



Coronavirus advice for UK employers

This briefing provides advice around the new Government measures announced on Friday, 20 March 2020 to support businesses to pay the wages of employees where that work is affected by reason of COVID-19¹.

The Coronavirus Job Retention Scheme

The government has set out a number of measures to assist employers during this uncertain and unprecedented time. The job retention scheme is one of these measure and will allow employers to access financial assistance if they cannot maintain their current workforce because of operations having been severely affected by coronavirus (COVID-19) and to support employees who would have otherwise for example been laid off with no income or made redundant. For the sake of this scheme, these workers are referred to as “Furlough workers”.

This will allow employers to furlough workers and apply for a grant that covers 80% of their usual monthly wage costs, up to a cap of £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage.

This is a temporary scheme in place for 3 months starting from 1 March 2020, but it may be extended if necessary and employers can use this scheme anytime during this period.

The types of businesses can access the Scheme

All businesses are eligible to apply under this scheme, provided they have created and started a PAYE payroll scheme on or before 28 February 2020; enrolled for PAYE online and have a UK bank account. It does not matter if an employer is a sole trader, a partnership, a charity or a limited company, providing the employer have genuine furloughed workers due to not having any work available for them to do, then you are envisaged to be able to access the financial assistance that is available.

To who does the Scheme apply to?

This scheme is envisaged to apply to all employees and workers that were on your PAYE payroll on or before 28 February 2020. This also includes casual workers, agency workers and apprentices, provided they are all on your PAYE: this appears to be the only criteria other than work requirements set out below. For the purposes of this note we have referred to them as “employees”.

To be eligible for the grant, when on furlough, an employee cannot undertake work for, or on behalf, of the organisation. This includes providing services or generating revenue. As expected, employers are free to consider allocating any critical business tasks to staff that are not furloughed. This will not apply to those who are still working for you, albeit on reduced hours.

¹ Last updated – 09:00 on 6 April 2020

How will the employer go about this in practice?

The first step for employers is to identify those employees who are deemed furlough workers. This will only apply if an employer genuinely has no work for the employees to undertake.

There appear to be some discrepancies in the guidance as to the extent necessary for an employer to consider that it has no work for employees to undertake and our opinion at this stage is that this includes those employees for whom the employer cannot “safely” provide work for. For example, those who are being required to “shield” due to underlying health conditions. We have explained more about “shielding” below.

If this is the case, there are two main options for an employer when placing staff on furlough leave:

1. Rely on an existing contractual right in the Contract of Employment to place an employee on lay off.

This provides the employer with the contractual right to place an employee on a lay off period, ordinarily on an unpaid basis (subject to a statutory guarantee payment).

The employer does not have to obtain the employee’s agreement to do this however we would always advise that you communicate this to staff prior to notifying them by letter that they are now considered as a furlough worker. This is because the guidance indicates that furlough has to be a provision agreed between the parties, albeit where you have the contractual right to place staff on lay off, we consider this to be a “reduced” requirement given furlough is essentially a more generous provision of lay off for employees given furlough can be a paid period, subject to the information below.

This notification should be done in writing so that you can evidence it to HMRC as necessary.

HMRC have confirmed that you will need to keep records of these notifications for a minimum of 5 years as we assume that they will be conducting audits after expiry of the Scheme to ensure compliance with the scheme.

We can assist you with this correspondence and can provide you with a letter to suit these circumstances. These letters are included as part of the fixed monthly cost for the majority of our Employment and HR Support package clients but are also available on a fixed fee basis for those who are not existing support package clients.

2. The employee does not have a lay off clause within the contract

On this basis the employer does not have the contractual right to insist that an employee is on a lay-off period. Instead the employer will need to obtain the employee’s agreement that they are to become a furlough worker.

If you are able to obtain the employee’s agreement then they would be required to sign a variation letter to confirm that they are in agreement to the change to their contract of employment.

We envisage that in the circumstances the employee will agree to this as an alternative to a redundancy situation. Furthermore, it is in the best interests of an employee to agree to this change because should the employer have no option but to make the employee redundant then the employer could explain to the employee that it may not be possible to pay a redundancy payment to the employee at the moment due to the current economic climate. This would mean that the employee would need to make such a claim through the Employment Tribunal or through the government service which could take months if not in excess of a year

to reach conclusion. Nevertheless, provided the employer is able to demonstrate a fair reason for redundancy the maximum payment would be a basic award which is equivalent to a statutory redundancy payment. This may be the risk that the employer is willing to take in the circumstances.

Whilst written consent is beneficial, as an alternative consent can be obtained verbally with a letter issued to the employees to confirm arrangements and this letter can make clear to staff that you deem them to have consented to being placed on furlough unless you hear otherwise from them. As indicated above, most employees agree to furlough given it is a better option to the alternative options available to them.

As with the above, this notification should be done in writing and we can assist you with drafting such correspondence if needed.

Who decides if a member of staff is to be a furlough worker?

This is entirely the employer's decision as it would be in a normal lay off situation when there is genuinely no work available for the employee. However as referred to above, the employee needs to be in agreement with this. Employees can request to be furloughed, but it is not something you are required to agree to, albeit we recommend being mindful of any potential discriminatory reasons which could arise from such decisions.

If the business is not shutting down completely then it is important that when an employer chooses which employees should remain working in the business and those who should be laid off, that a fair selection criteria is used similar to one that would be utilised in a redundancy situation, albeit a shorter version is likely to be used due to time constraints. This is not required if whole functions are laid off but will need to be considered if work has been reduced in certain departments for instance and therefore a number of team members need to be laid off but not all. We can of course assist you through this process.

Those who are able to work from home are not deemed a furlough worker as they will be continuing to carry out work under their contract of employment and as such they are entitled to their normal rate of pay.

What exactly will furlough workers be entitled too?

The government has announced that the HMRC will reimburse to the employer 80% of your employee's wages up to a maximum of £2,500 per month; plus automatic enrolment minimum employer pension contributions and employer National Insurance contributions.

You cannot claim for:

- additional National Insurance or pension contributions you make because you chose to top up your employee's salary; or
- any pension contributions you make that are above the mandatory employer contribution.

You can choose to top up your employee's salary, but you do not have to. Employees must not work or provide any services for the business while furloughed, even if they receive a top-up salary. Grants will be pro-rated if your employee is only furloughed for part of a pay period.

Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they written to confirming their furloughed status.

Your employees will still pay the taxes they normally pay out of their wages. This includes pension contributions (both employer contributions and automatic contributions from the employee), unless the employee has opted out or stopped saving into their pension.

The way you work out your employees' wages is different depending on what type of contract they're on, and when they started work. Please note that this section has changed slightly from the initial guidance issued by the government: HMRC would state that it has been clarified however we consider that elements of the following have in fact changed from the initial guidance issued:

Full or part time employees on a salary

You should claim for the 80% of the employee's gross salary, as of 28 February 2020 (so for example, if any employee was issued with a salary increase from 1 March 2020, the 80% reimbursement will be based on their previous salary as opposed to their new salary).

Employees whose pay varies

If the employee has been employed for 12 months or more, you can claim the highest of either the:

- same month's earning from the previous year; or
- average monthly earnings for the 2019-2020 tax year (whichever is the higher).

If the employee has been employed for less than 12 months, claim for 80% of their average monthly earnings since they started work.

If the employee only started in February 2020, work out a pro-rata for their earnings so far, and claim for 80%.

Past Overtime, Fees, Commission, Bonuses and non-cash payments

You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

This is a section of the government guidance which has been updated however unfortunately, in our opinion, it remains unclear. This appears to relate to only those employees who have contractual entitlement to overtime and commission for example. We assume this would therefore refer to guaranteed overtime and commission, but it is unclear when this would apply.

We assume this means that where an employee is contractually entitled to commission, then you could calculate their entitlement under the rules for Employees whose pay varies (above). For this reason, we would suggest that you inform staff that whilst you will pay them based on this calculation for the time being, to include the commission, the situation remains unclear and for that reason if it transpires that you are unable to claim reimbursement under the Scheme for these elements of their pay, you either:

- a) reserve the right to reclaim such sums from them from future payments and obtain their agreement to this; or
- b) amend the payment for future months by notifying them of the change and the reason for it.

Benefits in Kind and Salary Sacrifice Schemes

The reference salary should not include the cost of non-monetary benefits provided to employees, including taxable Benefits in Kind. Similarly, benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should also not be included in the reference salary.

Normally, an employee cannot switch freely out of a salary sacrifice scheme unless there is a life event. HMRC agrees that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly.

Apprenticeship Levy and Student Loans

Both the Apprenticeship Levy and Student Loans should continue to be paid as usual. Grants from the Job Retention Scheme do not cover these.

National Minimum Wage

We have received some clarity in relation to the National Minimum Wage (NMW) and National Living Wage (NLW) which is as we expected: individuals are only entitled to the NMW / NLW for the hours they are working or treated as working under minimum wage rules.

This means that furloughed workers who are not working can be paid the lower of 80% of their salary or £2,500 even if, based on their usual working hours, this would be below their appropriate minimum wage.

Please however note that staff can be asked to undertake training whilst on furlough but any time spent training should be treated as working time for the purposes of the minimum wage calculations and must be paid at the appropriate minimum wage, taking into account the increase in minimum wage rates from 1 April 2020. This is not in addition to the sums already being paid to them, but you do not need to ensure that the furlough payment being made to them includes sufficient monies to cover the NMW / NLW for time spent undertaking training. Their pay would need to be topped up if payment was not sufficient to cover all hours spent undertaking training.

How will the employer arrange for the salary to be paid?

Once the employer has designated their employee as furlough workers, our understanding currently is that employers will need to submit earnings of all furlough workers to the HMRC. This will be through a new HMRC portal however this is currently in the process of being set up and therefore is not available at present. It is envisaged it will be open by the end of April 2020. HMRC guidance confirms that you should make your claim using the amounts in your payroll - either shortly before or during running payroll. Once HMRC have received your claim and you are eligible for the grant, they will pay it via BACS payment to a UK bank account.

To claim, you will need:

- your ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- your bank account number and sort code
- your contact name
- your phone number

You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim.

In the meantime, the question is whether staff should be paid the 80% which you later claim via the grant or whether this is unpaid until reimbursement is obtained from the government (essentially deferred payment).

This will depend on whether the employer has the necessary cash flow in place to be able to pay 80% of the furlough worker's wages until they are reimbursed by HMRC. To pay the employees the 80% in the normal way when pay is due is naturally recommended. If at all possible staff should be paid as normal and the sums then only later "reimbursed" by the government Scheme.

However, we appreciate this may not be possible. If this is not possible then the employee would need to be placed on a period of unpaid leave until the payment is received by the HMRC. Provisions relating to obtaining consent to this or have the contractual right to place staff on unpaid lay off referred to above will then apply. We recommend you seek advice if this is your proposed way forward. We also recommend that business speak to their accountants about any schemes available to them to assist with their immediate cash flow issues in the first instance as if loans can be obtained on favourable terms to assist with this, this should be the preferred option as opposed to obtaining employee agreement to deferring their entitlement to pay and this being a period of "unpaid" leave pending receipt of reimbursement from the government.

Alternatively, an employer is able to enforce staff to take annual leave provided adequate notice is provided. This should be twice the length of annual leave that they are being asked to take (for example, two days' notice to require an employee to take one day and two weeks to require staff to take one week). You would however need to be reasonably comfortable that an employee has sufficient accrued annual leave to take this time off or the employer may have difficulty reclaiming this cost should an employee leave the business. This may also not assist from a cash flow perspective and so all aspects need to be considered.

Minimum period of furlough

Any employees you place on furlough must be furloughed for a minimum period of 3 consecutive weeks. When they return to work, they must be taken off furlough. Employees can be furloughed multiple times, but each separate instance must be for a minimum period of 3 consecutive weeks.

This therefore means that rotating staff on furlough is possible. We received a number of queries previously asking if we considered this to be acceptable and whilst we believed it would be, we had no guidance until this weekend to confirm this to be the case. This now confirms our expectations however please remember that each furlough period has to be for a minimum of 3 consecutive weeks.

Employees who commenced after 28 February 2020

Employees who commenced with you after 28 February 2020 cannot be furloughed. They may however be able to apply to be furloughed by their previous employers if they were with that employer on 28 February 2020.

In such circumstances, your options in respect of that employee will be reliant on any Contract of Employment in place between you: you may be able to place them on a period of lay off, the employee may agree to being placed on unpaid leave or you may need to consider withdrawal of job offers. We would recommend seeking advice to ensure that this is dealt with appropriately.

Employees who stopped working for you after 28 February 2020

If you made any employees redundant, or they stopped working for you on or after 28 February 2020, you can re-employ them, put them on furlough and claim for their wages through the scheme. Please note that the government guidance has changed in this respect as it now includes those employees who may have resigned from your employment to pursue other employment or may have been dismissed for other reasons, not just those who were made redundant by you.

It however is not a legal obligation on you to do so. The government are appealing morally to employers to re-hire staff but this may not be a workable option for you for a number of reasons:

- You may not wish to re-engage a staff member because to do so may mean that they acquire two years' continuous service, resulting in them having increased legal rights at the end of the furlough period;
- To do so when other staff members are required to work for example may affect employee relations; and
- You may feel that it is unfair to the remainder of your workforce.

It is also unclear precisely how the rehiring of a staff member would work. It is currently envisaged that they would be re-engaged as if their termination of employment never happened and they would maintain their continuity of service. This of course leads to a number of issues, for example the impact if a P45 has already been processed. We do not have clear guidance on how this will work in practice yet.

If your employee is self-isolating or on sick leave

Unfortunately guidance has been unclear to date on the different types of isolation and it has led to a great amount of uncertainty with employers. In order to try to assist, we clarify some of the different circumstances below:

1. If you have a staff member who is self-isolating due to experiencing symptoms themselves, they are required to self-isolate for a period of 7 days from the date of experiencing symptoms. They should be paid at least Statutory Sick Pay ("SSP") from day 1.
2. If you have a staff member who lives with someone who is self-isolating due to experiencing symptoms, that staff member is also required to self-isolate but their period of self-isolation should be for 14 days in accordance with government guidance. They should also be paid at least SSP from day 1.
3. If you have someone who declares themselves to be "self-isolating" due to feeling as though they are within a high risk group, then this is not a period of self-isolation for the purposes of the SSP rules. Instead, this is a version of social distancing. We discuss this in more detail below.

In relation to options 1 and 2 above, an employee can be required to provide you with an Isolation Note (instead of sick or fit notes) to demonstrate why they are required to self-isolate. Ordinarily for the first 4 days of absence an employee is able to self-certify and this is still the case in this circumstance. Following 7 days of self-isolation the government now states that isolation notes can be accessed through the [NHS website](#) and [NHS 111 online](#) which is aimed at providing the employer with sufficient evidence that an employee has been advised by a medical practitioner that they should self-isolate. This note will be emailed directly to the employee who can then forward that onto the employer accordingly. Of course we have to wait to see how effective this is as we suspect it could be subject to abuse, but these can be used for options 1 and 2 above. Isolation notes will not apply to the third circumstance and we refer to the social distancing guidance below for further information on this.

Please note that if an employee is self-isolating but is still well enough to work and can work from home, their normal rate of pay should apply.

Whether employees should be paid any enhanced sick pay in addition to SSP remains unclear and will very much depend on the contractual arrangements you have in place with staff. In many circumstances employers are drawing a distinction between when an employee is actually unwell, and in normal circumstances would thereby be entitled to claim company sick pay as opposed to SSP only; compared to where they are self-isolating due to a family member experiencing symptoms but they themselves are otherwise well. In the majority of circumstances employers have been willing to pay enhanced company sick pay to those actually suffering with symptoms but have paid SSP only

for those self-isolating in the latter example. Please seek legal advice if you are uncertain or an employee disputes their entitlement to sick pay.

Please note it is unclear whether the period of sick pay can coincide with furlough. Our interpretation is that someone would still have to report needing to self-isolate to you, and they would then come off a period of furlough leave and instead would be paid SSP.

This is of course open to abuse by employees unfortunately as SSP will be less than what they can claim through the furlough scheme ordinarily but this is how we believe it should be operated in line with the guidance. You are not going to be able to claim furlough payment for employees whilst they are receiving SSP.

Shielding Employees

This is a new term but applies to those employees who are [shielding in line with public health guidance](#) (or need to stay home with someone who is shielding). The guidance now states that if they are unable to work from home and you would otherwise have to make them redundant then they can be furloughed. According to the government guidance, this includes those who live with someone who has received a shielding letter.

The difficulty with this is that it leaves the question open as to what you should be doing with employees who are shielding in line with government guidance, but you still have sufficient work that they could do. In such circumstances you would not need to make them redundant otherwise, but it is unclear whether they should be furloughed irrespective of whether you have work for them to do or not. Our interpretation has been that if you do not have work that they can safely do, in line with the shielding guidance they have been issued, and they are unable to work from home, then they can be furloughed and employers have to bear in mind that they have a duty of care towards employees. However, this remains unclear.

For this reason we suggest taking a pragmatic view on this, pending further clarity from the government. Employees could be informed that at present it is unclear whether they can be furloughed given we do have sufficient work for them to be carrying out. In which case we will pay them in line with the 80% Scheme and place them on furlough in line with the guidance which states that we can do so if they have received a shielding letter themselves or a family member has, but that should this not be possible, we will have no option but to recover these sums from them and reserve the right to reclaim the sums paid in full. If the employee is unwilling to agree to this, we can offer them to take a period of unpaid leave or annual leave as alternatives.

Alternatively if you need an employee to remain in work but they have received a shielding letter or one of the members of their household has, then you can inform them that the government guidance states that they can be placed on furlough but this is not a requirement on the business to do so. Provided you can provide a safe place for them to work, putting in place the government guidance (for example observing the 2 metre distance rule, providing them with adequate personal protection equipment and providing them with sufficient hand washing or sanitising facilities) then it doesn't appear from current guidance that you are prevented from requiring them to work, particularly if they are key workers. However, this could be seen to be contrary to health and safety and a duty of care you owe to an employee, particularly if it is the individual employee who is in receipt of a shielding letter. We therefore recommend consulting with the staff member about the level of risk they feel they are in and trying to reach agreement with the employee on ways forward knowing that furlough may be an option available to you as mentioned above.

Social Distancing and employees who do not want to go to work

Some people might feel they do not want to go to work if they're afraid of catching coronavirus. This could particularly be the case for those who are at higher risk. On occasions employees will declare

themselves as self-isolating, but they are not self-isolating because of suffering symptoms themselves or because of a family member experiencing symptoms: therefore they are in fact choosing to “social distance” and this does not attract any special type of treatment as far as furlough or SSP purposes are concerned.

An employer should listen to any concerns staff may have and should take necessary steps to protect everyone. For example, they could offer extra car parking where possible so that people can avoid using public transport.

You are still required to do all that you can to support your staff to social distance in the workplace. The government have confirmed that measures will be taken should they need to if employers are not providing their staff with adequate protections. This has also been reiterated by recent HSE guidance for employers.

If an employee still does not want to go in, they may be able to arrange with their employer to take the time off as holiday or unpaid leave. The employer does not have to agree to this.

If an employee refuses to attend work without a valid reason, it could result in disciplinary action, albeit we recommend seeking legal advice if you consider the need to do so as it is likely to be high risk.

Employees with caring responsibilities

This has not previously featured in the Scheme guidance but with effect from 4 April 2020 the guidance confirmed that employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19), can be furloughed. For example, employees that need to look after children can be furloughed.

Once again it is unclear whether you would need to have no work available for that individual for them to be furloughed or not. It is for this reason we suggest taking the same pragmatic view as mentioned above for Shielding employees, as an alternative to unpaid dependants leave.

Please of course remember to consider flexible working as much as possible to allow employees with caring responsibilities the ability to work from home around their caring responsibilities.

If your employee has more than one job

Employees can be furloughed by more than one employer. Each job is separate, and the cap applies to each employer individually. Employees can also be furloughed in one job and receive a furloughed payment but continue working for another employer and receive their normal wages.

Working for a new different employer whilst furloughed

We previously did not consider that this would be possible under the government reimbursement scheme but the guidance issued on 4 April 2020 confirmed that provided working for another employer is contractually permitted, your employees are permitted to work for another employer whilst you have placed them on furlough.

For any employer that takes on a new employee, they are being asked to ensure that they complete the HMRC starter checklist form correctly and if an employee is furloughed from another employer, they should complete Statement C on the [starter checklist](#) form.

Eligible individuals who are not employees

As previously thought, as well as employees, the Scheme can be claimed for any of the following groups, if they are paid via PAYE: office holders (including company directors); salaried members of

Limited Liability Partnerships (LLPs); agency workers (including those employed by umbrella companies); and limb (b) workers

Office Holders

Office holders can be furloughed and receive support through this scheme. The furlough, and any ongoing payment during furlough, will need to be agreed between the office holder and the party who operates PAYE on the income they receive for holding their office. Where the office holder is a company director or member of a Limited Liability Partnership (LLP), the furlough arrangements should be adopted formally as a decision of the company or LLP.

Company Directors

As office holders, salaried company directors are eligible to be furloughed and receive support through this scheme. Company directors owe duties to their company which are set out in the Companies Act 2006. Where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed. Where one or more individual directors' furlough is so decided by the board, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned.

Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company (for example filing accounts), they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company. This also applies to salaried individuals who are directors of their own personal service company (PSC).

In practice we consider this a difficult judgment to make given distinguishing between statutory duties and salaried director duties will be very difficult. We recommend seeking legal advice in each situation whereby you are intending on relying on these provisions.

Salaried Members of Limited Liability Partnerships (LLPs)

Members of LLPs who are designated as employees for tax purposes ('salaried members') under the Income Tax (Trading and Other Income) Act (ITTOIA) 2005 are eligible to be furloughed and receive support through this scheme.

The rights and duties of a member of an LLP are set out in an LLP agreement and in the absence of an agreement, default provisions in the LLP Act 2000, based upon company and partnership law. Such an agreement may include separate agreement between the LLP and an individual member setting out the terms applicable to that member's relationship with the LLP.

To furlough a member, the terms of the LLP agreement (or any such agreement between the LLP and the member) may need to be varied by a formal decision of the LLP, for example to reflect the fact that the member will perform no work in the LLP for the period of furlough, and the effect of this on their remuneration from the LLP. For an LLP member who is treated as being employed by the LLP (in accordance with s863A of ITTOIA 2005), the reference salary for this scheme is the LLP member's profit allocation, excluding any amounts which are determined by the LLP member's performance, or the overall performance of the LLP.

Agency Workers (including those employed by umbrella companies)

Where agency workers are paid through PAYE, they are eligible to be furloughed and receive support through this scheme, including where they are employed by umbrella companies.

Furlough should be agreed between the agency, as the deemed employer, and the worker, though it would be advised to discuss the need to furlough with any end clients involved. As with employees, agency workers should perform no work for, through or on behalf of the agency that has furloughed them while they are furloughed, including for the agency's clients.

Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.

Limb (b) Workers

Where Limb (b) Workers are paid through PAYE, they can be furloughed and receive support through this scheme.

Those who pay tax on their trading profits through Income Tax Self-Assessment, may instead be eligible for the Self-Employed Income Support Scheme (SEISS), announced by the Chancellor on 26 March 2020.

Contingent workers in the public sector

The Cabinet Office has issued guidance on how payments to suppliers of contingent workers impacted by COVID-19 should be dealt with where the party receiving the contingent worker's services is a Central Government Department, an Executive Agency of a Central Government Department or a Non-Departmental Public Body.

Volunteer work

A furloughed employee can take part in volunteer work, if it does not provide services to or generate revenue for, or on behalf of your organisation.

Your organisation can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance.

Training

Furloughed employees can engage in training, as long as in undertaking the training the employee does not provide services to, or generate revenue for, or on behalf of their organisation. Furloughed employees should be encouraged to undertake training.

Where training is undertaken by furloughed employees, at the request of their employer, they are entitled to be paid at least their appropriate national minimum wage for this time as referred to above.

Holiday

This is the biggest element relating to the Government's Scheme which remains incomplete. The current Government guidance for both employers and employees is silent on how the Scheme interacts with annual leave and holiday pay.

However we believe that employers reclaiming under the Scheme for furlough leave will be entitled to claim money from HMRC for those of their employees who are taking holiday leave while furloughed. This is because eligibility for the furlough payments is that it requires employees not to be at work and not to be working. This would remain the case whilst on annual leave.

We also believe that for example two weeks' holiday can count towards the minimum three weeks' furlough leave needed to claim repayment under the Scheme.

The difficult question comes down to what rate of pay an employee should be paid when taking holiday during any period of furlough. This remains unclear. We hope that we will be provided with further guidance but we do not know whether that will be the case.

Due to us remaining bound by EU case law at this time, it seems to us that holiday pay should reflect an employee's normal remuneration. This has been interpreted in numerous cases as including overtime, allowances, commission payments, and some bonuses. For a number of reasons we therefore believe that holiday pay should be based on their normal pay, pre furlough leave. This in practice would mean that we consider you will be able to recover 80% of an employee's basic salary for any period of furlough when they are on annual leave during a furlough period, but you would be required to top that up to 100% of their normal pay (including any regularly worked overtime, commission etc).

You can distinguish between payment of the first 4 weeks' annual leave, the remaining 1.6 weeks and any additional contractual entitlement, and if you are not in a position to pay holiday topping it up to the 100% this can be considered, but if you are able to do so, we would recommend paying any period of annual leave during furlough at an employee's normal rate of pay.

The government has also announced it is allowing employees to carry over up to four weeks (not 5.6 weeks) annual leave into the next two leave years. This can apply if it is not reasonably practicable for them to take some, or all, of the holiday they are entitled to due to coronavirus. The change is aimed at allowing businesses under particular pressure from the impacts of COVID-19 the flexibility to better manage their workforce, while protecting employees' right to paid holiday.

Please however note that in the absence of government guidance, we are unable to corroborate this approach and therefore you must exercise caution when relying on this as it is based on assumptions and our interpretation of information available to us. The government have in fact addressed some points which previously required clarification and that clarification later supplied by HMRC has been contrary to normal employment law principles we would ordinarily follow, therefore this advice has to be caveated for this reason.

How will this affect other employees within the organisation who are not deemed as furlough workers?

These employees have not been deemed as furlough workers because there is work available for them and therefore they would be entitled to full pay as normal. This will include employees who are required to work from the business premises, client premises as normal or home workers. Please note however that this may cause resentment between staff particular from those who are required to work during this time and therefore for it is important that an employer is able to demonstrate a fair selection process.

The furlough worker will remain employed by the business throughout the duration no work is available and therefore the employee's continuous service is protected.

What if we are already considering redundancies?

Please seek legal advice in relation to individual circumstances however in general, we would recommend that instead employers should postpone redundancies so that they can gain a better picture of the business' position and instead utilise "furlough" as an interim measure.

There is an argument to say that redundancies whilst you have the alternative option of placing staff on “furlough” could be deemed unfair given you are under an obligation to consider alternatives to redundancy and if not explored with employees, this would be considered a reasonable alternative in most circumstances. Of course if an employee refuses to be placed on “furlough” leave and you still do not have any work for them, then this will generally be considered a fair redundancy situation, subject to a fair redundancy procedure being followed.

Sources of Advice

A copy of the government advice can be found here:

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

General advice for businesses can be found here:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses>

Employees can be referred here for guidance:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-guidance-for-employees>

We hope that this has been helpful but please let us know if you have any specific enquiries.