

COVID-19: Furlough leave agreement for an employer to seek the agreement of a PAYE worker by changing the employment contract ready for the PAYE worker to be registered on the HMRC portal for the Coronavirus Job Retention Scheme (CJRS).

This letter is designed for the PAYE worker agreeing to the reduction in salary to 80% and being told by the employer that they will not be working and will be on Furlough leave.

In the notes all references to “PAYE workers” follows the Government Guidance issued at various times since the CJRS was announced which states that employers can claim for all types of PAYE workers who must have been on the employer’s PAYE payroll on 19 March 2020 and included in the employers RTI submission by that date. Employees can be on any type of contract, including:

- 1.full-time employees
- 2.part-time employees
- 3.employees on agency contracts
- 4.employees on flexible or zero-hour contracts

This letter refers to the guidance, published on 15 April 2020, which sets out the details of the CJRS. Please regularly check [GOV.UK](https://www.gov.uk) for updates from the Government/HMRC.

The new HMRC portal for employers to claim the grant is due to go live during the week starting **20 April 2020**.

It is now clear that the CJRS applies from the date that the Furlough Leave started - not just 1 March in all cases. Employees can be placed on three weeks of Furlough Leave at a time which gives employers the flexibility for their staffing requirements.

This letter is a template letter and is not a substitute for legal advice which you should obtain before completing this letter. This letter follows the HMRC guidance issued on 15 April 2020.

There may be questions and variations needed on this letter so please do contact us to discuss what is needed.

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On Employer's Letterhead

[EMPLOYEE'S NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[POSTCODE]

[DATE] April 2020

Dear [EMPLOYEE'S NAME],

COVID-19 furlough leave: proposed changes to your employment contract

[Following our meeting/announcement /first letter the Company sent you on [DATE], you have confirmed that you are aware that that you are on furlough leave and will be registered by [NAME OF EMPLOYER] (**Company**) into the Government's Coronavirus Job Retention Scheme (**CJRS**). On 20 March 2020, the Government announced the CJRS as part of its financial support package in response to the COVID-19 pandemic.

At present the Company is operating on a Government enforced emergency reduced opening OR temporarily closure.

[Insert any further details of the changes the employer is making which explain the need for furlough leave consistent with the first letter / any initial announcement].

Under the CJRS, any employer can obtain a grant to cover 80% of the salary costs of employees and PAYE workers, up to a total of £2,500 per month for each retained employee, plus the associated employer's National Insurance contributions (NICs) and minimum automatic enrolment employer pension contributions on the reduced salary. The CJRS will cover the cost of wages backdated to as early as 1 March 2020 for those not working from that date. Workers must be on the payroll on 19 March 2020 to qualify for the CJRS. It will be open initially for three months until 31 May 2020 unless the Government extends it. Employers will make a filing with HMRC every 3 weeks stating which staff are on furlough leave. You will be on temporary "furlough leave" for at least three weeks and thereafter for rolling periods of 3 weeks until we notify you.

We are therefore proposing to implement the CJRS as an alternative to making redundancies which would otherwise be inevitable in the light of the impact of the coronavirus pandemic on the Company's business.

[Delete if less than 20 staff are affected by these proposals i.e. could be made redundant if they do not accept the furlough leave. Note: the 20 staff figure includes any staff made redundant in the last 90 days. It is vital that you take legal advice if this situation applies to your business. There are requirements to consult with the employees' representatives in sufficient time (either 30 or 45 days before

redundancies take effect) and if consultation does not take place the employment tribunal can make a protective award in favour of affected employees up to 90 days gross per affected employee. . We have informed your appropriate representatives of our proposals and are commencing consultation with them immediately.]

We have set out below the proposed changes to your employment contract dated [DATE] (**Contract**):

1. Your designation under the CJRS on the HMRC system will mean certain changes to your terms of employment, the effect of which will be to place you on furlough leave for an initial period of [three OR [NUMBER] weeks/month[s]] from [DATE] 2020 (**Effective Date**) because there is no work for you to do. This period may be extended or stopped as the need arises. The Company will plan to give you at least one week's notice if the CJRS will be extended or your furlough leave will cease and for example you need to return to work. The Company may ask you to agree to a shorter notice period depending upon the situation at that time. You will be registered in the CJRS for periods of a minimum of three weeks at any time.
2. With effect from the Effective Date, [for an initial period [up to and including 31 May 2020],] you will remain employed by the Company but will be placed on a period of temporary leave (**Furlough Leave**).
3. During Furlough Leave the Company shall be under no obligation to provide any work to you and may revoke any powers you hold on our behalf, and you agree not to attend your usual workplace or carry out any work for the Company. You should note that it is a condition of the Company's eligibility for the CJRS that furloughed employees do not provide any services or generate any revenue for the employer.
4. **[If the employer will not be able to pay April payroll without the CJRS grant being received from HMRC then please contact us as additional advice will be needed on how to proceed]**

Please use the relevant paragraph 4 below depending upon what type of pay arrangement the Company has with the relevant employee.

1. For Full-time and part-time salaried employees, whose pay will be calculated on the basis of their gross salary as at 28 February 2020, excluding any fees, commission and bonuses but reduced to a maximum of £2,500 (gross) per month. During the period of Furlough Leave under the CJRS, in lieu of your normal pay, your yearly salary shall be [reduced to] the lower of:

- a. 80% of your basic salary as at 28 February 2020, excluding any fees, commission and bonuses; and
- b. £2,500 (gross) per month / £30,000 (gross) per year.

The Company will be receiving a grant from the Government for that amount under the CJRS [and requires the receipt of that grant in order to pay your salary].

[In addition the Company will be topping up your monthly salary by £[] gross) (equivalent to []%) so you receive this percentage of your salary before you went on Furlough Leave. *[If the employer is topping up it should make sure it has sufficient cash flow to top up for each of the three week periods that it plans to place the employee on furlough leave. If it cannot afford to top up for every period and it has to miss a top up this could be an unlawful deduction in wages and lead to a claim from the employee at the Employment Tribunal. Please contact us if this situation applies and we have various solutions to deal with this position to enable an employer to provide an effective top up but without this liability.]*

OR

2. For Employees or PAYE workers with variable pay, whose pay will be calculated on the basis of average monthly earnings During the period of Furlough Leave under the CJRS, in lieu of your normal pay, your pay shall be calculated on the basis of 80% of your normal monthly remuneration as defined in this letter. Your "normal monthly remuneration" for the purposes of this letter will be calculated as at each normal monthly payment date and will be the higher of:

- c. your total earnings in the corresponding monthly pay period in the previous year; or
 - d. your average monthly earnings calculated over the previous 12-month period, or the entirety of your employment if you have worked for us for less than 12 months. Where you started working for the Company in February 2020, a pro-rata calculation will be done to work out your estimated monthly earnings.]
5. Your usual PAYE Tax, National Insurance contributions, pension (if applicable) and any other statutory deductions or other agreed deductions will be deducted in the usual way, and your salary will be payable in arrears on the normal monthly payment date directly into your bank or building society account.
6. If you are opted in to automatic enrolment, your minimum employer pension contributions will be paid in the normal way based on your salary level your period of Furlough Leave. You will continue to receive all other contractual benefits (e.g. medical insurance and life cover) in the usual way and subject to the terms of any benefit arrangement. **OR** *[Each benefit scheme will need to be checked to make sure it is possible to cease cover and it may not be economic given the administration involved and need to restart the scheme to cease providing them and it is a positive sign that the Company is continuing*

to value staff if these schemes are kept in place. You will cease to be entitled to any contractual benefits for the duration of the Furlough Leave.]

7. [INSERT WORDING ABOUT OPERATION OF ANY DISCRETIONARY BONUS OR COMMISSION SCHEME DURING FURLOUGH LEAVE. THE GOVERNMENT GRANT PAYMENT UNDER CJRS WILL NOT COVER THESE PAYEMENTS. COMPULSORY BONUS OR COMMISSION SCHEME PAYMENTS MAY BE CLAIMABLE UNDER THE CJRS]
8. If HMRC rejects our claim under the CJRS or decides not to fund your salary (or any part of your salary) for any reason during the Furlough period, we shall be entitled not to pay you the amounts set out above and any amounts paid to you shall be limited to the maximum amount which we are able to recoup from HMRC [(except in relation to periods of holiday taken during Furlough which shall be calculated and paid in the usual way)].
9. You shall ensure that [NAME OF LINE MANAGER] has up-to-date contact details for you so that you may be contacted during Furlough Leave (except during any periods taken as holiday in the usual way).
10. Your period of Furlough Leave will end when any of the following events occur:
 - a. you or the Company cease to be eligible for funding under the CJRS;
 - b. the Company gives you the notice in paragraph 1 above (or such shorter agreed notice period) as the Company agrees that your employment will resume on the terms and conditions which applied immediately before the Furlough Leave commenced, or on such terms and conditions as further amended to take account of the applicable circumstances; or
 - c. your employment is terminated for any reason.
11. *[Note: this is the statutory lay-off scheme which is a scheme historically designed for production line/shift/factory workers and the employer could decide to insert this clause for agreement to apply on-going in the amended employment contract e.g. in case COVID-19 reappears or customer demand fluctuates in the future. Please contact us if you need more advice on this aspect.]* When your Furlough Leave ends, in the event that there is still any more disruption in the provision of work and accordingly a diminution in the requirements of the business for work of a kind for which you are employed, or any other occurrence affecting the normal working of the business in relation to the work you are employed to do, the Company reserves the right not to provide you with work without any pay except for your statutory guarantee payments. *[Note: this is a maximum of £29 a day for 5 days in any 3-month period - so a maximum of £145. See <https://www.gov.uk/lay-offs-short-timeworking/guarantee-pay>. This low level of statutory guarantee payment may not be appropriate for the Company's overall employment relations but a higher contractual amount could be inserted and agreement asked from the*

PAYE worker]

Holidays and Holiday pay

[Most PAYE workers have a right to a minimum of 5.6 weeks' paid annual leave under the Working Time Regulations 1998 (SI 1998/1833) (WTR 1998). This amounts to 28 days for a full-time employee which is 20 holidays and 8 public holidays ("WTR 28 days' holidays"). Many receive additional holiday rights under their contracts.

The 15 April 2020 Government Guidance does not give any indication of how the CJRS interacts with annual leave. The Government has not confirmed whether employees can take or be required to take annual leave during furlough leave and, if so, what remuneration they would be entitled to.

For these reasons we are proposing that employers may want to take a practical view and based on the legal research we have undertaken we have proposed a Technical Solution where employers have for cash flow reasons a need to restrict additional holiday accruing and a Practical Solution for employers where the benefit of preserving employee relations for a few days of holidays and pay up to 31 May 2020 outweighs the holiday administration and costs.

Technical Solution

Taking holiday during furlough leave. Technically it seems that holiday will continue to accrue in the usual way during periods of furlough leave as furlough leave appears to be like sick leave or maternity leave where holidays accrue. It is likely that PAYE workers will not want to take holidays during this leave. It is however unclear what effect taking annual leave will have upon furlough leave (and indeed, whether a PAYE worker can be on annual leave and furlough leave simultaneously).

Holiday pay. Depending on the type of PAYE worker and when the holiday is taken, it is likely that most PAYE workers will remain entitled to full pay while on holiday rather than the reduced pay that will apply during furlough leave. This is because they have a right to holiday pay based on the last 12 weeks average pay and from 6 April 2020 over 52 weeks average pay under The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (SI 2018/1378).

For these reasons, we have included optional wording suspending by agreement the right to take holiday during furlough leave so employers do not have to pay any additional holidays, or at least during the initial period of leave envisaged by this letter.

We have also provided an optional paragraph reducing the PAYE worker's holiday entitlement to the statutory minimum of WTR 28 days holidays per

leave year where PAYE workers have more than 28 days holiday under the Contract, to limit the amount of accrued holiday which will build up during the furlough leave. Again this change will need to be made by agreement.

Employers could also consider whether to cancel any annual leave which has already been booked and is due to take place during the Furlough Leave or soon after it ends so the PAYE workers are available for work. Under the regulation 15 of the WTR there is a procedure which employers and PAYE workers should follow - often it is in a more informal way in practice.

Notice by worker to take leave

A worker must give notice if they wish to take statutory holiday (regulation 15(1) WTR 1998). The notice must be at least twice the period of leave that they are requesting (regulation 15(4)(a)).

Employer's counter-notice

An employer may refuse a worker's holiday request by serving a counter-notice. This must be given at least as many calendar days before the date on which the leave is due to start as the number of days which the employer is refusing (regulation 15(4)(b), WTR 1998).

Therefore, if there is enough time before the leave for the employer to give the statutory notice required they could do now. The employer should also consider any additional holiday policy in the staff handbook / clauses in the employment contract on annual leave and any holiday policy.

The Government passed emergency legislation on 26 March 2020 relaxing the restriction on carrying over the four weeks' leave derived from the Working Time Directive (2003/88/EC) (WTD leave). The Working Time (Coronavirus) Amendment Regulations 2020 (SI 2020/365) ("Coronavirus Amendment Regulations") amend regulation 13 of the Working Time Regulations 1998 (SI 1998/1833) (WTR 1998) to permit the carry-over of up to 4 weeks of any untaken WTR 28 days holidays leave where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus (including on the PAYE worker, the employer or the wider economy or society)". The paragraph below therefore provides an option to allow PAYE workers to carry forward untaken holiday for two leave years, in accordance with those regulations.

Note that additional leave (that is, the 1.6 weeks' leave provided under regulation 13A of the WTR 1998 for the 8 public holidays) may already be carried forward into the next leave year in accordance with a relevant agreement (regulation 13A(7), WTR 1998). We have taken the view that, notwithstanding the wording of the Coronavirus Amendment Regulations, employers should permit carry-over of all statutory holiday, not just WTD leave, where such holiday is unable to be taken due to coronavirus. This is because the WTR 1998 oblige employers to allow workers the opportunity to take 5.6 weeks' leave each year, regardless of whether it is reasonably practicable to do so. If an employer fails to allow additional leave to be taken,

and refuses to allow it to be carried over under a relevant agreement, this would amount to a breach of the WTR 1998. This letter would amount to a relevant agreement for the purposes of the WTR 1998.

Public holidays – Good Friday, Easter Monday, May Day and Spring Bank Holiday etc.

Public holidays are usually part of the legal minimum WTR 28 day's holidays and are paid holidays. PAYE workers must get their usual pay for bank holidays.

PAYE workers may still be required to use a day's paid holiday for bank holidays, including when they are on Furlough Leave.

If PAYE workers usually work on bank holidays but are currently on Furlough Leave then an additional clarification should be added below to confirm if they have to take holiday on that day or if they can take the time off at a later date.

We suggest that if PAYE workers cannot take bank holidays off due to coronavirus, they should use the holiday at a later date in their leave year.

If this is not possible, bank holidays can be included in the 4 weeks' paid holiday that can be carried over under the Coronavirus Amendment Regulations . This holiday can be taken at any time over the next 2 holiday leave year periods.

12. You will continue to accrue holiday in the normal way while on Furlough Leave][, but you may not take any holiday [during the Furlough Leave][during the initial period of Furlough Leave [up to and including 31 May 2020]].
13. While you are on Furlough Leave your holiday entitlement under the Contract will be reduced to your statutory entitlement under the Working Time Regulations 1998 (SI 1998/1833) (WTR 1998), that is 5.6 weeks per leave year, which shall include public holidays.
14. Where the arrangements set out in this letter or the effects of the coronavirus pandemic mean that it is not reasonably practicable for you to take all of your accrued holiday in the current leave year, you may take any untaken accrued holiday, in the two leave years immediately following the leave year in respect of which it was due.

Practical Solution

Taking holidays. *Employers may find that for employee relations it may be better to allow holidays to accrue during Furlough Leave but not restrict holidays down to the WTR 28 day's holidays (where more are granted in the Contract) and for holiday accrued during Furlough Leave to be taken over the next 2 holidays years. Employers could for example indicate that they expect*

PAYE workers to take half of the holiday accrued while on Furlough Leave in the holiday year starting in 2021 and half in the year starting 2022. This approach could also apply to any additional holidays in the Contract in addition to the WTR 28 day's holidays.

Holiday pay. This would also mean that employers, to preserve cash flow, would pay holiday pay in the future (rather than each month of Furlough Leave) at the rate of pay calculated when the business is on a more settled basis.

15. You will continue to accrue holiday in the normal way while on Furlough Leave], but you may not take any holiday [during the Furlough Leave][during the initial period of Furlough Leave [up to and including 31 May 2020]].
16. Where the arrangements set out in this letter or the effects of the coronavirus pandemic mean that it is not reasonably practicable for you to take all of your accrued holiday in the current leave year, you may take any untaken accrued holiday, in the two leave years immediately following the leave year in respect of which it was due.

[If employers do want to make sure the employees take holiday which has been accrued up to the start of Furlough Leave or a certain number of days in this holiday year we have added an additional sentence]

The Company requires you to take any holiday in this leave year which was accrued up to the date of the start of your Furlough Leave [and other holidays during the year so that you take at least [] in this holiday year].

[If employers do want by agreement to get PAYE workers to take holiday while on Furlough Leave and be paid for it each month contact us to discuss what is required and we will produce additional wording.]

17. If you become sick while on Furlough, you are required to notify [NAME OF LINE MANAGER] of your absence. [Any company sick pay payable in respect of sickness during Furlough will be based on the adjusted rate of pay to which you are entitled during Furlough.] **OR** [You will not be entitled to any company sick pay while on Furlough.]
18. The remaining terms of your Contract shall be unaffected by these changes. In accordance with clause [NUMBER] of the Contract, you shall not without the Company's prior written consent work for anyone else while you are employed by the Company and on are Furlough Leave. You may carry out unpaid voluntary work, for example being an NHS volunteer, and may undertake training, provided that it does not involve the generation of any revenue for the Company (for example so that your skills remain up to date for your work) and that it meets any criteria set out in the CJRS.
19. We will ensure that for any mandatory training which you complete during the Furlough Leave you will receive your normal daily salary (which under CJRS must be at least the National Minimum Wage or National Living Wage at the applicable rate for the time spent training.

[INSERT DETAILS REMINDING EMPLOYEE OF PARTICULAR KEY CLAUSES IN THE CONTRACT WHICH WILL CONTINUE TO APPLY, SUCH AS CONFIDENTIALITY AND RESTRICTIVE COVENANTS.]

If you agree to these changes, please indicate your acceptance by signing and returning the enclosed copy of this letter to [NAME] by [DATE] April 2020.

The changes shall be immediately effective from the Effective Date.

You should keep your signed copy of this letter safe, together with your Contract, which shall be amended by this letter.

I would like to thank you for returning this letter promptly and I hope that you and your family remain safe and healthy while you are on your period of Furlough Leave

[I appreciate that you will receive a lower salary when your Furlough Leave commences and accordingly you may be eligible for support through the welfare system, including Universal Credit. Please see <https://www.gov.uk/government/publications/Guidance-to-employers-and-businesses-about-covid-19/covid-19-Guidance-for-employees#claiming-benefits> and <https://www.citizensadvice.org.uk/health/coronavirus-what-it-means-for-you/> for more information.]

If you have any questions, please contact [NAME].

Yours sincerely,

[Name]
[Title]

I agree that my contract of employment is hereby amended by the terms set out in this letter from the Effective Date.

.....
Name

Date: April 2020