

## IMPORTANT CHANGES TO THE *Job Retention Scheme*

The Job Retention scheme (JRS) ends on 30 June 2020, and will be replaced by the Flexible Furlough Scheme (FFS). The FFS will run from 1 July to 31 October 2020, when it is expected that all government support will end. The FFS is closed to anyone who did not make a claim under the JRS.

Whilst there are some common areas between the two schemes, the FFS is more complex and introduces the new concept of 'usual hours' to enable employers to return employees to the work place on reduced hours as their businesses get back up and running. There are also other changes, which we highlight below.

However, if you intend to use the FFS, you will have to refer to HMRC's guidance as it will be your responsibility to get any claims right, even where you engage others to help with your claim. The guidance is extensive and cannot be reproduced here. This is the link to HMRC's [landing page](#), where you may access links on eligibility of employers and employees, what to include in pay, how to calculate reference pay, usual hours and claim amounts, together with a number of worked examples.

The Treasury have also updated the legal backing to the JRS and FFS in its third Treasury Direction dated 25 June 2020 and a further link may be found [here](#).

### PAYROLL SERVICE OBLIGATIONS

As your payroll service provider, we would remind you that, under the terms of our payroll engagement, we are only able to process any information provided by you and that you are responsible for the accuracy of any calculations or returns made as part of the operation of your payroll. This means that if you use either the JRS or FFS, it is your responsibility to provide us with the information necessary to calculate your payroll.

Whilst we would be pleased to assist with any claim under either scheme, or to assist with the calculations necessary to make payment of the claims through your payroll to your employees, this work will form part of a separate engagement and will be charged for in addition to your normal payroll costs.

### KEY CHANGES

- From 1 July, provided the employee had been successively furloughed for a block of at least three weeks under the JRS, you can agree a reduced hour working pattern with them, depending on your business needs.
- The employee will be furloughed for their remaining 'usual hours'. There will be no minimum furlough hour requirement, unlike under the JRS where employees had to be furloughed for blocks of at least three consecutive weeks.
- If their furlough started after 10 June, having already had a prior period of three consecutive weeks on furlough, they will have to remain on furlough for another full three weeks, even if that straddles 30 June.
- Any flexible working agreement is likely to result in a contractual change to the employment contract and so must be agreed between you and confirmed in writing. You may need employment law advice and you may also need to vary the agreement as your business needs change.
- The agreement with the employee may be oral but must be confirmed in writing, which may be by email. There is now an express requirement for the agreement to be reached, but not necessarily confirmed, before the start of the claim period. The agreement can be varied to reflect any changes made during the period to which the claim relates.

- The employee will be paid by you for all hours worked at their normal contracted rate, which has to be at least the new NMW rate introduced from 1 April.
- In addition, if you make a claim under the FFS, they will also be paid for the hours not worked out of their usual hours, based on the current rate of 80% of their reference pay, capped at £2,500, pro rated for their furloughed hours as a percentage of their usual hours.
- Therefore, if they work 60% of their time, the furlough pay cap will be 40% of £2,500 per month only.
- The government will reimburse the furlough payments, employer's NIC and pension contributions on the furlough payments, as it does under the JRS, until the end of July. However, the calculation for the NIC reimbursement will change under the FFS and so please refer to the guidance.
- From 1 August, you will have to cover all NIC and pension amounts for hours not worked, in addition to having to pay for any hours worked by your employees.
- From 1 September, in addition to the NIC/pension costs on the furlough pay and costs for all hours worked, you will also pay 10% of the furloughed wages, as the contribution from the Government will reduce to 70% of the reference pay, pro rated for hours not worked, capped at £2,187.50 per month.
- From 1 October, your contribution to the furlough pay will be 20%, as the Government's contribution will reduce to 60%, pro rated for hours not worked, capped at £1,875 per month.
- Employees will continue to receive at least 80% of their reference pay, subject to the cap, pro rated for the hours not worked.
- You will still be able to rotate teams of workers under the FFS, provided they have all previously been furloughed for the required three week period under the JRS.

## REFERENCE PAY

The calculation for the reference pay will not change and you should refer to the guidance for further details on whether your employees are fixed or variable rate employees.

**A fixed rate employee** is one who receives a regular salary for the hours worked, regardless of when the hours are worked. The guidance includes further details on what can be included in the reference pay, which includes non discretionary overtime payments and commissions. The reference pay period for a fixed rate employee is the last payroll submitted on or before 19 March 2020, and so is fixed for the duration of either the JRS or FFS.

**A variable rate worker** is one whose hours vary and their reference pay is the higher of:

- Their average wages in 2019/20; and
- Their wages in the same pay period in the prior year.

Therefore, the reference pay may vary each pay period, depending which amount is the highest.

## NEW CLAIM PERIOD STEP

The first step under the new scheme will be to [define your claim period](#) as it is the claim period that forms the basis of a worker's 'usual hours' calculation.

### Under the FFS, claim periods:

- have to be for a minimum of 7 days, unless they include the first few or last days in a calendar month, in which case the claim period may be shorter;
- can be no more than for one calendar month;
- cannot straddle any calendar month end;
- must not include any claim under the JRS, which must be dealt with separately;
- Must not overlap;
- Must include all employees who are furloughed, regardless of differing pay periods;

The number of employees included in any claim period will be capped on the maximum number included in any one claim under the JRS, excluding any returning family leave employees or forces reservists where the leave started before 10 June and the return date was after 10 June.

Claims can be made up to 14 days before the claim period end. Previously, this time limit was made in reference to the pay period. Claims can also be made before, during or after any pay period. You cannot make more than one claim for any period or part of a period.

Whilst HMRC recommend you use a claim period that closely follows your pay periods, this will not be possible where you operate different pay periods for groups of employees. This will complicate the calculations.

## USUAL HOURS

You will then have to work out each employee's '[usual hours](#)' and compare this with the hours actually worked, which are paid for at normal rates of pay, which will leave you with the furloughed hours, against which you are able to make a claim under the scheme.

In many cases, this might also be what you pay to your employee in addition to their hours worked. However, you can still pay more if you want to, although you will not be able to make an additional claim for this. It remains a fundamental requirement under the scheme that all claim amounts have to be paid to your employees without any deduction for charges made for costs incurred in operating the scheme.

The usual hour calculations are complex and have been criticised by many as being unclear and unnecessarily complicated, which may put many employers off making claims under flexible arrangements. Further HMRC have given different instructions as part of the published guidance and to software developers, and to how their online claim calculator works. They have also warned that even if using their own calculator, the employer will remain responsible for getting their claims right.

As a reminder, you are able to keep staff on full furlough or return them in full to the workplace. You may also prefer to refer back to the actual employment contract and provide work for the basic hours only although this may prejudice zero hour or agency workers.

## Furloughed hours

Although there is no minimum requirement for the number of hours spent on furlough, employees are not able to work for their employers whilst on furlough. This includes not being able to provide services to or generate any income for their employer, although they can do training, work for another employer (provided their contract permits) or do volunteer work for unconnected third parties.



Practical difficulties will be encountered when an employee carries on working, despite an agreement to work for a set number of hours and so you will need a system in place to ensure this does not happen, otherwise a claim may be incorrectly made. You may also need to implement a time recording system.

A further practical issue will be where holiday should attach (furloughed hours or unfurloughed hours). Whilst holidays still need to be paid at full rate, you will need to determine if the holiday is being taken whilst on furlough or not and whether a claim should then be made for any of the time off.

### Fixed rate worker usual hours

If you are using a fixed rate reference pay amount, you will have to follow the fixed rate usual hour calculation. This is based on their contracted hour working pattern, divided by the number of calendar days in the regular working pattern, multiplied by the number of calendar days in the pay period, or part of period, that falls within the claim period.

Example: Worker contracted to work 37 hours per week, weekdays, has a contracted hour working pattern of 37 hours over each 7 calendar days = 5.2857 hours per day. The worker is on a calendar pay period. If the claim period was for July (31 calendar days and all covered by one pay period), this would equate to 163.8 hours, rounded up to 164 hours. In September, the usual hours would be 158.5, rounded to 159, as September only has 30 days.

If the employee worked 70 hours in July, the claim would be for 94 hours (164 less 70), and so the maximum claim would be capped at the lower of:

- $£2,500 \times 94/164 = £1,432.93$ ; and
- $80\% \times \text{reference pay} \times 94/164$ .

### Variable rate worker usual hours

If you are using a variable rate reference pay amount, you will have to follow the variable rate usual hour calculation which will be the higher of:

- The average number of hours worked in 2019/20 and
- The corresponding hours in the comparative pay periods where any part overlaps with the claim period.

These hours will have to be recalculated for each claim period and should include any holiday hours taken in the above periods and any contracted overtime hours, and this information may be difficult to extract from payroll systems.

Please refer to the guidance for more [details](#) and [examples](#).

### Choosing your claim period

As the furlough claim is based on calendar days, and pay for actual hours worked will depend on working days, you may get unexpected results as, for a worker now working 50% of their time, their pay may not necessarily be 50% of their normal pay plus 50% of the normal furlough pay paid under the JRS.

Further, the usual hours will not necessarily be the hours worked in the period that forms the reference pay amount, as there is no requirement under the reference pay calculation to match this exactly to the prorated pay period calendar days with the current year pay period as there is when working out usual hours.

The claim period selected and interaction with usual hours, particularly for variable hour workers, may also increase or decrease claims and should be handled with care. This raises the question of whether employers should model claims to claim the maximum amount possible for the greatest number of employees, in order to protect against possible employment claims at a later date, or whether they should model claims to be as low as possible to ensure there is no accusation of scheme abuse by HMRC at a later date. You may therefore want to choose the claim period that works best for you, and document your reasons for doing so, based on some of the following factors:

- What your flexible working agreement says;
- How far in advance you can predict the working hour requirements for your business;
- How often you pay your staff;

- How many workers in each pay period calculation do you have who will have furloughed hours;
- The costs of submitting multiple claims if doing on a weekly basis.

The rules are complex and difficult to see how they will work in practice, particularly where employers chose only to pay what they will be able to claim, although please note that from 1 September, employers will also have to contribute towards the furlough pay element.

## EMPLOYMENT ALLOWANCE

It is not possible to claim the EA and your NIC costs back under the JRS or FFS and so many employers have been choosing not to claim the EA yet. However, you may need to reconsider this once you have to start covering all employer NIC costs from 1 August, or earlier if the greater part of your work force has returned before then. See HMRC guidance for further [details](#).

## IMPORTANT DATES

- Any first claim under the JRS had to be made by 30 June.
- The last claim under the JRS has to be made by 31 July.
- Claims under the FFS can be made from 1 July.
- The last claim will have to be made by 30 November, and there is an anecdotal suggestion that all claims for each calendar month will have to be completed by the end of the following calendar month, although nothing formal has been announced on this yet.

## CESSATION OF THE JRS

If any furlough periods straddle 30 June, you will need to submit two claims, one under the JRS and one under the FFS. There is no guidance on how you apportion the claim for the JRS and so it would appear reasonable to deal with the FFS claim first, where guidance is given, leaving you with a balance to deal with under the JRS.

## RETENTION OF RECORDS

The guidance is not consistent on the length of time for retaining records but it is best practice to keep everything for at least 6 years. As the guidance is being updated frequently, you should keep a clear record of when you are reviewing the guidance and making the decisions you are, with this also being important for employment law disputes at a later date.

Overall, you should document your business needs and the decisions made as a result, and the guidance that you are then reviewing and applying at any particular point. You should then retain these records and furlough agreements, together with your calculations and claims, seeking advice where appropriate to do so from both employment lawyers and accountants. Whilst the grants do tie into the amounts due to employees, the grant calculations are not a function of payroll and should be viewed as a separate exercise.

## CORRECTING EARLIER CLAIMS

HMRC have now issued new [guidance](#) on how to correct an earlier over claim by either adjusting in subsequent claims or calling HMRC to make a repayment. There is no similar provision for under claims yet other than by contacting HMRC.

## INFLEXIBLE FURLOUGH?

The main function of the FFS is to help employers bring their staff back on reduced hours whilst the business need dictates a reduced work force as being necessary, whether due to the pressures of social distancing, problems with supply chains or the customers just not being at full volumes yet.

However, the calculations will be far more complicated than under the JRS and, given the cost of keeping staff on furlough will also increase from 1 August, with more of the furlough cost being suffered by the employers, employers will need to look critically at their staffing requirements which may result in redundancies being brought forward, in which case employment law advice should be taken.

Alternatively, employers may want to keep staff on full furlough and rotate groups of workers. They might also want to

renegotiate employment terms and not use the FFS, by reducing contracted hours and pay rates or just using zero hour or agency workers as and when needed, as usual, but again, advice should be taken.

## SUMMARY OF SPLIT OF COSTS FROM 1 JULY



	July	August	September	October
Government contribution: employer NICs and pension contributions	Yes	No	No	No
Government contribution: wages	80% up to £2,500	80% up to £2,500	70% up to £2,187.50	60% up to £1,875
Employer contribution: employer NICs and pension contributions	No	Yes	Yes	Yes
Employer contribution: wages	-	-	10% up to £312.50	20% up to £625
Employee receives	80% up to £2,500 per month			

## NEXT STEPS

If you would like help with your claim under either the JRS or FFS, please do let us know. If we are engaged as your payroll service provider, this work will form part of a separate engagement. The rules are complex and impractical but we will help you navigate your way through the scheme changes.



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