

# Updates to the Coronavirus Job Retention Scheme, The 2<sup>nd</sup> Treasury Direction, SSP and Annual Leave

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## The Coronavirus Job Retention Scheme will remain open until the end of October 2020, but what was announced by the Chancellor on Friday?

1. Chancellor Rishi Sunak announced on 29<sup>th</sup> May 2020:
  - From 1<sup>st</sup> July (a month earlier than previously announced), employers can bring back to work employees that have previously been furloughed for any amount of time and any shift pattern, while still being able to claim the Scheme grant for their normal hours not worked. Employers will have to pay their full wages whilst working. When claiming the Scheme grant for furloughed hours employers will need to report and claim for a minimum period of a week.
  - The Scheme will close to new entrants from 30<sup>th</sup> June. From that point onwards, employers will only be able to furlough employees that they have furloughed for a full 3 week period prior to 30<sup>th</sup> June.
  - This means that the final date by which an employer can furlough an employee for the first time will be 10<sup>th</sup> June, in order for the current 3 week furlough period to be completed by 30<sup>th</sup> June. Employers will have until 31<sup>st</sup> July to make any claims in respect of the period to 30<sup>th</sup> June.
  - Further guidance on flexible furloughing and how employers should calculate claims will be published on 12<sup>th</sup> June<sup>1</sup>.

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<sup>1</sup> <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

## So what do the Scheme updates mean as far as the amounts of grant which can be claimed and what contributions will employers have to make?

2. The amounts of grant which can be claimed will change and employers will have to start contributing as follows:
- **June and July:** The government will pay 80% of wages up to a cap of £2,500 as well as Employer National Insurance (ER NICs) and pension contributions. Employers are not required to pay anything.
  - **August:** The government will pay 80% of wages up to a cap of £2,500. Employers will pay ER NICs and pension contributions – for the average claim, that represents 5% of the gross employment costs the employer would have incurred had the employee not been furloughed.
  - **September:** The government will pay 70% of wages up to a cap of £2,187.50. Employers will pay ER NICs and pension contributions and 10% of wages to make up 80% total up to a cap of £2,500. For the average claim, this represents 14% of the gross employment costs the employer would have incurred had the employee not been furloughed.
  - **October:** The government will pay 60% of wages up to a cap of £1,875. Employers will pay ER NICs and pension contributions and 20% of wages to make up 80% total up to a cap of £2,500. For the average claim, this represents 23% of the gross employment costs the employer would have incurred had the employee not been furloughed<sup>2</sup>.

## Has there been a 2<sup>nd</sup> Treasury Direction issued yet?

3. A new Treasury Direction for the Scheme was published on 22<sup>nd</sup> May 2020. It amends and effectively replaces the 1<sup>st</sup> Treasury Direction issued in relation to claims made on or after that date, or in relation to earlier claims that would have been compliant with the 2<sup>nd</sup> Treasury Direction in any event, until 30<sup>th</sup> June. The 2<sup>nd</sup> Treasury Direction will therefore apply to the furlough period from the date of the last claim an employer made under the 1<sup>st</sup> Direction<sup>3</sup>.

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<sup>2</sup> <https://www.gov.uk/government/news/chancellor-extends-self-employment-support-scheme-and-confirms-furlough-next-steps>

<sup>3</sup> Paragraph 16.3, 2<sup>nd</sup> Treasury Direction.

4. This means that some periods of furlough which occurred prior to the publication of the 2<sup>nd</sup> Direction will be determined on its terms, even though the employer could not have been aware of its terms at that time.

### **What, if any, changes has the 2<sup>nd</sup> Treasury Direction introduced?**

5. Generally, the 2<sup>nd</sup> Direction addresses some discrepancies between the 1<sup>st</sup> Direction and HMRC's guidance, but there is one major amendment:
  - The major amendment is that the new wording on the form of agreement required to place an employee on furlough removes the explicit requirement in the original Treasury Direction that an agreement must be in writing. It is now specified that the agreement between employer and employee must specify '*the main terms and conditions upon which the employee will cease all work in relation to their employment*', be incorporated (expressly or impliedly) into the employee's contract, and be made in writing '*or confirmed in writing*' by the employer<sup>4</sup>.
  - The employer retain the agreement or confirmation until at least 30<sup>th</sup> June 2025<sup>5</sup> (which it can be assumed that a further direction will extend this until the end of October 2025).
  - Detailed guidance on the kinds of study and training that an employee can do while on furlough without breaching the requirement that a furloughed employee do no work for the employer<sup>6</sup>.
  - Pension scheme trustees to continue to do work for the sole purpose of fulfilling their duties<sup>7</sup>.
  - In relation to Statutory Sick Pay ('SSP'), where SSP is in payment or due to be paid, furlough cannot begin until immediately after the end of the period of incapacity for work for which the SSP is being paid or due to be paid. It goes on to suggest that the timing of the end of the period of incapacity should be determined by agreement between the employer and employee<sup>8</sup>.

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<sup>4</sup> Paragraph 6.7(b), 2<sup>nd</sup> Treasury Direction.

<sup>5</sup> Paragraph 6.7(c), 2<sup>nd</sup> Treasury Direction

<sup>6</sup> Paragraph 6.8, 2<sup>nd</sup> Treasury Direction.

<sup>7</sup> Paragraphs 6.10 – 6.12, 2<sup>nd</sup> Treasury Direction.

<sup>8</sup> Paragraph 6.3, 2<sup>nd</sup> Treasury Direction.

- Detail of how the scheme applies to employees on unpaid leave<sup>9</sup>.
- With regard to pay, ‘regular’ pay means pay that ‘cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment’<sup>10</sup>. ‘Relevant matter’ for this purpose is defined to include business performance, the employee’s contribution, the employee’s performance of his or her duties, and any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity)<sup>11</sup>.
- As for ‘variations arising from a non-discretionary payment’, this covers payments such as overtime, fees, commission or piece rates, payments made in recognition of the employee undertaking additional or exceptional responsibilities, payments made in recognition of the circumstances in which the employee undertakes his or her duties or the time when they are undertaken, and payments made in recognition of similar matters. Such payments are only covered if a legally enforceable agreement, understanding, scheme, transaction or series of transactions prescribes the method of calculating the amount of wages or salary payable (whether or not that method involves an exercise of discretion)<sup>12</sup>.
- Employers do not need to make a payment to employees before claiming reimbursement from the Scheme, provided they intend to pay employees within a reasonable time of receipt<sup>13</sup>.

### **Have there been any updates on SSP?**

6. Entitlement to statutory sick pay has been extended under The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 4) Regulations 2020, to people who have been told to isolate under the new Test and Trace system, which started in England on 28<sup>th</sup> May 2020.
7. Accordingly, a person who has been notified that they have had contact with a person with coronavirus, and who is self-isolating for 14 days as a result, will be entitled to statutory sick pay.

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<sup>9</sup> Paragraphs 6.4 and 6.5, 2<sup>nd</sup> Treasury Direction.

<sup>10</sup> Paragraph 7.4, 2<sup>nd</sup> Treasury Direction.

<sup>11</sup> Paragraph 7.5, 2<sup>nd</sup> Treasury Direction.

<sup>12</sup> Paragraph 7.19, 2<sup>nd</sup> Treasury Direction.

<sup>13</sup> Paragraph 7.12, 2<sup>nd</sup> Treasury Direction.

## **What's the present position on annual leave for employees and workers?<sup>14</sup>**

8. Workers who have been placed on furlough continue to accrue statutory holiday entitlements, and any additional holiday provided for under their employment contracts.
9. Employers can:
  - require workers to take holiday; and
  - cancel a worker's holiday, if they have given sufficient notice to the worker.
10. The required notice periods are:
  - double the length of the holiday if the employer wishes to require a worker to take holiday on particular days
  - the length of the planned holiday if the employer wishes to cancel a worker's holiday or require the worker not to take holiday on particular dates
11. Employers can ask workers to take or cancel holiday with less notice, but they would need the worker's agreement to do so.
12. Workers on furlough can take holiday without disrupting their furlough (the notice requirements still apply).
13. If an employer requires a worker to take holiday while on furlough, the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday.

## **Will they still be able to carry forward annual leave?**

14. To protect workers from losing their statutory holiday entitlement, the government passed The Working Time (Coronavirus) (Amendment) Regulations 2020.
15. These Regulations stated that where it has not been reasonably practicable for the worker to take some or all of the 4 weeks' holiday due to the effects of coronavirus, the untaken amount may be carried forward into the following 2 leave years.

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<sup>14</sup> <https://www.gov.uk/guidance/holiday-entitlement-and-pay-during-coronavirus-covid-19>

16. When considering whether it was not reasonably practicable for a worker to take leave as a result of the coronavirus, so that they may carry untaken holiday into future leave years, an employer should consider various factors, such as:
- whether the business has faced a significant increase in demand due to coronavirus that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures;
  - the extent to which the business' workforce is disrupted by the coronavirus and the practical options available to the business to provide temporary cover of essential activities;
  - the health of the worker and how soon they need to take a period of rest and relaxation;
  - the length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year;
  - the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the coronavirus situation.
  - The ability of the remainder of the available workforce to provide cover for the worker going on leave.
17. Employers should do everything reasonably practicable to ensure that the worker is able to take as much of their leave as possible in the year to which it relates, and where leave is carried forward, it is best practice to give workers the opportunity to take holiday at the earlier practicable opportunity.

### **How about furloughed workers?**

18. The Government guidance states that workers who are on furlough are unlikely to need to carry forward statutory annual leave, as they will be able to take it during the furlough period. However, to do so they must be paid the correct holiday pay which is likely to be higher than the rate of pay that will be covered government grants, with the employer making up the difference.
19. If, due to the impact of coronavirus on operations, the employer is unable to fund the difference, it is likely that this would make it not reasonably practicable for the worker to take their leave, enabling the worker to carry their annual leave forwards.

20. In this situation, the worker must still be given the opportunity to take their annual leave, at the correct holiday pay, before the carried annual leave is lost at the end of the next 2 years.

**The contents of this article should not be taken as legal advice on the circumstances of any particular case. Tailored legal advice should always be obtained prior to acting, especially during such a developing and everchanging public health crisis.**

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