



Covid-19 Pandemic

Job Retention Scheme Q&A

UNISON
the public service union

Employment Law Questions and Answers relating to the Government’s Job Retention Scheme

1. What is furloughing?

The Government has devised a job retention scheme (JRS) to provide a grant for wages and costs for continuing to employ qualifying Employees on temporary leave (furloughing) due to reasons relating to the current coronavirus pandemic.

2. How does the scheme work?

Under JRS, HM Customs and Revenue (HMRC) may reimburse the Employer a proportion of the wage costs relating to the Employee. The amounts (and caps) that apply depend on the relevant dates claimed for, as the scheme changed significantly from 1 July 2020 with the introduction of ‘flexible’ furloughing.

Originally, an Employer could claim up to 80% wages (capped at £2,500 per month) for each individual on furlough, but the amounts changed for periods of flexible furlough from 1 July 2020 to 31 October 2020. On 31 October 2020, the Government announced that the JRS would be extended by a further month, with an Employer permitted to claim up to 80% wages (capped at £2,500 per month) for each individual on furlough. On 5 November 2020, the Government announced the JRS would be extended until 31 March 2021. Under each version of the JRS, an Employer may top up wages of Employees on furlough and this is something organisers can negotiate.

The legislative basis for the scheme was originally confirmed in a [Treasury Direction and schedule](#) on 15 April 2020. The first Treasury Direction was updated by a second Treasury Direction on 22 May 2020 and then by a third Treasury Direction on 25 June 2020 due to the introduction of flexible furloughing from 1 July 2020. A fourth Treasury Direction was published on 1 October 2020 which related to (the now withdrawn) Job Retention Bonus scheme. The fifth Treasury Direction was made on 12 November 2020 to cover the scheme from 1 November 2020 and states that a further one will be made to address how the scheme will apply after 31 January 2021.

Guidance on the JRS produced by the Government was first published on 26 March 2020 and has been updated frequently since that time. There are now many pages of separate types of Government guidance for businesses and individuals that can be found from [here](#).

3. Who can access the scheme?

The online application portal for the scheme opened on 20 April 2020. It is for Employers to make applications on behalf of Employees selected to be put on furlough. The original JRS is for claims from (in theory) 1 March 2020 up to 30 June 2020, the extended scheme (that

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introduced flexible furlough) applied from 1 July 2020 to 31 October 2020, with the scheme now further extended to 31 March 2021

There is some uncertainty about which staff an employer can legitimately furlough for payments under the JRS. This is because of there being different legislative bases (the Treasury Directions) for the JRS that apply at different times. For example, from 10 June 2020 to 31 October 2020, except for those returning from family leave or military reservists, the scheme was closed to new claims for Employees who had not already been placed on furlough for a minimum of 3 weeks. However, the Government's guidance on 10 November 2020 now suggests that Employers can furlough staff for the first time to claim periods from 1 November 2020.

Unless an employee was on furlough for the whole of the claim period from 1 July 2020, the relatively complex rules around calculating flexible furlough will apply. These are explained in a bit more detail below in Q24, but in summary:

- From 1 July 2020, Employers can require Employees to return part-time but must pay normal wages for days worked. The Employer can continue to claim for 80% wages on days not worked up to the cap of £2,500 per month.
- From 1 August 2020, Employers will be required to pay employer NICs and pension contributions on furlough pay.
- From 1 September 2020, Employers will be required to pay 10% of furlough pay and can apply to recover the remainder up to £2,187.50 per month.
- From 1 October 2020, Employers will be required to pay 20% of furlough pay and can apply to recover the remainder up to £1,875 per month.

The Government announced on 31 October 2020 that from 1 November 2020 employees would receive 80% of their current salary for hours not worked, but that Employers would be required to pay employer NICs and pension contributions on furlough pay. On 10 November 2020, the Government published more detailed guidance on how the JRS would operate from 1 November 2020 and this was then supplemented by the Treasury Direction on 12 November 2020 which includes the specific calculation methods and formulas to be applied. These largely follow the same methodology as applied in August 2020 but are set to be reviewed and may be updated for claims made for the period after 31 January 2021. Separately, the [self employment income support scheme](#) (SEISS) opened for claims on 13 May 2020. This is relevant for those who are neither employees nor workers paid via PAYE. To claim, individuals must provide their self-assessment Unique Taxpayer Reference (UTR) number; National Insurance number; Government Gateway user ID and password; and UK bank account details. The SEISS grant should be paid within 6 days of a completed claim.

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It was confirmed on 29 May 2020 that SEISS would be extended with applicants eligible to claim for a second grant in August 2020. Applications for the first SEISS grant closed on 13 July 2020. The second SEISS grant application closed on 19 October 2020. However, the Government announced an extension to the SEISS on 2 November 2020, explaining that further taxable grants would be available for the periods from 1 November 2020 to 31 January 2021 (for 55% average monthly trading profits) and then 1 February 2021 to 30 April 2020. Applications for the first extended grant are due to open on 30 November 2020, but there are currently no details on the level of the second extended grant or when applications will open.

4. Who decides whether someone is furloughed?

The Employer decides who is to be furloughed. As this will require a variation of the Employee's contract, an Employee's consent is required before they go on furlough. Please see what is said about 'consent' in the sections below.

5. Are Public Sector organisations / Organisations that receive public funding entitled to use the scheme?

Yes. Although the Treasury Directions are silent on this point, the guidance (applicable for the JRS up to 31 October 2020) states that:

- a. it would expect the majority of public sector Employees to continue to provide essential public services and contribute to the response; and
- b. where Employers receive public funding for staff costs, and that funding is continuing, those Employers to use that money to continue to pay staff in the usual fashion and correspondingly not furlough them.

The guidance for the JRS from 1 November 2020 says that organisations can use the scheme if they are not 'fully funded' by public grants and that they should contact their sponsor department for further guidance.

This also applies to non-public sector Employers who receive public funding for staff costs.

UNISON would hope that that members employed by organisations in receipt of public funding are kept in fully paid employment rather than put on furlough.

6. Will a company in administration be able to access the JRS?

Yes, depending on what steps are taken by the Employer or Administrators and whether the affected Employees consent.

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7. Will JRS cover Employees who were made redundant since 28 February 2020?

Yes in cases up to 31 October 2020, if they are rehired by their Employer in order to be put on furlough. In claims for the period from 1 November 2020, an employer may consider rehiring staff made redundant since 23 September 2020. While it may seem unlikely to happen in practice, the Government's guidance explains that this is possible under the JRS, so organisers can negotiate with Employers to reappoint staff who would otherwise be dismissed as redundant.

8. Can an employee work while on furlough?

Employees were not permitted to work, or provide services or generate income for their Employer, while on furlough up to 30 June 2020. This only applies to the Employer (and includes any company that is linked or associated with the Employer) who has put the Employee on furlough.

From 1 July 2020, Employers can require Employees to return to work part-time through the flexible furloughing scheme. This will continue until 31 March 2021. Employees must not work on days they are not required to under what has been agreed for the flexible furloughing period.

9. Will furlough wages be subject to income tax and deductions?

Yes, it is for the Employer to calculate these amounts correctly.

10. Can Employees on agency contracts be furloughed?

Yes, provided that they are paid via PAYE. Where the situation arises, furlough should be agreed between the agency, as the deemed employer, and the agency worker. The Government guidance advises the agency to discuss the need to furlough with any end clients involved.

As with Employees, agency workers should perform no work for, through, or on behalf of the agency that has furloughed them while they are furloughed up to 30 June 2020, including for the agency's clients. It remains to be seen how this has operated in practice from 1 July 2020 for those who have been on 'flexible' furlough.

Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.

11. Can Employees on flexible / zero-hours contracts be furloughed?

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Yes, provided that they are paid via PAYE. They will be paid by the Employer whose payroll they are on. Where an Employee's pay varies by week or month, and they have been employed for 12 months before the claim, an Employer can claim and pay the Employee the higher of the same month's earning from the previous year or the average monthly earnings from the 2019-20 tax year.

12. What is the position where an Employee has more than one job?

Employees with more than one job can be furloughed by each Employer. Each job is separate, and the relevant threshold and cap applies to each Employer individually.

13. Who pays Employer National Insurance contributions and minimum automatic enrolment Employer pension?

Employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment Employer pension contributions on behalf of furloughed Employees and can claim for these costs from the Government in addition to the furlough wage in claims for periods up to 30 June 2020. Note that Employers cannot claim for reimbursement of these costs from 1 August 2020.

14. Can a furloughed employee do volunteer work/training?

Yes, if it does not provide services to, or generate revenue for, the Employer while on furlough. This is specified in each of the Treasury Directions and guidance to date.

If Employees must complete relevant training courses requested by the Employer while furloughed, then they must be paid at least the full NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised. Note this requirement for pay does not apply for all training done while on furlough.

15. Do Employees need to consent to furlough?

Yes, the agreement between employer and employee must specify:

- the terms and conditions upon which the employee will cease all work in relation to their employment;
- that it is incorporated into the employee's contract; and
- in writing what has been agreed between the Employer and Employee.

Employers can only claim for the period 1-13 November 2020 where they obtained relevant agreement from Employees to extend furlough beyond 31 October 2020 in the period up to 13 November 2020.

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Employers should discuss with their staff and make any changes to the employment contract by agreement. Where the Employees do not consent to changes, then advice should be sought as soon as possible, as it potentially raises a number of different claims. When Employers are making decisions in relation to the process, including deciding who to offer furlough to and when a furlough period must end, equality and discrimination laws will apply in the usual way.

The Government's guidance and Treasury Directions state that 'such agreement may be by means of a collective agreement', but see what we say about collective issues below. In short, there are a number of potential legal issues that may arise depending on the factual circumstances. A record of what has been agreed must be kept for five years under JRS but may need to be kept longer for different legal reasons, such as data protection law.

Also note that where furlough was extended beyond 30 June 2020 (or any subsequent date) then any variation and / or extension of the original furlough agreement must be agreed and the same issues and potential concerns about consent should be considered for any extended period on furlough.

16. What is the minimum period for which an Employee may be furloughed?

Up until 30 June 2020, the minimum period for which Employees can be furloughed is three weeks. This is specified as 21 calendar days in the relevant Treasury Directions, however this changed under flexible furloughing.

Government guidance states that from 1 July 2020, an Employer must claim for minimum periods of 1 week and this must not overlap calendar months, which has been confirmed in the third Treasury Direction with specified methods for the relatively complex calculations required. The fifth Treasury Direction (and corresponding guidance) confirms the same approach will continue from 1 November 2020.

17. Can an employer rotate staff for 3 weeks on furlough and then working 3 weeks?

Yes for claims in the period up to 30 June 2020, as the scheme changed from 1 July 2020 for employers who wished to continue or introduce rotating furlough. There is a shorter minimum period (of 1 week) and Employers can only furlough the maximum number it previously furloughed at any time prior to 1 July 2020. This means that Employers who previously rotated Employees on furlough cannot require all Employees to work part-time under flexible furlough from 1 July 2020. From 1 November 2020, there is no limit on how Employers rotate furlough, except that it must be agreed with the Employees.

18. Can Employees with caring responsibilities be eligible for furlough?

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Yes, but Employers must consider and avoid potential unlawful discrimination under the Equality Act 2010 (EqA 2010), such as indirect sex discrimination for mothers with sole parental responsibility for school age children or associative direct disability discrimination for those who live with someone disabled.

19. If you belong to a category of employee/worker that is required to shield, then can you be furloughed?

Yes, but there are likely to be issues under the EqA 2010 that require advice. Any person who is 'extremely clinically vulnerable' and shielding is almost certainly disabled for the purposes of the EqA 2010. Employers must avoid discriminating against Employees who are disabled and also against Employees who associate with persons (ie living in the same household) who have a protected characteristic under the EqA 2010.

[Government guidance](#) about shielding was published on 23 June 2020 and proposed changes made from 6 July 2020 (to relax requirements that applied from March 2020) and 1 August 2020 (to pause shielding) for those who are shielding. This was most recently updated on 13 November 2020 to reflect changes made in the Government's approach for everyone with the restrictions from the second Lockdown that commenced on 5 November 2020, but also specifies additional restrictions to remain home where possible. The second Lockdown is due to end on 2 December 2020. It remains to be seen what measures the Government will introduce when the second Lockdown ends, although it seems likely to revert back to guidance that is specific to local restrictions.

20. What about Employees on unpaid leave?

Generally, an Employer can only claim JRS payments for Employees that started unpaid leave after 28 February 2020. The first Treasury Direction permits that Employees who were already on unpaid leave at 28 February 2020 and finish their unpaid leave as originally planned may then be put on furlough. The subsequent Treasury Directions make it clear that where a period of unpaid sabbatical or other period of unpaid leave is enjoyed by an employee, no JRS claim may be made in respect of the period of unpaid leave.

21. Dealing with Employers that have already imposed cuts

While the Treasury Directions do not refer to this point, Government guidance makes clear that the JRS (in claims for up to 31 October 2020, at least) will not apply for Employees who agreed reductions to hours or pay before the JRS opened to claims on 20 April 2020.

Redundancy

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22. Can an Employer still make staff redundant and will their redundancy rights be affected by furlough?

The original aim of the JRS was to avoid redundancies, although the scheme has been extended on multiple occasions, some commentators have questioned whether it has artificially affected the long-term viability of jobs.

Staff can be made redundant while on furlough and their rights will be affected, as the way in which JRS was implemented will have varied their contractual rights. This might impact upon a number of issues. For example, in July 2020 law was introduced to make clear that statutory redundancy pay must be calculated on pre-furlough rates. This is expected to continue for the JRS until 31 March 2021. Additionally, the fifth Treasury Direction states that Employers cannot claim under the JRS for the period from 1 December 2020 for Employees serving notice. This could be notice for redundancy, resignation or retirement.

The decision to put Employees on furlough is made by the Employer and any dismissal for redundancy must still stand up to the scrutiny of the law on unfair dismissal and redundancy pay.

These rights normally depend on qualifying Employees having 2 years' service but note that 'automatic' unfair dismissals (e.g. where the Employee is dismissed because of a qualifying protected disclosure) can be claimed by Employees with less than 2 years continuity of employment.

23. What happens for Employees who are given notice of redundancy after 31 October 2020 – can the Employer be forced to furlough instead?

In theory an Employer could re-hire an Employee given notice of redundancy after 31 October 2020 (if that person was employed between 20 March 2020 and 30 October 2020) and then furlough the individual. However, it seems unlikely that many employers will do this because of additional costs (from employer NICs and pension contributions) and potential legal risks with managing the continuing employment and uncertainty about how the JRS will end in future.

The decision on whether to furlough staff is for the Employer to decide. Therefore, while organisers can raise concerns about potential unfairness from any refusal to re-hire and furlough, the Employer cannot be forced to furlough.

Pay

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24. At what rate will Employees be paid to be furloughed?

There are different rates and caps that apply for Employees on furlough up to 30 June 2020; for Employees on ‘flexible’ furlough from 1 July 2020; and, for Employees on extended furlough from 1 November 2020.

The Government guidance includes an online calculator for data to be inputted and a number of worked examples.

It is for the Employer to decide what is applied for and it must calculate the ‘costs’ for ‘fixed rate’ staff and ‘non-fixed rate’ staff in each relevant claim period. The guidance refers to ‘regular’ and ‘variable’ wages, as well as overtime, fees and commission provided that they are ‘non-discretionary’. However, it specifically excludes any payments that are ‘discretionary’ (including tips, discretionary commission and discretionary bonuses) and non-monetary benefits, such as a company car. This inevitably seems likely to cause confusion and dispute on what these terms mean in practice under existing employment law.

From 1 July 2020, Employers must provide HMRC with details of the ‘baseline’ number of ‘usual hours’ in order that it can be compared with the actual hours worked for each period of ‘flexible’ furlough claimed. The third and fifth Treasury Directions specify the relatively complex calculations and information to be provided by an Employer within the same month of each claim and the Government’s guidance advises that a claim should not be made until it is sure of the exact number of hours an employee will have worked within the relevant claim period. This information must therefore be correct each time to avoid Employees receiving lower wages than what has been agreed for the period on flexible furlough. Employers must pay the Employees normal wages for any days worked.

25. How much will an Employee be paid on furlough if they are a term-time employee and on an annualised contract?

Term time only (TTO) Employees are normally required to work only during school terms but continue to be engaged under a contract when not required to work. Their pay is often split into twelve monthly instalments that takes account of their working pattern. TTO Employees will normally be contractually required to take annual leave during periods of school closure each year.

If a TTO Employee works 39 weeks per year and is entitled to at least 5.6 weeks annual leave - which must not be pro-rated following the decision in *Harpur Trust v Brazel &*

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UNISON [2019] - their annual salary is likely to be payment for 39 + 5.6 weeks = 44.6 weeks divided into 12 monthly instalments.

It is hoped that most TTO Employees will be paid 100% of their normal wages on furlough, but some might get 80% of what they normally receive in a month (for example: 39 weeks worked per year, plus a minimum of 5.6 weeks divided by 12 months x 80%). This is the minimum amount and it may be possible to negotiate for more where an Employer has no mechanism for designating when TTO Employees take their annual leave. Please see the example at Q37 below in relation to Annual Leave.

26. How much will an Employee be paid on furlough if they are a part-time employee?

The 'pro-rata' principle will normally apply for part-time employees and workers on the Employer's PAYE at the relevant time, although note the exceptions for TTO Employees and potential problems in calculation of the 'regular' wage explained above, especially under the arrangements for flexible furlough.

27. How much will an Employee be paid where they are on a zero hours contract or their salary varies from week to week/ month to month?

Where an Employee's pay varies by week or month, and they have been employed for 12 months before the claim, an Employer can claim and pay the Employee the higher of the same month's earning from the previous year or the average monthly earnings from the 2019-20 tax year.

For Employees whose pay varies but they have been employed for less than a year, the calculation should cover the average monthly earnings since they started work.

28. What will Employees on National Minimum Wage/National Living Wage be paid while furloughed?

The government has stated that Employees on the National Minimum Wage (NMW) or National Living Wage (NLW) can be paid less than the legal minimum on the justification that the NMW/NLW does not apply to furloughed Employees. However, UNISON would seek to negotiate that Employees who earn either NMW or NLW earn 100% of their pay.

29. What if you are required to complete a course whilst I am furloughed?

If workers are required to complete certain types of training whilst they are furloughed, then they must be paid at least the NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised. However, this potential entitlement depends on the type of training and certain thresholds being met when it was requested, as different rules apply under the different Treasury Directions.

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30. What if I am on an annual salary and regularly receive performance bonuses, unsocial hours payments?

As explained above, there could be some debate on what amounts to ‘regular’ parts of remuneration because of the way the Treasury Directions and guidance have been drafted. This will also be affected by whatever is agreed between the Employer and Employee when the individual is put on furlough or any period of flexible furlough.

Normally, the Employer can claim for any regular payments received. This includes wages, past overtime, fees and some commission payments. However, this means discretionary bonuses (including tips), other types of commission payments and non-cash payments will be excluded.

31. What if my basic pay in my contract or employment is the London Living Wage?

The Employee should be entitled to receive 80% of the London Living Wage up to 30 June 2020 because this will be the basic salary for the purposes of the furlough payments, with the tapered sums from 1 August 2020 under flexible furlough that are due to continue until 31 March 2021. The Employer can also claim for the costs of regular (but not discretionary) payments normally received.

Annual leave

32. Can people request annual leave when on furlough?

Paid annual leave is a fundamental social right and Employees have the right to take paid annual leave whilst on furlough, but there remains a number of contentious legal issues about how annual leave rights will work because of the JRS and other legal requirements from the current lockdown. In particular, whether any restrictions (eg the need to self-isolate or socially distance) prevent the Employee from resting, relaxing and enjoying leisure time.

Annual leave is not referred to in the Treasury Directions but the Government eventually produced its [guidance](#) about holiday entitlement and payments under the JRS on 13 May 2020. There are some points which remain open for interpretation about how existing legal rights are affected. The guidance cannot affect the legal entitlements to annual leave and pay in respect of it. The main minimum legal entitlements are set out in the Working Time Regulations 1998 (WTR 1998) and EU law, although workers may benefit from contractual holiday arrangements which go beyond these.

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Advice about rights of members under the WTR 1998 is a reserved matter, so queries about annual leave (including matters discussed in this section) should be discussed with UNISON's Legal Services team.

33. Can an Employee cancel annual leave whilst on furlough?

This remains unclear, but presumably 'yes', subject to it being agreed and any notice period the Employee needs to give the Employer.

34. Can an Employer force an Employee to take or cancel annual leave?

Yes, according to the Government's guidance. But attempting to force an Employee to take annual leave in the present circumstances is a controversial point, as it could undermine the fundamental purpose of holiday when the Employer requests that annual leave be taken. For example, this could breach the same legal rights that already exist to protect workers on long-term sick leave from being forced to take annual leave.

Employers must follow the notice requirements for annual leave under Regulation 15 WTR 1998, but note these can be varied by a relevant agreement (including collective agreements) where it is possible for clear terms to be incorporated into the individual's contract of employment.

Unless there has been a valid variation, the minimum default notice periods under Regulation 15 WTR 1998 are:

- Double the length of the annual leave if the Employer wishes to require the Employee to take holiday on particular days.
- The length of the planned holiday if the Employer wishes to cancel a holiday or require the Employee not to take holiday on particular dates.

These notice periods are in advance of the first day of the holiday, and the notice must be given before the notice period starts.

Note that many Employers will not want staff to take annual leave during furlough as 100% of normal wages (ie that the individual received before furlough, see below) must be paid for holiday and the Employer would be able to obtain 80% wages for holiday pay paid under the JRS. This means the Employer would have to make up the difference.

35. What if someone cannot use their annual leave entitlement for the year?

Under the Working Time (Coronavirus) Amendment Regulations 2020 (that came into effect on 27 March 2020), Employees can 'carry forward' the EU-minimum 4 week annual

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leave period for full-time workers (or a pro rata amount for part-time workers) into two subsequent annual leave years where it was “not reasonably practicable to take leave conferred by regulation 13 [of the Working Time Regulations 1998] because of Coronavirus”.

The remaining 1.6 week’s leave under statute can be carried over by up to a year by agreement with an Employer under existing law.

36. At what rate of holiday pay will someone on furlough be paid?

Pay whilst on annual leave should be at the normal rate of remuneration under domestic and European law. This means pay earned whilst normally working and not the 80% furlough pay which is limited to £2,500 per month under the original JRS or tapered sums provided for under the extended JRS.

While the Government guidance confirms that an employee should receive their ‘correct holiday pay in accordance with current legislation’ (and we expect this to mean the first 4 weeks must be paid at a worker’s “normal remuneration” and additional 1.6 weeks subject to the statutory rules on a week’s pay) this does not sit easily with how the Treasury Direction and Government guidance refers to ‘regular’ wages explained above. Employers are obliged to pay additional sums above the grant (i.e. to top up the difference between furlough pay and annual leave pay) but they may restrict or cancel annual leave where there is a business need to do so.

Note that from 6 April 2020, where the Employee’s weekly wage is variable, the statutory holiday pay (i.e. 5.6 weeks minimum entitlement, or pro-rata equivalent) is calculable by reference to an average from the previous 12 months earnings.

37. How does Annual Leave apply to Term-Time Only (TTO) workers?

As explained above, the position of TTO Employees is different to other types of part-time workers.

For TTO Employees that continue to receive 100% of their normal pay during the period they are furloughed, the payment of any annual leave should be included in these payments. It is for the Employer to claim for relevant sums under the JRS scheme and make up the difference in any shortfall where necessary.

For TTO Employees that are only receiving 80% of their normal pay during furlough (or a lower amount under flexible furlough), they should be paid 100% of their pay for any periods when they are on annual leave.

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TTO Employees are entitled to a pro-rated annual leave allowance compared to a full year employee. However, for many TTO Employees, it is not specified on what days they are actually taking their annual leave. This means there is uncertainty for what happens where the Employer is closed outside of term time.

For example, if there is an allowance of 30 days leave and there are 60 days of school closure then a TTO Employee can be deemed to be taking half a day's leave on each of the days of school closure. So if there were 30 closure days over summer, then 15 of those would be annual leave. This means it could be argued that for 3 weeks of the 6 weeks the Employee should receive full pay rather than a lower sum due to the limits imposed by the JRS. Note that advice should be sought if such a situation were to arise as this type of argument is complicated by ongoing developments in the underlying law.

Sickness during furlough

38. Will an employee who falls sick while furloughed be entitled to sick pay?

Yes, but it remains unclear how this will work in practice for some Employees. In particular, whether an Employee who is eligible for SSP can be placed on furlough. Potential entitlements depend on the dates of claims, as different rules apply under the different Treasury Directions.

Employees placed on furlough have the same employment rights as before, but there are now also deeming provisions by which an Employee will sometimes be treated as incapable of work even if they are in fact not incapable of work for the purposes of statutory sick pay (SSP). For example, those who are self-isolating and those who have been advised by a GP to refrain from work due to an underlying condition which makes them vulnerable or extremely vulnerable to the risks from coronavirus (ie shielding) may be eligible for SSP. The new deeming provisions mean that SSP is due from the first day of sickness due to the specified coronavirus-related reasons.

The third Treasury Direction covering claims up to 31 October 2020 provides that where SSP is paid 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 also states that the timing of the end of the period of incapacity should be determined by agreement between the Employer and Employee.

This means that if an Employee is ill, the Employer can attempt to seek their agreement to continue on furlough where wages can be paid via the JRS up to 31 October 2020, even

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if they are eligible for SSP (when earning at least £120 per week) or more general contractual sick pay under their contracts of employment that the employer must pay itself. Note that the new deeming provisions for SSP will not normally apply for contractual sick pay benefits and some small employers employing less than 250 staff can claim a rebate for up to 2 weeks of SSP paid from 13 March 2020 for coronavirus related reasons.

The fifth Treasury Direction and associated guidance largely repeat these points, meaning that there remains a potential concern about fair treatment for those who fall sick while working under flexible or rotating furlough and those who are told to self-isolate (eg those who must shield) from 1 November 2020 to 31 March 2021.

39. Will an employee who falls sick whilst on furlough be entitled to sick leave on the furlough rate of pay or their normal rate of pay?

Sick pay should be calculated at the normal rate of pay, rather than on the furlough rate of pay, but different rules apply which depend on the timing and reasons for the sickness as well as the individual's contractual entitlement.

While the Government guidance states that an Employer can decide whether to keep an Employee on furlough or move them to SSP in this type of scenario, the Treasury Directions make it unclear what happens to workers who become sick, recover and go on furlough, and then become sick again. It is stated that the subsequent period of sickness must be disregarded, which is presumably to enable the furlough to continue, but this may undermine a number of legal requirements, such as reporting on health and safety at work.

Under an Employee's contract of employment, the Employer might still need to follow enhanced sick leave provisions (such as wages higher than SSP), as the contractual terms will continue to apply.

40. Can an Employee who lives with someone shielding be put on furlough?

Yes, an Employer can decide who it puts on furlough. [Government guidance on shielding](#) explains changes introduced from 6 July 2020 (to reduce restrictions that applied from March 2020) and from 1 August 2020 (to pause shielding) should be taken into account. Further changes to this guidance were made on 28 October 2020 (which appeared to reduce the chance that someone will be instructed to shield), but with the second Lockdown that began on 5 November 2020, the guidance was updated again on 13 November 2020 to reintroduce many of the original restrictions for those who must shield. This is due to apply until at least 2 December 2020. If the employer targets

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someone because of their close association with someone who has a protected characteristic under the Equality Act 2010 (eg someone who is shielding because of a disability or pregnancy) then the individual may require advice on a potential claim of direct associative discrimination.

41. What if someone dies during furlough? Will their rights and entitlements be affected in any way?

No. The furlough scheme should not affect workers' employment rights or pension entitlements if they die in service.

42. Will workers be required to provide a sick note if they have COVID-19?

Employees will not need to provide a GP fit note if they contract COVID-19. If evidence is required by an employer, those with symptoms of coronavirus can get an isolation note from [NHS 111 online](#) and those who live with someone that has symptoms can get a note from the [NHS website](#).

Maternity/Paternity Leave (and other equality issues e.g. vulnerable Employees)

43. Will those on Maternity leave have to be furloughed?

No, there is no requirement to put those who are on maternity leave on furlough. There are a number of legal protections for workers on maternity leave under the Equality Act 2010 and related legislation. Any selection process by an Employer to put staff on furlough must not breach those rights.

44. Will those on Maternity leave be entitled to take furlough leave?

The Treasury Directions and Government guidance to date are not clear on this issue. In theory, a worker on maternity leave could agree to return before the expected date in order to be put on furlough. This is not something that should be agreed lightly, as there would be no right to return to maternity leave after the period on furlough ends. However, see payment whilst on maternity leave below.

45. What rate of pay should be paid for those on maternity leave?

There are statutory maternity pay ('SMP') rates and calculations which depend on an individual's circumstances in the period before maternity leave commences. An employee eligible for SMP or Maternity Allowance would be entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average

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weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate rose from £148.68 a week to £151.20 a week on 5 April 2020.

Additionally, there can be contractual maternity provisions that supplement SMP. The guidance states an Employer can claim through the scheme for enhanced (earnings related) contractual pay for Employers that qualify. SMP cannot be claimed for under the JRS.

46. What about workers who are pregnant and forced to either attend work or take unpaid leave?

Pregnant workers are particularly vulnerable and should not be put in this position. The Government has ‘strongly advised’ pregnant workers to work from home if possible. This was before the emergency legislation that imposed workplace closures and further restrictions on travelling from home for the first and second Lockdowns.

Where the nature of Employee’s role means there is no suitable alternative work available that could be done from home, the Employer should consider suspending the Employee on full pay in line with requirements for the risk assessment of pregnant workers under The Management of Health and Safety at Work Regulations 1999.

47. What is the position for over 70s, workers with diabetes, heart disease who are told to either attend work or take unpaid leave?

There are protections under the Equality Act 2010 for workers with protected characteristics of age and/or disability. Note that whether an individual has a disability for the purposes of the Equality Act 2010 can often be an issue disputed by an Employer. These rights are particularly important to raise where an Employer is considering putting Employees on furlough.

When these rights are read in the context of the Government’s guidance on COVID-19 about which groups are ‘strongly advised’ to remain home, an Employer should be challenged on whether this type of policy (remain at work or take unpaid leave) can be objectively justified as a proportionate means of achieving a legitimate aim for workers with those protected characteristics.

TUPE and furlough

48. If an Employee’s employment is outsourced / TUPE transferred, will they still be entitled to furlough?

Potentially, depending on the date and facts of the relevant transfer.

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Following a TUPE transfer there is an automatic transfer of rights and as a matter of law the new employer steps into the old employer's shoes. Unfortunately, the Government's guidance and Treasury Directions to date have created very complicated and difficult problems that may potentially arise. For example, different rules apply for claims made under JRS for the periods up to 30 June 2020 as separate to claims in the period up to 31 October 2020 and then from 1 November 2020. Additionally, while the JRS should apply for relevant employees who transferred since 28 February 2020, there is uncertainty on which type of relevant transfer is eligible at different times in claims for the period up to 31 October 2020. The fifth Treasury Direction appears to widen the scope of which staff will be eligible for furlough and claims in the period from 1 November 2020, but much will depend on what happens in practice.

TUPE is a reserved matter, so queries on advice should be referred to UNISON Legal Services.

Trade union rights and collective agreements

49. Should UNISON agree Furlough Agreements with Employers?

Where the Employer recognises UNISON and decides that there is not enough work for all Employees, they may consider proposing a Furlough Agreement for negotiation and agreement with UNISON.

UNISON has drafted a Memorandum of Understanding that it can use with Employers, to agree how matters should progress and this information may be obtained from the Region.

The original Treasury Direction required a furlough agreement to be in writing between the Employer and the individual Employee. The Government's guidance of 23 April 2020 and updated Treasury Directions have confused the issue by stating that a collective agreement may be used for consent. UNISON has taken the view that it is unable to provide consent to furlough on behalf of an individual employee. This is because the Treasury Directions (to date) specify that an Employee must provide written agreement to the Employer if they agree to signing up to the JRS. Any queries about this should be raised with UNISON Legal Services.

50. Collective Agreements and Consent - ensuring appropriate procedure to achieve furloughed status

Even if there are contractual terms that permit some variation of terms, due to the wording of the Treasury Directions to date, an Employer will need to obtain each Employee's

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agreement in writing to be placed on furlough leave. Further consent will be needed if the period of furlough extends beyond 30 June 2020 and / or again after 31 October 2020.

Providing all the issues set out above regarding the operation of the scheme have been addressed with the Employer, staff should of course be encouraged to agree given that the alternatives would be the termination of employment by reason of redundancy or unpaid leave until the business recovers, but it will always remain the individual's choice to decide.

51. Can a branch secretary or representative carry on with their union duties/activities during furlough?

This will be a very busy and difficult time for most members.

Where UNISON Branch representatives receive paid facility time (funding from Employers to conduct trade union activities) they will continue to carry out their full range of duties and provide a service to their Employer, so we would expect them to carry on working and expect their employer to provide them with suitable facilities as set out in their facilities agreement. We would not expect them to be furloughed.

Branches will need to be alert to some Employers that put on furlough union representatives who receive paid facility time and expect them to continue their full range of duties for 80% wages or the reduced sums that applied from 1 July 2020. Branch Representatives will need to speak to their Regions if this is proposed or happens.

Note that the Guidance to Employers of 30 April 2020 states that “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 your organisation or a linked or associated organisation”.

Please note that the Guidance refers only to “individual or collective representation of employees”. However, trade union ‘duties’ are specified in law, and there can be additional duties agreed in a relevant facilities agreement. For example there is a difference between individual and collective representation (e.g. disciplinaries, redundancy and TUPE consultation) and collective bargaining on terms and conditions or the physical conditions in which any workers are required to work (i.e. Health and Safety representative roles). See also [ACAS Code of Practice Time off for TU Duties and Activities](#). It is not clear if these additional duties can be carried out during furlough, and Organisers should look out for Employers who seek to furlough TU reps who are continuing their full range of duties.

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Branches may need to consider making alternate arrangements with Regions where necessary.

A trade union representative may continue to carry out trade union ‘activities’ which includes all other representative and participatory activities in the widest terms, except industrial action and as a union learning representative.

Furloughed Employees whose pay does not include any paid facility time, may carry out trade union duties and activities as set out in the Guidance above, as this is voluntary and not deemed to be a service to the Employer because it is normally done in an employee’s non-working time.

Branch representatives should seek further advice from Regions where necessary. New methods of communication will need to be considered, but Branch representatives must continue to liaise with colleagues from Regional and National teams for advice and guidance where it is needed.

52. Will Employers be able to use the pension contribution towards pensions/ public sector pensions?

The Coronavirus Act 2020 introduced some changes to NHS pensions in relation to the suspension and abatement of pension for recently retired healthcare professionals returning to work. These came into effect on 25 March 2020 and are due to last 2 years, but the Act permits for this period to be shortened or extended.

53. What will the effect of furloughing be on pension accrual?

The relevant scheme rules will normally define what amounts to pensionable pay and the reduction in wages will be the main issue that affects pension accrual.

Note that minimum auto-enrolment Employer pension contributions also fall within the amount that can be claimed through the JRS. Employers can claim this and associated Employer national insurance contributions. In addition to 80% of wages (up to £2,500 per month per Employee).

Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April 2020 and will be £520 per month from 6th April 2020 onwards).

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54. What will happen to Employee contributions to pensions during furloughing?

Unless the pension scheme rules provide for something else where the pensionable pay has decreased, the Employee will be expected to continue to pay normal contributions from what they receive while on furlough.

57. Employment law related questions

Issues related to member's work and employment law assistance should in the first instance, as before, continue to be directed to your branch (see the contact page on our website for more information).

UNISON HAS PRODUCED SEPARATE GUIDANCE ON MATTERS RELATING TO RETURN TO WORK WHICH ALSO REFERS TO HEALTH AND SAFETY MATTERS CONNECTED WITH CORONAVIRUS AND OVERLAPS WITH SOME OF THE POINTS ABOVE [\[HERE \]](#)

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