

Employer's notes

COVID-19 2nd Lockdown in England: Furlough Leave letter for an employer to seek the agreement of the employee by changing the employment contract for the employee to be registered on the HMRC portal for the extended Coronavirus Job Retention Scheme (CJRS) from 1 November 2020.

The Government requires the employee to agree to this change in her/her employment contract.

Employees should send this letter to employees and PAYE workers and ensure confirmation is received from the employee/PAYE worker that the letter is understood and the employee/PAYE worker consents to being on furlough leave. To prevent disputes in the future employers should require a copy of the letter counter-signed by the employee to be returned.

Employers are required to keep records of the actual hours worked by any employees on flexible furlough arrangements for 6 years and the furlough agreement for a period of 5 years.

This letter is designed for the employee or 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 full time Furlough leave.

We use "employee" to include a PAYE worker (including zero hours contract workers) as well.

The employee must have been on one of the Company's HMRC Real Time Information (RTI) submissions between 20 March and 30 October 2020.

If an employee is already on furlough leave then the letter will need to be customised accordingly.

If the employer is planning to use the flexible furlough scheme for part of the employee's unworked working time and pay 100% of salary and benefits for the worked hours then this letter will need further customisation. In particular the new employment laws introduced on 6 April 2020 now require that employers clearly state in the employment contract to employees what are the normal working hours and the days of the week the employee is required to work. It must also state whether those hours or days are variable and if they are, the statement should state how they may vary or how that variation will be determined (section 1(4)(c), Employment Rights Act 1996). As this furlough leave agreement is amending the employment contract these new requirements have to be taken into account whether the employee was employed before or after 6 April 2020. Employers must be very clear particularly for flexible furlough agreements to confirm the working time.

Please contact us if you need advice.

If an employee was previously eligible for CJRS, the calculation rules will remain the same.

*If an employee was **not** previously eligible for CJRS, there are different ways to calculate wages.*

There is no maximum number of employees who can be placed into the CJRS.

Employers must decide who to place in the CJRS in line with equality and discrimination laws.

Employees that were employed and on the payroll on 23 September 2020 who were made redundant or stopped working for their employer afterwards can be re-employed and claimed for under the CJRS.

*The CJRS **cannot** be used for redundancy payments – either the payment for the notice or the statutory redundancy payment but the Government may look at this again.*

If the business is contemplating making redundancies or already consulting about redundancies please contact us for advice.

The Government will review the CJRS in January and determine if employers have to start contributing more again.

The Job Retention Bonus will no longer apply and be claimable as the CJRS has been extended to 31 March 2020. The Government states that it will introduce a retention incentive at the appropriate time.

Please note that the Government Guidance issued on 5 November 2020 states:

*“Where consistent with employment law, any flexible furlough or furlough agreement made retrospectively that has effect from 1 November 2020 will be valid for the purposes of a CJRS claim as long as it is made according to the CJRS conditions. **Only retrospective agreements put in place up to and including the 13 November 2020 may be relied on for the purposes of a CJRS claim starting from 1 November 2020.**”*

See for more details:

<https://www.gov.uk/government/publications/extension-to-the-coronavirus-job-retention-scheme/extension-of-the-coronavirus-job-retention-scheme>

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

Employers should check www.gov.uk regularly for further updates.

Claims can be made from 8am 11 November and are expected to be paid 6 working days after a valid claim is submitted.

For advice on using this letter please contact:

Richard Mullett

The Legal Partners Limited

Richard.Mullett@TheLegalPartners.com

0208 255 1914 / 07802 666378

[ON HEADED NOTEPAPER OF EMPLOYER]

[EMPLOYEE'S NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[POSTCODE]

[DATE] November 2020

Dear [EMPLOYEE'S NAME],

COVID-19 furlough leave: reintroduced from 1 November 2020 - proposed changes to your employment contract

Following our announcement sent to you on [DATE], you have been informed that the Government has extended the furlough scheme for the 2nd lockdown in England. The 2nd lockdown is scheduled to be from 5 November until 2 December 2020 but this may be extended so we will update you further around 2nd December 2020.

The Coronavirus Job Retention Scheme also known as the furlough scheme (**CJRS**) will last up until 31 March 2021.

Until at least [2nd December 2020] and possibly longer the Company is operating on a very reduced scale and with substantially reduced staff **OR** The Government has required the Company to close / cease all operations temporarily for this period.

Accordingly the Company is confirming that that you are on furlough leave and will be registered by [NAME OF EMPLOYER] (**Company**) into the CJRS.

This letter explains the current understanding of the changes the Company needs to make to your contract of employment to implement your entry into the CJRS. However, we may need to make additional variations to your contract in the light of further Government/HMRC clarification of the CJRS. Our ability to pay you for furloughed hours during the Furlough Period will be dependent on HMRC accepting the Company into the CJRS and receipt of funds from HMRC to pay you.

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

Under the CJRS, the Company 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. The Company will pay the associated employer's National Insurance contributions (NICs) and minimum automatic enrolment employer pension contributions on the reduced salary.

In order to take advantage of the scheme, the Company is required to place employees on "furlough leave" for periods of at least 7 days, and notify them of this change which the Company is doing by sending you this letter.

We are therefore proposing to implement the CJRS for you 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.

This will mean certain changes to your terms of employment, the effect of which will be to place you on furlough leave from [1st OR DATE] November 2020 until [2nd December 2020] (**Furlough Leave**), although 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 - if, for example, you will be returning 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 minimum periods of 7 days at any time.

[Delete if less than 20 staff are affected by these proposals. We have informed your appropriate representatives of the Company's proposals and are commencing consultation with them immediately.]

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

1. During your Furlough Leave, you will remain employed by the Company but will be placed on a period of temporary leave.
2. During your Furlough Leave the Company shall be under no obligation to provide any work to you and may revoke any powers you hold on the Company's behalf, and you agree not to attend your usual workplace or carry out any work on the Company's behalf. 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 or for any organisation linked or associated with the employer, during your furloughed hours.
3. For PAYE employees who have fixed pay: During your Furlough Leave, in place of your normal pay, your annual salary shall be reduced to 80% of your basic salary as at 30 October 2020 [OR your normal monthly remuneration], excluding any fees, commission and bonuses and anything which is not regular salary or wages and cannot be recovered under the CJRS, subject to the monthly cap imposed by the CJRS which is currently £30,000 per annum (gross) (£2,500 per month).

OR

For PAYE employees who have variable pay and were **previously** furloughed under the CJRS: the CJRS calculations as applied in August 2020 will be used to determine reference pay and usual hours.

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:

- a. your total earnings in the corresponding monthly pay period in the previous year, not including any payments which are not regular salary or wages and cannot be recovered under the CJRS; or
- b. your average monthly earnings paid to you during the tax year 2019 to 2020, or the entirety of your employment if you have worked for us for less than 12 months, not including any payments which are not regular salary or wages and cannot be recovered under the CJRS. Where you have worked for us for less than a month, a pro-rata calculation will be done to work out your estimated monthly earnings.

OR

For employees furloughed **for the first time** between November 2020 and March 2021 who were **not** previously eligible for CJRS: their pay will be calculated on the basis of their average earnings between the start date of their employment or 6 April 2020 (whichever is later) and the day before their furlough periods starts.

Your “normal monthly remuneration” for the purposes of this letter will be based on the average pay earned by you between the date your employment started or 6 April 2020, whichever is later, and the day before your Furlough Leave starts, but excluding any payments which are not regular salary or wages and cannot be recovered under the CJRS.

See for more information:

<https://www.gov.uk/government/publications/extension-to-the-coronavirus-job-retention-scheme/extension-of-the-coronavirus-job-retention-scheme>

[Insert additional wording if the Company is topping up the salary back to the 100% in addition to the CJRS grant payment.]

4. Tax, National Insurance contributions and any other statutory deductions will be deducted in the usual way, and you will be paid in arrears on the normal monthly payment date directly into your bank or building society account.
5. If you are opted in to automatic enrolment for your workplace pension, your minimum employer pension contributions will be paid in the normal way based on your salary level for your period of Furlough Leave. You will continue to receive all other contractual benefits in the usual way and subject to the terms of any benefit arrangement.

6. [INSERT WORDING ABOUT OPERATION OF ANY BONUS OR COMMISSION SCHEME OR OTHER BENEFITS OTHER THAN PENSION AND HOLIDAY DURING FURLOUGH LEAVE.]
7. 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).
8. Your period of Furlough Leave will end when any of the following events occur:
 - a. you or [NAME OF EMPLOYER] cease to be eligible for funding under the CJRS;
 - b. the Company gives you [one week's OR one day's] notice (or such shorter notice period) as we agree 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.
9. *[If the Company wants the flexibility in the future and in this furlough leave agreement and introduce lay-off or short time working clauses please contact us for advice as there are several options and a discussion is needed to understand what may be suitable]*
10. 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] **OR insert any holiday restrictions or reasonable requirements to take holiday during the Furlough Leave**]. *Note holiday pay is paid at 100% of salary for the holidays and 80% is funded by the CJRS.*
11. 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][any untaken statutory holiday to which you are entitled under the [Working Time Regulations 1998 (SI 1998/1833)][**(WTR 1998)**]], in the two leave years immediately following the leave year in respect of which it was due. *Note: employees can spread untaken holiday over this 2 year period*].
12. If you become sick during your Furlough Leave, you are required to notify [NAME OF LINE MANAGER] of your absence. *[If there is Company Sick pay: Any company sick pay payable in respect of sickness during your Furlough Leave will be based on the adjusted rate of pay to which you are entitled for those furloughed hours. **OR If there is SSP only: You will not be entitled to any Company sick pay during your Furlough Leave but, if eligible, you will receive Statutory Sick Pay.***
13. If HMRC rejects the Company's claim under the CJRS or decides not to fund your salary (or any part of your salary) for any reason during your Furlough Leave, we shall be

entitled not to pay you the amounts set out above. Any amounts paid to you shall be limited to the maximum amount which we are able to recoup from HMRC for you (except in relation to periods of holiday taken during your Furlough Leave which shall be calculated and paid in the usual way).

14. 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 [NAME OF EMPLOYER] and on 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.
15. We will ensure that for any mandatory training which you complete during your Furlough Leave you will receive 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]. The changes shall be immediately effective from the date that you were placed on Furlough Leave.

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/coronavirus> and the "Work and financial support" section for more information.

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

Yours sincerely,

.....
Name
Title
For and on behalf of [COMPANY NAME]

I agree that my Contract shall be varied by the revised terms of this letter starting on the date of my Furlough Leave.

Signed:.....

NAME OF EMPLOYEE

Date: 2020