

Furloughing under the Job Retention Scheme

Guidance Notes as at 16 April 2020

If as a result of the Coronavirus crisis you have a shortage of work, or insufficient funding to continue with full-time employment across your business, there are currently three alternatives to compulsory redundancy. You may be able to place employees on furlough under the Government's Job Retention Scheme ("JRS"); you may be able to lay off some or all of your employees; or you may be able to place them on short-time working. In this document we consider the option to furlough under the JRS but in the event that you would like to consider any other options, please consult our Advisory Service.

THE JOB RETENTION SCHEME

This involves designating some or all of your employees as 'furloughed workers'. This means temporarily changing the status of employees so that they do no work but are retained on your books, to be brought back when you have work for them to do.

Employers who do this will be able to obtain a grant from the Government to cover 80% of furloughed employees' wage costs, to a maximum of £2,500 per employee per month. There is no requirement to make up the pay to 100%, but employers can if they wish to.

FURLOUGHING EMPLOYEES

You need to designate which employees are to be furloughed. This may be all of your workforce, or some of it. Theoretically, any employee can be furloughed and this includes full time, part time, zero hours, variable hours, fixed term and apprentices. They must have been on your payroll on or before 19 March 2020 and have been notified to HMRC via a RTI submission on or before 19 March 2020. Staff need to be on PAYE in order for you to be able to claim the grant for their wages.

Each period of furlough must be at least 3 weeks in duration.

If an employee went on unpaid leave on or before 28 February 2020, you cannot furlough them until the date on which it was agreed they would return from unpaid leave.

If an employee started unpaid leave after 28 February 2020, you can put them on furlough instead.

Employers can decide to place employees who are on sick leave or self-isolation on furlough, though must bear in mind the minimum furlough period. This is also the case where an employee becomes sick during furlough. Whilst the employer has the choice, it is clear that it must be either one or the other. Where SSP is paid, no claim for wages can be made under the Job Retention Scheme, though you may be able to claim for SSP to a maximum of 2 weeks per employee via the SSP Rebate Scheme, which is not yet open.

Employees who are 'shielding' (under advice from the NHS to remain at home and avoid face to face contact for a period of 12 weeks) can be furloughed if they cannot work.

Employees who were transferred to a new employer under TUPE legislation after 19 March 2020 can be furloughed and the new employer can use the Scheme to claim their furlough pay.

Foreign nationals on any category of visa can be furloughed.

It is your choice over who to designate as furloughed and employees cannot insist on it. If only a portion of your workforce is to be furloughed, you should consider carefully who it should be and you should seek advice from our Advisory Service prior to deciding on any selection process or criteria.

GETTING AGREEMENT FROM EMPLOYEES

In all cases, you should discuss the situation with employees and agree with them that you are designating them as a furloughed worker. It is especially important that you get agreement to any reduction in pay, otherwise this may give rise to claims of unlawful deduction from wages, breach of contract or constructive dismissal.

Whilst a drop to 80% with a £2,500 cap may not appear an attractive option it is likely to be viewed more favourably when it is explained to the employee that redundancy may be the only other option available.

Once agreement is obtained, you should confirm the temporary furloughed worker status to the employee in writing and you must keep a record of this communication for five years.

EMPLOYEES WHO LEFT AFTER 28 FEBRUARY 2020

If employees left your organisation for any reason after 28 February 2020 but before 19 March 2020, including redundancy, you can agree to bring them back and place them on furlough.

WORKING DURING FURLOUGH

Employees cannot work for you or any linked or associated employer while they are on furlough. They can undertake online training or volunteer subject to public health guidance, as long as they are not making money for you or providing services to you or any linked or associated employer.

If employees are required to, for example, complete 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 the 80% of their wage that will be subsidised.

Because you can place employees on furlough more than once, you do have the option of bringing them in if there is work to do but a period of furlough must stop for this to happen. You can then agree to place them on furlough again.

It will be your decision over whether you allow your furloughed employees to find work elsewhere during furlough considering any current contractual restrictions on this.

THE GOVERNMENT GRANT

The Government's current guidance sets out that you will need submit information to HMRC confirming who your furloughed workers are. Once HMRC have received your claim and confirmed you are eligible for the grant, they will pay it to you via BACS payment to a UK bank account. The Government are creating an

online portal to be used to submit the necessary information.

You should make a claim in accordance with actual payroll amounts at the point at which the payroll is run or in advance of an imminent payroll.

The grant is a reimbursement to the employer therefore you should make the wage/salary payment to the furloughed worker as normal where you have the funds. Employers who are struggling with salary payments because of the current situation may be able to obtain assistance from the Coronavirus Business Interruption Loan Scheme (CBILS).

HMRC intend to have the portal up and running by 20 April 2020 and claims can be backdated in respect of workers who were furloughed after the 1 March 2020. The scheme is initially intended to run for 3 months but may be extended.

THE AMOUNT OF THE GRANT

For full time and part time salaried employees, the employee's actual salary before tax, as in their last pay period before 19 March 2020, should be used to calculate the 80%. 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 (benefits in kind) should be excluded.

Once you have worked out how much of an employee's salary you can claim for you must then work out (i) the amount of Employer National Insurance Contributions and (ii) minimum automatic enrolment employer pension contributions on this sum. You are entitled to claim for these sums, calculated using the reduced wage, on top of the capped amount for wage costs.

TAX, NATIONAL INSURANCE AND PENSIONS

Wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

Employers will be liable to pay Employer National Insurance contributions on wages paid, as well as automatic enrolment contributions on qualifying earnings unless an employee has opted out or has ceased saving into a workplace pension scheme.

All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

If you decide to top up employees' pay above the 80%, employer National Insurance Contributions and automatic enrolment contribution on that top up salary will not be funded through the Scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which was £512 until 5 April 2020 and is now £520 per month).

EMPLOYEES WHOSE PAY VARIES

If such an employee has been employed (or engaged by an employment business in the case of agency workers) for a full year the employer will claim for the higher of either:

- the amount the employee earned in the same month last year, or
- an average of their monthly earnings from the last year.

If such an employee has been employed for less than a year, employers will claim for an average of their monthly earnings since they started work.

The same arrangements apply if the employee's monthly pay varies because they are, for example, a zero- hours employee.

If the employee has been employed for less than a month, the employer will pro-rata the earnings from that month.

NATIONAL MINIMUM WAGE / NATIONAL LIVING WAGE

National Minimum/Living Wage is a rate payable for hours worked. For as long as no hours are being worked by the employee it does not matter if 80% of their wage falls below the minimum hourly rate – but see the above note on training.

EMPLOYEES ON MATERNITY LEAVE

Those about to go on maternity leave will go on leave as normal. However, if their earnings have reduced due to a period on furlough prior to the start of leave, and specifically during the period used to calculate their entitlement to Statutory Maternity Pay, their entitlement may be affected. Those already on maternity leave will remain so until they wish to return, at which point you would need to assess whether there is work for them or reach agreement with them to be 'furloughed'. Individuals must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby.

If you offer enhanced contractual pay to women on maternity leave, this is included as wage costs that you can claim through the Scheme.