**Coronavirus Job Retention Scheme**

The government has published details of its Job Retention Scheme. The most important point for large employers is that it makes clear that collective consultation must take place if the number of employees warrants it. Therefore, if you intend changing the terms of conditions of 20 or more employees at one establishment you must consult with a recognised union or, if there is not one, elected representatives. As you are not making redundancies at the moment, there will be no need to wait for a certain period before furloughing employees, but you must complete an HR1 form.

Detailed guidance for employers can be found here [<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>].

**Q: What does ‘furloughing’ an employee mean?**

**A:** The word ‘furlough’ is said to come from the Dutch word ‘verlof’ meaning leave of absence and was used when soldiers were sent home on leave when there was no work to be done. It is not an expression which we are familiar with in the UK, although it is apparently used in the USA. It means sending home an employee when there is not enough work to do, with a guaranteed payment to them, until such time as you have sufficient work and then want to bring them back.

**Q: What does the Job Retention Scheme offer?**

**A:** The government has confirmed that provided an organisation had created and started a PAYE scheme as at 28 February 2020 then between 1 March 2020 and 31 May 2020 (with a possible extension if needed) for employees who were on the payroll as at 28 February 2020, if they are furloughed for at least three weeks because there is no work for them or their employer is unable to operate because of coronavirus, then the government will pay grants to employers representing 80% of their wages, capped at £2,500 a month.

This is open to businesses, charities, recruitment agencies where their agency workers are paid through PAYE and public authorities. However, if your organisation receives public funding already then it is expected that this public funding will be used to continue to pay employees and that they will not be furloughed.

**Q: Who can be furloughed?**

**A:** Full-time and part time employees, employees on agency contracts (who are not working) and employees on flexible or zero hours contracts.

**Q: What is covered under ‘wages’ and does this include overtime or commission?**

**A:** For employees whose pay does not vary, this is their actual salary before tax excluding fees, commission and bonuses. For those whose pay varies it is the earnings in the same pay period in the previous year; or the average earnings in the 2019-20 tax year (or fewer if they have worked for less time than this, including a part-month calculation if they were taken in February) whichever is the higher, excluding fees, commission and bonuses.

**Q: Do employers have to top up the 80% to 100%?**

**A:** No. The employer must pay the grant it receives under the scheme (less normal deductions) but they do not have to top it up, although employers may want to.

**Q: Do employers still have to pay 13.8% NI?**

**A:** Yes, but they will be able to claim this back as well.

**Q: Do employers have to still make pension contributions?**

**A:** Yes, although they may agree with the employee to have a pension break so that the employee is not making their contribution and neither is the employer. Minimum auto-enrolment employer contributions of 3% can be claimed back.

**Q: What if the 80% brings the employee down below the minimum wage?**

**A:** As they will not be carrying out work for the employer then this is not a problem. However, if the employee is carrying out on-line training for the employer whilst furloughed then they must receive minimum wage.

**Q: How do we apply?**

**A:** The government is setting up an online portal through HMRC which they have said will be operational by early April. Employers will have to self certify that they have furloughed employees. We recommend you ensure there is a paper trail in place to evidence this, in case it is requested later.

**Q: Can we furlough any employee?**

**A:** As the name of the scheme suggests, it is a job retention scheme, and so you can only furlough an employee where you either have no work or are unable to operate because of coronavirus and it must be for a minimum of 3 weeks. Also, only employees on your payroll as at 28 February 2020 will qualify.

**Q: Do we need the employee’s agreement to furlough?**

**A:** You will need to check the employment contract. Some contracts have clauses which allow you to send home employees with or without pay if you do not have enough work. These are called ‘lay off’ clauses and are generally only found in employment contracts in industries such as manufacturing where they have peaks and troughs.

If you have such a clause in your contract you do not need your employee’s consent to furlough them. If you do not have such a clause then you need their agreement to send them home on reduced pay as you are effectively varying the contract. However, most employees faced with redundancy or a guaranteed payment at least up until 31 May 2020 are likely to agree.

It is important to note that if you intend varying the contracts of 20 or more employees at one establishment then the collective consultation rules apply and you will have to consult with the unions or, if none, elected representatives and file an HR1 form. As you are not making redundancies at this stage, you will not have to wait 30 days before furloughing employees.

**Q: What if the employee does not agree to be furloughed?**

**A:** If the employee does not agree then you will have to proceed with a redundancy process, obviously considering all alternatives to redundancy before making a final decision. Remember that if there are 20 or more employees in one establishment then it is important to go through collective consultation which means consulting with a union or elected representatives if there is no union for a 30 day period (20-99 employees) or 45 day period (100 or more) and filing an HR1 form (failure to do this is a criminal offence).

**Q: Can the employee still do some work for us?**

**A:** No, the employee must do no work for you which generates income or provides a service to you. So you could not reduce their hours or working days or alter their duties and claim money under this scheme. Whether you wanted to put a restriction on what they do when they are off, such as not working for others, is a matter for each employer. However, you may allow them to volunteer or train during this period, but if they are doing on-line training they must be paid the minimum wage.

**Q: Do we have to have started a redundancy process to be able to claim?**

**A:** No, but if you do not have the right to send employees home on reduced pay and are having to vary their contracts then if there are 20 or more employees at one establishment you will have to consult with the recognised union or, if there is not one, elected representatives.

**Q: If I am furloughing 20 or more employees at one establishment do I need to submit an HR1 form?**

**A:** Yes, because you will have to start collective consultation then our advice is you should submit an HR1 and failure to do so is a criminal offence.

**Q: Can I furlough those employees who are self-isolating or are caring for someone who is vulnerable?**

**A:** The guidance makes clear that those who are shielding in line with guidance from Public Health England can be furloughed. Those who are self-isolating or on sick leave get SSP but can be furloughed after that.

**Q: I have employees on unpaid leave can I furlough them?**

**A:** No

**Q: Can I ask employees to take holiday during furloughing?**

**A:** Provided that you give twice as much notice as the actual holiday then yes. The question is how much should they be paid because we know from significant litigation that employees must receive their normal pay when on holiday which can include overtime and commission provided it is regular and averaged out over the previous 12 months (from 6 April 2020).

**Q: Can I furlough those on long-term sick?**

**A:** The guidance says that those on sick leave should be paid SSP (or company sick pay if appropriate). However, once they have returned to work they can be furloughed and so it is anticipated a large number of employees currently off sick will now feel they are ready to return to work. If they have a fit note signing them off into the future then you would need to see confirmation from their doctor that they are ready to return to work.

**Q: How do we select those to be furloughed?**

**A:** If you have a group of people who all do the same job and only need half of them, then you will have to apply fair and objective selection criteria in deciding who stays and who is ‘furloughed’. This would have to be carried out quickly and probably based on what skills you will need in the short term. So for instance if you need some of the sales force you are going to select your best sellers to stay as they have the best chance of making sales. Bear in mind that decisions must not be discriminatory.

**Q: When making this selection, can we take into account individual circumstances such as the ability to work from home?**

**A:** This would be a reasonable consideration but do not make stereotypical assumptions e.g. all women with children cannot work from home as this may end up in a discrimination claim.

**Q: Can we bring employees back temporarily off furloughing and then furlough them again if we are not busy?**

**A:** Furloughing must be for a minimum of three weeks.It is specific in the guidance but practically speaking you may need to bring back more staff if others get sick and so it is hoped that the government will take a flexible approach to this.

**Q: Can I not just say that the contract is frustrated because neither party anticipated this event at the time the contract was entered into?**

**A:** Frustration of contract is rarely successfully argued in an employment context and especially given the government’s scheme to retain jobs, it is likely to be frowned on by tribunals.

**Q: If I go ahead and make an employee redundant anyway, without considering furloughing is this likely to be an unfair dismissal?**

**A:** Yes. We anticipate a tribunal taking the view that the employer has not done everything possible to avoid redundancies and so those with over two years’ service may successfully claim unfair dismissal, subject to there being extenuating circumstances.

**Q: If we are making 20 or more employees redundant in a 90-day period at one establishment, could we rely on the ‘special circumstances’ argument so that we did not have to collectively consult?**

**A:** Based on current case law it is highly unlikely that any such argument would be successful.

**Q: What about employees on statutory leave such as maternity/adoption/paternity/shared parental leave?**

**A:** If a pregnant woman is furloughed then calculation of her maternity leave at 90% for six weeks will be calculated based on her earnings in the ‘relevant period’ and so if these earnings were reduced due to furloughing then this may affect the 90%. If contractual pay enhances statutory amounts then this will be reduced to 80% but it is not currently possible to pay less than the statutory minimum for statutory maternity pay.

If an employer pays enhanced maternity/shared parental/adoption/paternity pay then this enhanced amount counts as wages and the employer can claim back 80% or £2,500 whichever is the higher.

**Q: Can I make employees who are furloughed redundant?**

**A:** Yes, you can make them redundant and any grant will stop. However, you must still follow all normal rules such as consultation.

**Q: As the scheme is backdated to 1 March 2020 can I claim from then even though my employee was working in March?**

**A:** No, it is only backdated to allow those made redundant since 1 March to be reinstated and furloughed. You can only claim from the date your worker is advised in writing of their change of status.

**Q: What should be in a furloughing agreement?**

**A:** This should include:

* The employee’s agreement to be furloughed.
* Confirmation of when that starts or started if this was an employee made redundant and where they have done no work for the employer since that date. If they have been made redundant then agreement that the redundancy has been withdrawn and repayment of any redundancy payments or pay in lieu of notice which has already been made.
* Confirmation of how the employer can bring the furlough leave to an end.
* Confirmation that the employee will not be required or allowed to carry out any work for the employer during the furlough period other than volunteering or training. If they are doing on-line training they must receive the minimum wage.
* What the employee will be paid and, if relevant, agreement by the employee to accept less than their contractual pay.
* If applicable, agreement that they will be treated as using up statutory and contractual holiday entitlement during the furlough period.
* If there are any applicable statutory rights e.g. maternity, shared parental or adoption leave and pay, confirmation that these will continue and if they were receiving enhanced contractual payments, agreement to reduce these to 80% of their contractual level, capped at £2,500 per month.
* Asking the employee to ensure that the employer has up-to-date contact details for the employee and asking the employee to remain contactable.
* Reserving the right for the employer to make unilateral changes to the scheme and telling them how any such changes will be advised to them.
* Confirmation that all other express and implied terms of the contract of employment remain in force so remember to check if there are other terms that need to be varied.

**Q: What do I need to make a claim?**

**A:** You will need the following:

* 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 can only claim every three weeks and the money will be paid via BACS. You must pay the grants received to the employee, less deductions for income tax and NI.

**Q: How do I treat this grant for tax purposes?**

**A:** Payments received by you under the scheme are made to offset these deductible revenue costs. It must therefore be included as income in your calculation of taxable profits for income tax and corporation tax purposes, in accordance with normal principles. You can deduct employment costs as normal when calculating taxable profits for income tax and corporation tax purposes.

27 March 2020