

FURLOUGHING EMPLOYEES – WHAT EMPLOYERS NEED TO KNOW

Many of our readers will have heard of the new **Coronavirus Job Retention Scheme** (“**the Scheme**”) which allows employers (in certain circumstances) to “furlough” employees whilst claiming a financial grant from HMRC. This isn’t a term that we are used to using in English employment law and so it has prompted lots of questions from employers keen to strike a balance between protecting their employees and also their business.

We’ve been guiding a number of clients through this area and set out below is a summary of some of the key points and frequently asked questions.

Please note that this is a rapidly evolving situation and there are still outstanding issues which are yet to be clarified. However, we hope that the note below assists you with some of the practical queries which you may face in implementing the Scheme. Should you require any further assistance, please do get in touch.

What is the Scheme?

The purpose of the Scheme is to support employers whose operations have been severely affected by coronavirus so as to reduce the number of redundancies and lay-offs that may otherwise have been necessary by subsidising employees’ wages if an employer places the employee(s) on “furlough leave” i.e. a period of temporary absence.

The government has agreed to reimburse, as a (non-repayable) grant, 80% of an employee’s gross monthly salary up to a cap of £2,500, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions.

The Scheme will be available to all UK employers, irrespective of size or sector for an initial period of three months (from 1 March 2020 and so it will currently run until 1 June 2020). The government has said that this may be extended if necessary. To be eligible, employers must be paying employees via a PAYE payroll on or before 28 February 2020 and have a UK bank account.

If a company is facing an insolvency situation and is under the management of an administrator, the administrator will be able to access the Scheme too.

Which employees can I furlough?

All employees, on any type of contract who were on their employer’s PAYE payroll on **28 February 2020** are eligible for the grant, including:

- full time;
- part time;
- employees on agency contracts; and
- those on flexible or zero hours contracts.

This therefore extends to casual workers, but not the self-employed for whom a separate scheme has been created.

It is essential that employees must not carry out any work for their employer whilst furloughed.

Which employees cannot be furloughed?

The following employees will not be eligible to be furloughed:

- new hires since 28 February 2020; and
- employees who were already on unpaid leave as at 28 February 2020.

I recently made some of our employees redundant, what can I do about that?

Employees who were made redundant after 28 February 2020 can be re-hired by their employer and placed on furlough leave and so are eligible for the grant.

Employees made redundant prior to 28 February 2020 cannot be re-hired in order to benefit from the Scheme.

If I have an employee who is on sick leave or self-isolating because of coronavirus, can I put them on furlough leave?

Employees who are on sick leave or who are self-isolating on medical advice should be receiving SSP (or contractual sick pay where relevant and applicable) but can be furloughed after they return from sick leave or stop self-isolating.

Employees who are shielding in line with public health guidance can be placed on furlough leave.

Are employees only eligible for the Scheme if redundancy was the only alternative?

The government indicated that the intention behind the Scheme was to offer an alternative to redundancy, lay-off or unemployment. The guidance for employees also refers to furlough leave as applying when the employer is unable to operate or has no work for the employee to do, but there is nothing in the guidance which expressly states that employers will be required to evidence that redundancy was the only alternative. In practice however, the Scheme is most likely to be used for employees who might otherwise be made redundant, since otherwise, an employer may well still need them to perform their role.

As furlough leave requires the employer to formally write to the employee confirming that they are not to work for the employer and send a copy of this letter to HMRC, HMRC may consider that this is sufficient to demonstrate that they would otherwise have been made redundant. However, it is important to be aware that HMRC have indicated in the guidance that it will retain the right to retrospectively audit employers' claims, with the ability to claw back fraudulent or erroneous claims. Therefore, whilst employers are likely to be permitted some discretion, any abuse of the Scheme will not be tolerated.

What can I claim for?

Once the Scheme is up and running, employers will be able to claim for the lower of (i) 80% of furloughed employees' usual gross monthly wage costs, or (ii) £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pensions contributions on that wage. Further guidance will be issued on how to calculate these sums before the Scheme goes live.

Fees, commission and bonuses cannot be claimed.

How are monthly earnings calculated for full time and part time employees?

For salaried employees (full time or part time), the 80% should be calculated on the employee's actual salary before tax, as of 28 February 2020.

And for employees with varying pay?

For employees with varying pay, you can claim for the higher of either:

- the amount the employee earned in the same month last year;
- an average of the employee's monthly earnings from the last year.

If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work. If the employee only started work in February 2020 (prior to 28 February 2020), you should pro-rata their earnings from that month.

Are employers required to top up the subsidy?

Under the rules of the Scheme, employers may choose to do this but do not have to in order to claim the grant. However, remember that this is subject to the usual employment law considerations and so if you are seeking to reduce an employee's salary by 20% (or more, in some cases), you should seek legal advice before doing so.

Are normal deductions applied to 80% wage costs?

Yes, the 80% or £2,500 per month is paid to the employee subject to tax and employee national insurance contributions. Employees will also pay automatic enrolment pensions contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension Scheme.

What if an employee is on Maternity Leave and receiving Statutory Maternity Pay?

Guidance suggests that statutory maternity pay will be paid as normal, but if the employer offers enhanced earnings-related contractual pay for maternity leave, this can be claimed under the Scheme as furloughed earnings. The same applies for contractual adoption, paternity or shared paternity pay. It remains to be seen if you need to designate these employees as furloughed in order to claim under the Scheme.

You may find that employees seek to return to work at an earlier stage than previously planned from these types of leave, if being furloughed would be more advantageous to them financially.

What if 80% of furloughed employees' salary brings their pay below National Living Wage/ National Minimum Wage levels?

Workers are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for hours they are actually working. Therefore, furloughed employees can be paid 80% of their salary even if, based on their usual working hours, this would be below NLW/NMW.

However, if they are required to undertake online training courses whilst they are furloughed then they must be paid at least the NLW/NMW for the time spent training – even if this is more than 80% of their wage that will be subsidised.

What does the employer receive?

According to the latest guidance, the grant to employers includes the associated wage costs of employer National Insurance contributions and minimum auto-enrolment pension contributions (3%) in addition to the 80% of a furloughed employee's normal wages, or £2,500.

This does not include any payment which the employer may choose to make to top up the 80% to 100% or any voluntary automatic enrolment contributions above the statutory minimum, or the cost of any other benefits – this cost would need to be borne by the employer.

Will the money need to be repaid?

No, as it is a grant and not a loan, it will not need to be repaid (unless the claim is found to have been erroneous or fraudulent). However, payments received under the Scheme will need to be accounted for in a business' calculation of taxable profits for Income Tax and Corporation Tax purposes – although businesses can continue to deduct employment costs as normal.

What about employees' benefits?

Benefits such as health insurance, private medical, gym membership etc should still be maintained unless otherwise agreed with furloughed employees.

It does not seem to be possible for employers to claim the cost of benefits through the subsidy (save for pension contributions at the minimum level).

Are employees permitted to work during furlough leave?

Furloughed employees are not permitted to work for their employer during furlough leave. This is thought to include working for another associated entity of the employer. The furloughed employee cannot generate income for their employer or provide services.

This means that employees working reduced hours or receiving reduced pay are not entitled to benefit from the Scheme. Employees who are on agency contracts must not be working.

Furloughed employees may undertake training or voluntary work provided it does not provide services or generate income for their employer. If the employer requires the employee to carry out training courses whilst they are furloughed, then they must be paid at least the national minimum wage for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

What if the employee has more than one employer? Can they be put on furlough leave by one employer and continue to work (and receive pay) from the other?

Yes. The employee can be put on furlough leave by one employer and continue to work for another, provided it is permitted by their employment contract. Likewise, they could be furloughed by both employers, if necessary. In this case, the employee will be in receipt of separate payments from each employer and the 80% of normal wages up to a £2,500 monthly cap applies to **each** job.

Can employees find another job whilst they are on furlough leave?

Potentially. The guidance is clear that agency workers will only be eligible for the Scheme if they are not working, but it is not clear whether this applies to all other types of employee, particularly given the response above. It may be that, for other employees, furlough leave only requires the employee not to work for the business which is claiming the relief and that they are able to work for other businesses.

However, employers should be able to prevent employees working elsewhere, even if this is permitted under the terms of the Scheme, if this is in breach of their contract of employment, for example if they want to work for a competitor. You may choose to allow them to do some additional work in other sectors, where the demand is currently high (e.g. health and social care, or retail) and where it is not in conflict with your business interests. You should make your position clear on this when designating an employee as furloughed.

How do I implement the Scheme?

The Scheme is not expected to be up and running until end of April 2020 and so the precise details of the application portal remain uncertain. However, following the recent guidance, it appears that employers will need to provide the following to make an application:

- Employer's ePAYE reference number
- Number of employees being furloughed
- Claim period (start and end date)
- Amount claimed (including the amount of Employer National Insurance Contributions and minimum automatic enrolment pension contributions)
- Bank account name and sort code
- Contact name
- Phone number

An employer will need to have calculated the amount it is planning to claim. It is therefore recommended to collate this information now so that the application can be made as soon as possible. As noted above, HMRC retain the right to retrospectively audit all aspects of the claim.

How should employers select employees to furlough?

Employees who are unable to work from home or have no work to do are likely to be the first choice. In other cases, employers may need to consider carrying out a process akin to a redundancy process – asking for volunteers, pooling and selection. It is important to be mindful that equality and discrimination laws still apply in the usual way. There is a risk of claims if the selection process is not handled fairly. It would be prudent to seek legal advice if you are unsure about how to manage this.

How should employers agree the changes with employees?

This will depend on the employer's rights under the contract and usual employment law considerations and so we recommend that employers seek legal advice if they need any help in implementing the changes.

Where you are furloughing employees, you should ensure that they are designated as such in writing.

What if the employee does not want to go on furlough leave?

The employee can refuse to be “furloughed”, however, this is likely to put them at risk of redundancy and/or the termination of their employment. However, any redundancies and/or dismissals must be carried out in line with normal redundancy rules and statutory protections.

Is there a requirement to conduct a collective consultation exercise where an employer proposes to put 20 or more employees on furlough leave?

Possibly and it depends on the circumstances. Guidance from the government does envisage that it may be necessary in some cases.

What period will the grant cover?

The grant will start on the day employee is placed on furlough and this can be backdated to 1 March 2020 (if an employee has not been working during this period).

How long will furlough leave last?

A minimum of 3 weeks and for up to 3 months – but this maximum period may be extended.

Can employees be made redundant during furlough leave?

Yes, employees can still be made redundant whilst they are on furlough leave or afterwards. However, the usual unfair dismissal rights will apply and therefore any dismissal for redundancy must be in accordance with normal redundancy rules and a fair process must be followed.

Can employees be rotated in and out of furlough leave?

Yes. As long as each employee spends a minimum of three weeks on furlough leave. Therefore, it seems that it may be possible for employers to take employees in and out of furlough leave on a three- week cycle (or longer) as required. This is likely to be important to business which still have work for some employees, but not enough for all and may ensure parity amongst the workforce.

Will employees continue to accrue holiday during furlough leave?

This is an area of much debate! Our view is that yes, employees will continue to accrue holiday as normal as they will remain employed. This is the position with all other types of leave from employment, including lay-offs which is the most similar type of leave.

Employers could try to agree that no contractual holiday (in excess of the statutory minimum 5.6 weeks per year) will accrue but it is not possible to contract out of employees' right to statutory holiday.

It is possible that the government may say that statutory holiday does not accrue – watch this space.

What if I choose not to put an employee on furlough leave and make them redundant instead – could I face unfair dismissal claims?

Potentially. It's difficult to determine whether the Tribunal would find such a dismissal to be unfair, but we advise you should always consider whether furlough leave is a viable alternative (and this should usually be discussed with the employee) and you should always ensure you can justify your decision making and keep clear records. The test is likely to be whether such a decision was reasonable with reference to the particular circumstances of the case, including the size and resources of the employer and so this will be determined on a case by case basis.

There may be cases where employers cannot afford to furlough employees at this stage and pay the 80% of their salary until the Scheme is up and running and grants are available. Whilst employer could ask the employees to agree to defer payment and remain on unpaid/lower paid leave until the employer receives the grant, some employees may be unwilling or unable to agree to this. In such circumstances it may be fair for employers to proceed with dismissing the employee for redundancy.

Employers will, of course, have to consider their cash flow at all times – can they afford to make employees redundant and pay notice and redundancy pay or is furloughing the better option?

Can I furlough some employees and make others redundant?

Yes, there is no prohibition on this under the rules of the Scheme issue to date, but this will of course need to be exercised appropriately with due regard to unfair dismissal protection and discrimination law. Ensure that you can justify your decision making and keep clear records.

What happens when the Scheme ends?

When the Scheme ends, employers must decide whether there is sufficient work for employees to return to work. Where employees can return to work, they will be entitled to all of the employment rights and their period of continuous service will remain unbroken.

What if I still need to make redundancies?

The intention behind the Scheme is to seek to protect jobs so that the employees can return to work for their employers when the employer has work for them to do under their contracts in the normal way. However, if this is not possible, employers will be able to make the furloughed employees redundant, subject to the normal rules on redundancy. It seems there is no condition which requires employers to protect employees who have been furloughed from redundancy, or repay any of the grant.

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