

Furlough Leave and the Coronavirus Job Retention Scheme

In light of the Government's Coronavirus Job Retention Scheme in response to COVID-19, we have prepared this briefing note for employers to assist them with dealing with the newly created concept of furlough leave. This is up to date at the time of issue.

What is the Coronavirus Job Retention Scheme?

As a result of COVID-19, many businesses have been or were advised to temporarily shut down or have suffered from a reduction in demand, thereby creating issues with cash flow.

One option for businesses is to consider short-time working, i.e. a reduction of an employee's working hours on a temporary basis. Alternatively you could consider laying-off employees, i.e. provide your employees with no work or pay or commence redundancy consultations. A further option is to consider furlough leave through the newly introduced Job Retention Scheme.

The purpose of the scheme is to pay employees who would have been made redundant, by instead designating them as being furloughed, i.e. to provide payments to employers in respect of them incurring costs from furloughing employees as a result of COVID-19.

The Job Retention Scheme is a temporary scheme, open between March and October 2020.

From July 2020 onwards, employers will be able to use the scheme more flexibly, thereby allowing businesses to bring furloughed employees back to work part-time, whilst also receiving some financial support.

It is open to all UK employers who created and started a PAYE payroll scheme on or before 19th March 2020, enrolled for PAYE online and have a UK bank account, although it is not open to employers in the public sector who receive public funds to pay salaries.

The last day that new individuals can be placed on furlough will be 10th June 2020, with the scheme closing to new entrants from 30th June 2020. The scheme itself will remain open for existing applicants until the end of October 2020.

The Government have now announced that this cut-off date will not apply to parents on statutory maternity and paternity leave who return to work in the coming months. One requirement however is that this will only be available to businesses who have previously furloughed members of staff.

We expect further details to be published by the Government about this announcement, which will clearly have a significant impact on parents returning to work, including any further eligibility requirements and cut-off dates.

The scheme can be accessed online at www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme. HMRC have emphasised that they should not be contacted unless it is absolutely necessary, i.e. more than 10 working days since you made a claim. See below for more information about the scheme and what you to do in order to claim.

Why is the guidance constantly changing?

As the Job Retention Scheme and furlough leave is a completely new legal framework in UK employment law, it is naturally taking time to get the systems established, to create all of the rules and resolve any outstanding issues.

The Government issued numerous updates to its online GOV.UK website with guidance about the scheme. Now that the scheme is up and running, we are now at a definitive stage of how the Job Retention Scheme will work, although we expect further changes as the country moves out of lockdown, particularly how the scheme will gradually come to an end.

What should I be doing if I want to furlough employees?

Subject to an employee's contractual terms (see below) you are legally required to maintain paying employees their full salary until you have their consent to be placed on furlough leave, otherwise they might have a claim for unlawful deduction of wages and breach of contract.

Regardless of the contractual position, you should obtain consent from employees in writing (electronic forms such as an email will suffice) stating that the employee will cease all work for the business.

Who can be placed on furlough leave?

Any employee who is employed as of 19th March 2020 through your PAYE scheme, on any type of contract and notified HMRC about the employee on an RTI submission on or before 19th March 2020 is eligible, provided they are furloughed for a full 3 week period before 30th June 2020. This will include full-time and part-time employees, apprentices, employees on agency contracts and employees on flexible and zero-hour contracts.

However, employees who are working reduced hours or reduced pay will not be eligible for the scheme.

The only proviso is that your business must be able to demonstrate that the individuals are furloughed by reason of coronavirus, which can be easily covered in your covering letter to those placed on furlough leave.

Directors who receive a salary are also eligible, but this would have to be sanctioned by fellow directors at board level.

The scheme is also not limited to those who would have otherwise been made redundant. Therefore employees who were made redundant or stopped working for a business on or after 28th February 2020 can be re-employed and placed on furlough, even if they were not re-employed until after 19th March 2020.

However you must consider the implications of rehiring members of staff, even on furlough leave, particularly for those who dismissed for misconduct and those who might accrue more than 2 years' service.

Furthermore, if a business had multiple PAYE schemes in place and transferred them to a new consolidated PAYE scheme after 19th March 2020, these individuals can also be placed on furlough leave.

Furlough leave must be taken in blocks of three weeks. There is nothing which prohibits rotating furlough leave amongst employees, provided each employee is off for a period of at least three weeks.

Employees who are working, but on reduced hours or pay, will not be eligible for the scheme.

In addition, employees on furlough leave are not permitted to work at all for your business up to and including 30th June 2020. This includes working for any business that is linked to the employer. They are however permitted to undertake voluntary work, provided they do not provide services or make money for your business.

The position is changing from 1st July 2020 when employers can take advantage of flexible furloughing (see below for further details).

For directors, they are permitted to fulfil their statutory duties such as filing Company accounts; otherwise they too are not permitted to work for the business. The permitted activities for directors is extremely limited.

What is the position in relation to TUPE transfers?

Individuals who were subject to a TUPE transfer to a new employer after 19th March 2020 can also be placed on furlough leave, subject to some specific requirements, although it is highly advisable to get specific legal advice if you are affected by TUPE as the Government's direction is extremely specific to each individual situation.

What will employees on furlough leave be entitled to?

Employees on furlough leave will be entitled to at least 80% of their wages, subject to a cap of £2,500 gross per month. The cap is also subject to the usual income tax and employee national insurance deductions.

The 80% is based on the employee's salary as of their last pay period prior to 19th March 2020. If an alternative calculation has been made based on salary as of 28th February 2020, businesses can still use this figure for their first claim.

You can top up an employee's salary once they have agreed to be furloughed, but there is no legal obligation to do so.

For employees whose pay varies each month, they are entitled to either the same month's earnings from the previous year, or by taking the average monthly earnings from the previous tax year, whichever is higher.

See below for details about pay arrangements if your business is taking advantage of flexible furloughing from 1st July 2020 onwards.

What is included in the 80% grant, up to a cap of £2,500 per month from the Government under the scheme, and do I have to contribute anything?

Between March and July 2020, the Government will reimburse employers your business for the wages of those members of staff who are placed on furlough leave, up to 80% of their monthly wages, up to a cap of £2,500 per month.

Anything this is not regular salary or wages should be disregarded, including non-financial benefits, including performance related bonuses as well as any discretionary and conditional payments such as tips. Employer national insurance and statutory pension contributions are not included, although these can also be reclaimed from the Government under the Scheme.

From August 2020, employers will be gradually asked to contribute towards an employee's salary whilst they are on furlough:

- In August 2020, the Government will continue to pay 80%, up to a cap of £2,500 per month, as per the previous months of March to July 2020 inclusive. However, employers will be responsible for paying employer national insurance and pension contributions, approximately 5% of an employee's gross monthly costs.
- In September 2020, in addition to the abovementioned costs, employers will be required to pay 10% of furlough pay, with the Government grant being reduced to 70%, which represents approximately 14% of an employee's gross monthly costs.
- In October 2020, the employer's contribution to furlough pay will increase to 20%, with the Government grant being reduced to 60%, which represents approximately 23% of an employee's gross monthly costs.

It is envisaged that the Government's Coronavirus Job Retention Scheme will not be available from 1st November 2020 onwards.

What happens if an employee has a job with another employer?

The position is unchanged if an employee has more than one job with multiple employers, as they can be furloughed for any of their jobs without impacting their other jobs, as each job is separate. As such the 80% and £2,500 per month cap applies to each employer.

Can employees on furlough leave work for another employer?

Employees are able to work for other companies during furlough leave, subject to any restrictions in their Contract of Employment.

Although many employers are not recruiting, some firms in particular are desperate for staff, such as the food and care industries. It is potentially quite lucrative for employees, as they would still be able to get 80% of their salary, capped at £2,500 per month for their existing job, as well as income from alternative sources.

Employees will still be subject to any confidentiality and restrictive covenants during their employment, even if they have been furloughed. If these restrictions are not in place, it might be worth introducing these at the same time as updating or amending Contracts of Employment.

Are there are repercussions as a result of the national living or minimum wage?

Employees who are placed on furlough leave are not entitled to the national living or minimum wage. Therefore you should have not any issues if an employee's salary (80% of wages) falls below the national living or minimum wage.

However, if training is required whilst an employee is on furlough leave, for example online training, they must be paid at least the national living or minimum wage. If this is more than 80% of their wages, you will have to top up the difference.

How can I reclaim the monies for those on furlough leave?

Through an online portal, you can reclaim up to 80% of wages up to a cap of £2,500 gross per month, plus the associated national insurance contributions and statutory minimum employer pension contributions, subject to gradual employer contributions from August 2020 onwards (see above for further details).

Generally speaking, the starting position is that you can only claim for monies which are regular salary and wage payments. This includes the gross amount of earnings paid, any employer national insurance contributions from the gross amount and statutory 3% employer pension contributions.

For employees whose pay varies each month, you can either claim for either the same month's earnings from the previous year, or by taking the average monthly earnings from the previous tax year, whichever is higher. If a reference period includes a period of unpaid leave, you must instead use the salary what would have been paid to the employee if the employee was not on unpaid leave.

The payments received from the Government are grants, not loans. Similarly it is not permitted to deduct any monies received from HMRC for admin purposes.

Information which you will need in order to make a claim under the Job Retention Scheme include your ePAYE reference number, the number of employees being furloughed, the start and end date for furlough leave, the amount being claim, your bank account number and sort code, your name and telephone number.

If you are furloughing fewer than 100 employees, you will be asked to enter each employee's details into the system. For those with more than 100 employees, the employer can upload a file in an acceptable format, such as an excel spreadsheet.

Once you have submitted your claim, you will be given a reference number by HMRC, who in turn will then check your claim, and if accepted, will pay the amount claimed by BACS into your nominated account within 6 working days.

As you will be responsible for calculating the amount of money you are claiming under the Job Retention Scheme, HMRC will reserve the right to inspect and audit all aspects of your claim, either during or after the process. As such, you must keep and retain accurate records.

It has been confirmed that employers have to retain evidence that employees have been furloughed in writing (electronic forms such as an email will suffice) for up to 5 years. It is highly likely after COVID-19 that HMRC will undertake substantive investigations to check for any fraud. As such you should have documents to demonstrate that you have employee consent for furlough leave on file in readiness for inspection. Documents you will require to retain include the amount and period claimed for each employee, reference number and your calculations.

What is the position for those who are absent from work due to sickness, self-isolating or staying at home due to childcare issues?

Businesses can furlough employees who are off work due to sickness, in which case the employee would no longer get SSP, but furlough pay instead.

Similarly those who are shielding (social distancing such as those in vulnerable groups) can be furloughed too, as well as those who are staying at home because of caring responsibilities, especially in light of school and nursery closures.

If an employee becomes sick whilst on furlough leave, they will still be entitled to SSP or Company sick pay. However it is the employer's discretion as to whether the individual is moved to SSP or Company sick pay, or alternatively to keep them furloughed. One key consideration is that once the individual is taken off furlough leave, the business will no longer be able to claim for the furloughed salary from HMRC.

What is the position in relation to those who are pregnant and are on or about to go onto maternity leave?

Employees who are on or about to take maternity leave must continue to take 2 weeks off work immediately following the birth of their baby, 4 weeks if they work in a factory or workshop. Similarly the usual rules surrounding statutory maternity pay continue, i.e. 90% of average weekly earnings in the first 6 weeks, followed by 33 weeks of pay, either at 90% of their average weekly earnings or the statutory rate of £151.20, whichever is the lowest.

There is nothing that prohibits a woman on maternity leave to return to work early and then being furloughed.

Similar arrangements apply for those on adoption, paternity and shared parental leave.

What is the position for those already on unpaid leave or sabbaticals?

No claim under the Job Retention Scheme can be paid for any period of unpaid leave or sabbatical.

If an employee is already on an unpaid sabbatical or period of unpaid leave, they cannot be placed on furlough leave until the period of unpaid leave or sabbatical has concluded upon the date or event anticipated when that period of unpaid leave or sabbatical commenced.

How do I place employees on furlough leave?

The Government have confirmed that for the purposes of the Job Retention Scheme, placing employees on furlough leave must be done in a way that is consistent with employment law and your contractual obligations. Therefore express consent may not always be required, but you should check your employment and contractual position in the first instance.

If you have a lay off clause in the Contract of Employment, you do not need to seek agreement from the employees for them to be designated furlough status.

For those who do not have the contractual right, it is necessary to obtain their express written consent, as it will amount to a variation of their Contract of Employment. In these situations, you will be required to consult with employees to seek their agreement to be furloughed. During the process, you would also have to advise them of the alternative to furlough leave, namely redundancy.

If there are a large number of employees involved, i.e. over 20 employees, it may be necessary to engage in collective consultation to obtain agreement on the changes to the terms of employment. However if this is not reasonably practical or viable, for example your business could go under, you should seek legal advice from ourselves on your options.

After the consultation process, correspondence should be sent to each employee, asking them to sign and return a copy of the letter providing their consent.

In any event, you should discuss the matter of furlough leave with your staff in the first instance, as well as confirming in writing that an employee has been placed on furlough leave, regardless of the contractual position, as HMRC may require evidence of this in the future.

There is a lot of debate about whether express consent is required. The Government's guidance has suggested that an employee may not always have to provide written consent. However we suggest that as a matter of good practice, you should get your employees to certify their acceptance to being placed on furlough leave, with electronic forms such as an email to suffice.

Please note that when deciding who to place on furlough leave, the usual discrimination and equality laws apply. However it is unlikely that a discrimination claim would arise if vulnerable employees are prioritised in the first instance, i.e. those over 70. However there is a possibility that the failure to place or the act of placing someone on furlough leave could amount to a detriment.

Please do not hesitate to contact us if you require bespoke advice and assistance about the process to follow regarding consultation, as well as template documentation to be used for the consultation process and correspondence to those placed on furlough leave.

Can employees request to be placed on furlough leave?

There is no legal right under the Job Retention Scheme for employees to request to be placed on furlough leave. However, one way of avoiding the tricky process of deciding who to place on furlough leave is to ask for volunteers who would like to be placed on furlough leave.

What is the position for those on apprenticeships?

Apprentices can be furloughed and are also permitted at the same time to continue with their training through distance-learning tools where possible and practical. However if this occurs, furloughed apprentices will be entitled to the minimum wage for the time spent when training, which may mean having to top up their salary.

If there is disruption to an apprentice's learning for more than 4 weeks, this must be reported as a formal break in learning. This may be required if you temporarily change an apprentice's job and allocate alternative duties and responsibilities, thereby preventing them from completing their training.

Similarly apprenticeships can continue their apprenticeship if they are able to work from home. Some temporary flexibility has been introduced by the Government in order to assist apprentices in these situations, such as alternative training and assessment methods.

What is the position on annual leave?

Employees on furlough leave continue to accrue annual leave as per their Contract of Employment. Subject to the contractual position under the Contract of Employment, you may be able to vary their holiday entitlement whilst they are on furlough leave, provided that their annual leave entitlement does not fall below 5.6 weeks of statutory leave.

Similarly employees can take holiday whilst they are on furlough leave, subject to your usual rules and procedures in the Contract of Employment or Staff Handbook, such as how employees can request annual leave and when an employer can reject a holiday request e.g. business needs. You are required to pay an employee's holiday pay at their normal rate of pay, or if their pay varies, the average pay they received in the last 52 working weeks. As you will only be able to claim up to 80% of an employee's salary on furlough leave, subject to a £2,500 monthly cap, you will be obliged to pay the additional amount.

In addition, the Government have announced that accrued untaken annual leave, capped at 4 weeks, can be carried over to the next 2 years.

In light of the ongoing situation with COVID-19, the Government are keeping the position on annual leave and holiday pay under review.

What is flexible furloughing?

From 1st July 2020, employers will be permitted to bring back furloughed employees to work on a part-time basis. It is up to individual businesses to decide what hours and days of work you require your employees to work.

Express consent to authorise flexible furloughing may not always be required, but you should check your employment and contractual position in the first instance.

If you have a lay off clause in the Contract of Employment or the consent in a Furlough Agreement, you do not need to seek agreement from the employees for them to be designated as flexible furloughed.

For those who do not have the contractual right, it is necessary to obtain their express written consent, as it will amount to a variation of their Contract of Employment. In these situations, you will be required to consult with employees to seek their agreement to be placed on flexible furlough. During the process, you would also have to advise them of the alternative to flexible furlough is continued furlough or potentially namely redundancy.

If there are a large number of employees involved, i.e. over 20 employees, it may be necessary to engage in collective consultation to obtain agreement on the changes to the terms of employment. However if this is not reasonably practical or viable, for example your business could go under, you should seek legal advice from ourselves on your options.

After the consultation process, correspondence should be sent to each employee, asking them to sign and return a copy of the letter providing their consent.

In any event, you should discuss the matter of flexible furlough with your staff in the first instance, as it may be the case that a sufficient number of individuals are willing to volunteer, thereby avoiding the need for consultation.

We suggest that as a matter of good practice, you should get your employees to certify their acceptance to being placed on flexible furlough, with electronic forms such as an email to suffice.

Please note that when deciding who to offer or place on flexible furlough, the usual discrimination and equality laws apply. However it is unlikely that a discrimination claim would arise if non-vulnerable employees are prioritised in the first instance, i.e. those under 70. However there is a possibility that the failure to place or the act of placing someone on flexible furlough leave could amount to a detriment.

Please do not hesitate to contact us if you require bespoke advice and assistance about the process to follow regarding consultation, as well as template documentation to be used for the consultation process and correspondence to those placed on flexible furlough.

What happens at the end of furlough leave?

Once the scheme comes to an end at the of October 2020, there will be further considerations about what to do. Depending on your circumstances, you may request employees to return to their duties. If not, you may need to consider the possibility of further short-term working, lay-offs and/or dismissals, which may require redundancy consultations.

See our separate Bulletin for further details about managing your business as the country comes out of lockdown.

How can we help you

Please contact us if you require any advice on any of the employment and HR issues referred to above. The team is on hand to advise and assist.

In addition we can assist you in drafting a bespoke advice and documentation for your business. Please contact Sally Morris on 01905 610410 or at sally.morris@mfgsolicitors.com to discuss this offer further and any frequently asked questions.

mfg Solicitors LLP

Advice is up-to-date as of 10.06.2020

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