC have also suggested that a failure to use a fair selection criteria could possibly amount to a breach of the implied term of mutual trust and confidence.<sup>43</sup>

### **Q31. Do employers have to consult employees?**

In most cases an employer will need an employee's agreement before they can put them on furlough. As such, individual consultation will clearly be necessary.

Whether an employer is required to consult the workforce more broadly will again be determined by existing employment law.

Where an employer proposes to make 20 or more employees redundant within a period of 90 days, they have an obligation to consult employee's representatives.<sup>44</sup> The [guidance for employers](#) notes that as the alternative to furlough will often be redundancy, employers with sufficient numbers of staff may have to collectively consult.

If there is an information and consultation agreement in place for a workforce, this may require an employer to consult employee representatives on furloughing decisions. A standard agreement will cover situations where there is a threat to employment within the organisation.<sup>45</sup> If no agreement is in place, negotiations can be triggered by a request from 2% of the workforce.<sup>46</sup>

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<sup>42</sup> Daniel Dyal, [Covid-19: Furlough and job retention: Key issues for Employment Lawyers \(UPDATED 11.04.2020\)](#), Cloisters, 11 April 2020 (accessed 20 April 2020).

<sup>43</sup> Alan Bogg and Michael Ford QC, [Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2](#), UK Labour Law Blog, 31 March 2020 (accessed 31 March 2020).

<sup>44</sup> Section 188, [Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

<sup>45</sup> Reg. 20, [Information and Consultation of Employees Regulations 2004 \(SI 2004/3426\)](#).

<sup>46</sup> Reg. 7, ICE Regulations 2004; Reg. 16, [Employment Rights \(Miscellaneous Amendments\) Regulations 2019 \(SI 2019/731\)](#).

### **Q32. Can employers make redundancies before the Scheme comes into effect?**

Yes. However, any dismissal will need to be compliant with general employment law.

Employees with two years' continuous service are protected from unfair dismissal.<sup>47</sup> While redundancy is a potentially fair reason for dismissal, the availability of the JRS, and the Government's Business Interruption Loans, may be relevant factors in considering whether dismissal was reasonable in the circumstances.<sup>48</sup>

Employees who are made redundant may also be entitled to statutory redundancy pay.<sup>49</sup>

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<sup>47</sup> Part 10, *Employment Rights Act 1996*.

<sup>48</sup> See generally [Key Employment Rights](#), Commons Library Briefing Paper CBP-7245, 23 November 2018 (Section 27).

<sup>49</sup> Section 135, *Employment Rights Act 1996*.

## 7. Meaning of 'reference salary'

### Q33. What payments are covered by the Scheme?

As noted in Question 7, the [Treasury Direction](#) says that employers can claim 80% of an employee's 'reference salary' up to £2,500 per month. As discussed, employers must be paying their employees at least this minimum amount in order to be eligible to make a claim. If an employer is paying an employee less than 80% of their reference salary they may not be able to claim for this under the Scheme.

Employers can also claim the Employer NICs and automatic enrolment pension contributions that are payable on the employee's reduced rate of pay.

The Direction sets out complex rules for calculating 'reference salary' (discussed below). These rules are different from the [rules used to calculate 'a week's pay'](#) in employment law.

### Q34. How is reference salary calculated?

The Government has published [guidance on how to calculate 80% of an employee's reference salary](#) and an accompanying online calculator. The guidance says reference salary includes regular wages and non-discretionary overtime, commission and bonuses. By contrast, it says tips, discretionary payments, non-cash payments and non-monetary benefits are excluded.

However, the rules in the [Treasury Direction](#) are extremely complex.<sup>50</sup>

#### Fixed rate employees

The Direction distinguishes between those who are fixed rate employees and those who are not. Fixed rate employees will generally include all those who are paid an annual salary.

A fixed rate employee's reference salary is the 'regular' salary that they were paid in the last pay period before 19 March.

Paragraph 7.4 of the Direction says pay is 'regular' if it:

- (a) cannot vary according to any of the relevant matters described in paragraph 7.5 [performance of the employee or the company] except where the variation in the amount arises as described in paragraph 7.4(d),
- (b) is not conditional on any matter,
- (c) is not a benefit of any other kind, and
- (d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

Commentators have flagged a number of issues with this definition, in particular paragraph 7.4(b).

Daniel Dyal explains that this would appear to exclude commission:

A final problem to note is that while it is true that the Guidance deals with pay pretty summarily and at times opaquely, what it does say is not easy at times to reconcile with the Direction. For

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<sup>50</sup> Treasury Direction, paras. 7.1 to 7.15.

instance it says that past overtime and contractual commission payments should be included when calculating variable employees' pay and this is not easy to reconcile with paragraph 7(4)(b). Perhaps the answer is that paragraph 7(4)(b) must be given a very narrow meaning; it is just that it difficult to know quite what.<sup>51</sup>

David Reade QC and Daniel Northall also note that the definition in paragraph 7.4(b) is very ambiguous:

It is unclear what the draftsman sought to exclude through this part of the definition. Taken to its extreme, it leads to absurd results. All payments of wages are "conditional on a matter" in the sense that the employee's work is a condition of payment.<sup>52</sup>

### Variable rate employees

The Direction provides that the reference salary of those who are not fixed rate employees (those whose pay varies) is the higher of:

- Their average monthly wages in the 2019-20 tax year; or
- Their wages in the same month in the previous tax year.<sup>53</sup>

Again, only 'regular' payments can be included in this calculation, leading to the issues identified above.

Jolyon Maugham QC has highlighted that paragraph 7.4(b) could have particularly serious implications for casual workers who do not have a right to guaranteed hours and whose pay is conditional on work being given to them.<sup>54</sup>

## Q35. What about employees returning from statutory leave?

The [Treasury Direction](#) sets out different rules for determining the reference salary of fixed rate employees who return from a period of sick leave or family-related leave that began before 1 March 2020.<sup>55</sup>

The reference salary for these employees will not be based on the regular salary they were paid in the last pay period before 19 March. This is because employees on statutory leave are often paid at a lower rate. Instead, these employees should be paid "on the same terms as the employee's paid leave." It is unclear precisely what this means.

The [guidance for calculating reference salary](#) says:

In line with other employees, claims for full or part time employees furloughed on return from family-related statutory leave should be calculated against their salary, before tax, not the pay they received whilst on family-related statutory leave. The same principles apply where the employee is returning from a period of unpaid statutory family-related leave.

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<sup>51</sup> Daniel Dyal, [Furlough Furore: the Treasury Direction and the Coronavirus Job Retention Scheme](#), Cloisters, 17 April 2020 (accessed 20 April 2020).

<sup>52</sup> David Reade QC and Daniel Northall, [The Treasury Direction: Answers or more Questions?](#), LinkedIn, 16 April 2020 (accessed 20 April 2020).

<sup>53</sup> Treasury Direction, para. 7.2.

<sup>54</sup> Jolyon Maugham QC, [Does the Job Retention Scheme apply to casual workers](#), Waiting for Godot, 18 April 2020 (accessed 20 April 2020).

<sup>55</sup> Treasury Direction, paras. 7.10.

### **Q36. Do employers have to top up the wages?**

The [guidance for employers](#) says that it is for employers to decide whether to top up wages (the extra 20% or anything above £2,500).

However, as noted in Question 26, the default position under the contract will normally be that workers are entitled to their *full wages* if they are ready, willing and able to work.

If the contract is not varied, an employer would likely be in breach of contract by only paying 80% of wages. This could also be an unlawful deduction from wages.

### **Q37. Will employee NICs and pension contributions have to be deducted?**

The [guidance for employers](#) says the payments made to employees with grants issued under the Scheme will be subject to the usual deductions, including income tax, employee NICs and auto-enrolment pension contributions.

### **Q38. Do furloughed employees have to be paid the National Minimum Wage?**

The [guidance for employers](#) says that furloughed employees are not undertaking 'work' within the meaning of the [National Minimum Wage Act 1998](#) and so do not have to be paid the National Living Wage / National Minimum Wage (NLW / NMW). As such, it will be permissible to vary the employment contract to reduce a worker's pay to 80%, even if this puts their wages below the NLW / NMW.

However, the guidance notes that if an employee undertakes training then this will constitute work for the purposes of the 1998 Act and the worker must be paid the NLW / NMW. The implication is that the employer must top up the grant made under the Scheme. Workers cannot contract out of their right to be paid the NLW / NMW.<sup>56</sup>

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<sup>56</sup> Section 49, [National Minimum Wage Act 1998](#).

## 8. Other employment issues

### Q39. Does being furloughed affect maternity rights?

The Treasury Direction does not alter existing rules on maternity leave and statutory maternity pay (SMP). However, concerns had been expressed that being furloughed could impact a woman's eligibility for SMP or the rate of SMP she receives.

An employee who has worked for her employer for a continuous period of 26 weeks by the 15<sup>th</sup> week before the expected week of childbirth will be eligible for SMP. Her normal weekly earnings must be above £120. SMP is paid for 39 weeks. The first 6 weeks are paid at 90% of the woman's normal weekly earnings. The remaining 33 weeks are paid at the statutory rate of £151.20. Some women will have a contractual right to enhanced maternity pay.<sup>57</sup>

'Normal weekly earnings' are calculated by reference to the eight weeks preceding the 'qualifying week' (the 15<sup>th</sup> week before the expected week of childbirth).<sup>58</sup> Groups including [Maternity Action](#) had expressed concern that a woman who is furloughed in the period preceding her qualifying week would be on lower pay and that this could impact either her eligibility for SMP or the rate at which she receives it.

On 23 April the Government made regulations to address this issue.<sup>59</sup> These provide that when an employee's 'normal weekly earnings' are being calculated for the purposes of SMP (or other statutory payments) and the employee was furloughed at any point during the eight week reference period, their earnings should be calculated as if they were paid at their full rate of pay rather than at a reduced rate.

Employers can already reclaim most of the cost of SMP from the Government.<sup>60</sup> The [guidance for employers](#) says that those who pay enhanced maternity pay can claim this as 'wages' under the Scheme.

A woman who is ineligible for SMP will still be able to claim [Maternity Allowance](#). However, this is paid entirely at the statutory rate.

### Q40. Does being furloughed affect continuity of employment?

The Government guidance does not address continuity of employment.

A number of employment rights are only available to employees who have a period of continuous employment with their employer. Examples include the protection from unfair dismissal, the right to redundancy

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<sup>57</sup> See [Key Employment Rights](#), Commons Library Briefing Paper CBP-7245, 23 November 2018, (Section 9).

<sup>58</sup> Regs. 20-21, [Statutory Maternity Pay \(General\) Regulations 1986 \(SI 1986/1960\)](#).

<sup>59</sup> Reg. 3, [Maternity Allowance, Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay \(Normal Weekly Earnings etc.\) \(Coronavirus\) \(Amendment\) Regulations 2020 \(SI 2020/450\)](#).

<sup>60</sup> Section 167, [Social Security Contributions and Benefits Act 1992](#).

pay and notice pay. Continuity of employment is generally broken by a period of more than one week where the relationship is not governed by the employment contract, although there are exceptions.<sup>61</sup>

As the employment contract continues to apply during periods of furlough, being furloughed itself should not affect continuity.

However, employees whose employment was terminated after 28 February 2020 can be re-hired and put on furlough (see Question 14). Periods between termination and reengagement can break continuity.

Under the 'temporary cessation of work' rule, continuity of employment can be preserved where an worker is made redundant following a reduction in the amount of work but is later re-hired.<sup>62</sup> Continuity can also be preserved where an employee is re-engaged after making a complaint of unfair dismissal.<sup>63</sup> However, it is unlikely that these rules would apply if an employee resigned in order to find a new job.

Alan Bogg and Michael Ford QC have called for statutory provision to specifically preserve continuity for coronavirus-related cases.<sup>64</sup>

#### **Q41. Does being furloughed affect annual leave?**

The relationship between furlough and annual leave remains one of the most complicated issues involving the JRS. The issue has been addressed in the updated [guidance for employees](#) and the new [guidance on calculating reference salary](#).

In the UK, the right to paid annual leave is set out in the [Working Time Regulations 1998 \(SI 1998/1833\)](#) ('WTR'). This sets out a right to 5.6 weeks of annual leave. This is comprised of 4 weeks, plus an additional 1.6 weeks to reflect the year's eight bank holidays. So far as the 4 weeks are concerned, the WTR implements the EU's [Working Time Directive \(Directive 2003/88/EC\)](#) ('WTD'). Although the UK has left the EU, it remains bound by EU law during the implementation period.<sup>65</sup>

The [Working Time \(Coronavirus\) \(Amendment\) Regulations 2020 \(SI 2020/365\)](#) allow workers to carry over up to four weeks of annual leave into the next two leave years where it was not "reasonably practicable" for them to take that leave because of coronavirus.

There are a number of issues concerning the relationship between annual leave and furlough:

- 1 Does annual leave accrue during furlough?
- 2 Can workers take annual leave during furlough?
- 3 Can workers be required to take annual leave during furlough?
- 4 What rate is annual leave during furlough paid at?

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<sup>61</sup> Section 212, *Employment Rights Act 1996*.

<sup>62</sup> See e.g. *Fitzgerald v Hall Russell & Co Ltd* [1970] A.C. 984.

<sup>63</sup> Section 219, *Employment Rights Act 1996*; Reg. 2, [Employment Protection \(Continuity of Employment\) Regulations 1996 \(SI 1996/3147\)](#).

<sup>64</sup> Alan Bogg and Michael Ford QC, [Legislating in Times of Crisis: The Coronavirus Job Retention Scheme](#), UK Labour Law Blog, 23 March 2020 (accessed 31 March 2020).

<sup>65</sup> See [Constitutional implications of the Withdrawal Agreement legislation](#), Commons Library Briefing Paper CBP-8805, 20 February 2020.

### Accruing annual leave

The generally accepted position appears to be that as workers on furlough remain employed, the 5.6 weeks of statutory annual leave will continue to accrue. Lewis Silkin LLP, the law firm, explains:

**Will workers continue to accrue holiday allowance while they are furloughed?**

Yes, because they remain employed. You could agree to reduce any enhanced contractual holiday (beyond the statutory minimum of 5.6 weeks per year) to reflect the fact that an employee has been on furlough, but employees will retain their right to annual leave under the Working Time Regulations.<sup>66</sup>

### Workers taking annual leave during furlough

The updated [guidance for employees](#) confirms that workers can continue to take annual leave while on furlough and this will not break the furlough period.

### Employers requiring workers to take annual leave

A separate issue is whether employers can require workers to take annual leave during furlough. Under regulation 15 of the WTR, employers can require workers to take annual leave on particular days. For example, many workers will be required by their employment contract to take eight days of their annual leave on bank holidays.<sup>67</sup>

This issue is not addressed in the Government guidance.

The Acas [guidance on holidays](#) says that it may not be reasonably practicable for workers to take annual leave during furlough and that they would be able to carry leave over into the next two leave years.

David Reade QC and Daniel Northall note that if employers were able to require workers to take leave, they could require workers to exhaust their annual leave entitlement during the furlough period:

The outstanding question is whether an employer is entitled to require its workers to take annual leave at times other than bank holidays. If the answer to this question is a simple, unqualified 'yes', one is forced to concede that it leads to a superficially unattractive proposition: an employer can run down annual leave entitlement to nought by requiring its staff to take lengthy or repeated periods of annual leave during periods of furlough. In this way, workers would receive neither additional leave nor additional pay and, so the argument would go, the right to annual leave would be illusory.<sup>68</sup>

UK case law suggests that workers can be required to take annual leave during periods when they would not otherwise have been working.<sup>69</sup>

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<sup>66</sup> Lucy Lewis and Richard Moore, [Furloughing employees - FAQs for employers on the coronavirus job retention scheme](#), Lewis Silkin LLP, 20 April 2020 (accessed 20 April 2020).

<sup>67</sup> Bank holidays are not, strictly speaking, holidays – although in practice most workers will take annual leave on these days. See Commons Library Insight, [Bank holidays: How are they created and changed?](#), 23 August 2019.

<sup>68</sup> David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020).

<sup>69</sup> [Russell v Transocean International Resources Ltd \[2011\] UKSC 57](#).

However, CJEU case law also suggests that there are circumstances in which workers cannot be required to take leave, such as during sick leave where a worker is unable to enjoy a period of rest and leisure.<sup>70</sup>

Alan Bogg and Michael Ford QC have argued that workers cannot be required to take annual leave during furlough as, in the current circumstances, furlough is more akin to a period of sick leave:

Although the CJEU case-law is not entirely clear, we think the better argument is that ‘furloughing’ for most workers in circumstances of the current lockdown is closer to sick leave, following the orthodox line in cases like *Stringer*, than it is to zero-hours working or taking parental leave. First, ‘furlough’ leave is not foreseeable and it is entirely beyond the control of the employee. The decision to furlough is the employer’s, not the employee’s, and the current situation as regards employment and economic activity could scarcely have been predicted a matter of weeks ago. While that cannot provide the complete answer, more important may be a second factor. ‘Furlough’ leave in the current circumstances, like sick leave, is subject to extensive physical and psychological constraints.<sup>71</sup>

### **Rate of pay during annual leave**

Under the WTR, holiday pay is paid at the rate of ‘a week’s pay’. This is calculated using a 52-week reference period.<sup>72</sup>

The guidance on calculating reference pay says that if a worker takes annual leave during a period of furlough they must be paid holiday pay calculated in accordance with these rules. It says that employers must top up a worker’s pay to this rate.

However, under EU law, a worker must be paid their ‘normal remuneration’ for four weeks of annual leave. If a worker took annual leave after being furloughed and on reduced pay for some time, this could affect the ‘week’s pay’ calculation. In such circumstances, it is not clear whether this would be compatible with the EU definition of ‘normal remuneration’.

Reade and Northall argue that “the safest course [...] which would eliminate all risk of litigation” would be for holiday pay to be paid at the full rate of pre-furlough remuneration.<sup>73</sup>

### **Q42. What will happen when the Scheme ends?**

As noted in Question 9, the [guidance for employers](#) says that the Scheme will cover a period until 30 June 2020, although this can be extended.

The Government has yet to provide any details of what will happen when the Scheme comes to an end. During a debate in the House of

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<sup>70</sup> [Stringer and ors v HMRC \(C-520/06\) \[2009\] ICR 932](#).

<sup>71</sup> Alan Bogg and Michael Ford QC, [Furloughing and Fundamental Rights: The Case of Paid Annual Leave](#), UK Labour Law Blog, 6 April 2020 (accessed 7 April 2020).

<sup>72</sup> BEIS, [Holiday Pay: Guidance on calculating holiday pay for workers without fixed hours or pay](#), April 2020.

<sup>73</sup> David Reade QC and Daniel Northall, [The Coronavirus Job Retention Scheme: An addendum on annual leave](#), Littleton, 4 April 2020 (accessed 7 April 2020).

Commons on 27 April, the Chancellor said that there will be a “gradual refinement” to the economic interventions the Government is making.<sup>74</sup>

If an employer believes that it cannot retain staff once the Scheme ends and is considering making redundancies, the obligation to undertake collective consultations may apply. The obligation applies when an employer is proposing to dismiss 20 or more employees within a period of 90 days.<sup>75</sup>

Employers proposing to make between 20 and 99 redundancies must begin consulting 30 days before the first dismissal. Employers proposing to make 100 or more redundancies must begin consulting 45 days before the first dismissal. An employer must also notify the Department of Business, Energy and Industrial Strategy. The consultation process can be shorter if employers have a “special circumstances” defence.

Acas has detailed guidance on [handling large-scale redundancies](#).

The term ‘propose’ does require a degree of intention, although Tribunals have found employers deciding between two alternative courses of action to be ‘proposing to dismiss’.<sup>76</sup>

The Government’s decision on 17 April to extend the Scheme beyond 31 May came after concerns were expressed by a number of large businesses that they would have to begin a collective consultation process (17 April was 45 days from 31 May).<sup>77</sup>

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<sup>74</sup> [HC Deb 27 April 2020 vol. 675 c115](#).

<sup>75</sup> Section 188, *Trade Union and Labour Relations (Consolidation) Act 1992*.

<sup>76</sup> [Scotch Premier Meat Ltd v Burns \[2000\] IRLR 639](#).

<sup>77</sup> [“Coronavirus: Airport handlers warn ministers of 10,000 jobs axe ‘within hours’”](#), *Sky News* [online] 17 April 2020 (accessed 28 April 2020).

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