

FURLOUGH WORKERS

On Friday 20 March 2020, the government published some very general guidance for employers and employees on the new Coronavirus Job Retention Scheme announced by the Chancellor during Friday's press briefing. Under this scheme, the government have committed to pay up to 80% of wages for those employees who would otherwise be made redundant. Although the Chancellor referred to the scheme's aim as being to avoid people being 'laid off', it is likely that he was using this as the commonly used term for redundancy rather than 'lay off' in the strict legal sense (a right not to provide work) as the objective is to avoid people losing their jobs and in a true 'lay off' situation, employment continues despite the employer providing no work to the employee albeit on a temporary basis.

We recommend that you read this guidance and issue the template letter we have issued with this to any employees you wish to "furlough" and ask them to sign and date the Agreement where possible. This can also be done by email acceptance if it is not possible to physically sign the Agreement.

This advice note is updated as at 12pm on Monday 23 March 2020 and is likely to change due to daily Government updates regarding same. Therefore, you should keep up to date by reading the Government website daily and seeking our advice on any specific circumstances you may wish to discuss with us. This advice note cannot be relied upon and is for information purposes only.

Who can access the scheme?

All UK businesses are eligible to use the scheme, regardless of size.

How will the scheme operate?

1. The employer will designate affected employees as 'furloughed workers' and notify them of this change. The brief guidance we have seen suggests that this may require consultation (please see below) and we would recommend that you consult with each individual regarding these changes
2. The employer will then submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal. Further guidance will be given by HMRC as to the information the employer will have to provide.
3. HMRC will then give the employer a grant to reimburse 80% of all furloughed workers wage costs, up to a cap of £2500 per month.
4. There is no obligation on the employer to make up the remaining 20% wages "but they may choose to do so". We have included this as an option in our template letter.

HMRC are working urgently to set up a system to reimburse these monies as the current systems are not set up to facilitate payments to employers. At the press conference the Chancellor indicated that he hoped the first grants would be paid before the end of April. He also stated that claims could be made for wages lost since 1 March.

The scheme is intended to run for 3 months but the Chancellor said that he would not hesitate to extend this period if necessary.

What does it mean to be a 'furloughed worker'?

In UK employment law, the term 'furloughed' has no legal significance and therefore we'll need to see what specific guidance is given on this when further details are released. The strict meaning of the word is a temporary leave of absence from work. Unless the government confirms to the contrary, we should assume that all contractual benefits (for example holidays) continue to accrue.

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Do you have to consult with the employee before making them a furloughed worker?

From the very basic information we have seen so far, it does appear that, unlike lay off and short-time working which is the exercise of a contractual right, the employer **does** have to seek the employee's agreement to becoming a furloughed worker. The employee's guide states that the employer should discuss becoming a furloughed worker with the employee. The employer's guide specifically states "*changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation*". It is difficult to make definitive assertions when there is so little information available to, but we suspect the words 'depending on the employment contract', probably refer to whether there is a contractual right to lay off. If the contract contains this right, then the employer already has the right to send the employee home without work and therefore the only 'change' in converting the lay off to a period of furlough, is that the employee will receive 80% of their pay rather than a week of statutory guarantee pay every 13 weeks.

Let's look at some of the options.

Employer wants to make the employee redundant

Although the government's aim is to save as many jobs as possible through the current crisis, some employers will want to make permanent decisions about continuing employment. In these cases, they would follow through a normal redundancy process. This will clearly be understandable if the employer has decided to cease trading. However, we should carefully consider the business cases in other situations given the government is effectively picking up the reduced wages (assuming the employee would be happy to be a furloughed worker). In order for the business case to stand up to scrutiny, it would probably need to be based on more than the immediate and direct impact of the current crisis unless it was clear that this will have a lasting impact on the need for the role. Therefore, we would recommend that you take specific advice from us on any proposed redundancies given the legal requirements associated with the process. Please note, employment legislation remains the same, at the date of writing.

Employer has reduced need for employees but does not want to make redundancies at the moment

If the employer has a right of lay off in the contract, they should speak to their employee, explain that they need to exercise the right to lay off which would have very limited right to pay (statutory guarantee of up to £29 per day for the first 5 workless days in any 13 week period). As an alternative, they could become a furloughed worker and receive 80% of their wages (subject to the monthly cap of £2500) for up to 3 months.

If the employer does not have a right to lay off in his contract, he could ask the employee to agree to becoming a furloughed worker as an alternative to redundancy.

What if the employer has already laid people off?

Many employers took immediate action last week as social distancing severely affected their businesses and many employees have already been laid off. There is no official guidance on what should be done in these circumstances but given that the government has strongly indicated that this scheme is about giving support to workers, and the fact that the Chancellor indicated that claims can be made for wages lost since 1 March, clients should contact employees who have been laid off (in a temporary sense and not dismissed) and offer to designate them as furloughed workers. At the moment it is unclear whether a day which has been treated as lay off and statutory guarantee pay paid, can now be treated as a period of furlough. Hopefully this will be clarified shortly.

It is unclear, at present, what the situation will be for employees who have been dismissed during this period and we will continue to update you as we get more information from the Government.

If an employer did not offer to designate laid off employees as furloughed workers, this could be viewed as a breach of trust and confidence and could give rise to a claim for constructive dismissal.

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What if there is work for employees for part of the week?

It is still not entirely clear whether the scheme will offer any support for employees on reduced hours in addition to those who are laid off completely but from what we can see at the moment, our advice would be that there is no support available in these circumstances. The employee guide to the scheme makes it clear that during a period of furlough, no work must be done for the employer or for any other new employer which would seem to rule out short-time working. Employees will still remain bound by their contracts of employment during the furlough period.

Can a period of furlough trigger redundancy?

Unlike lay off, where a continuous period of lay off or short- time working can allow the employee to trigger redundancy, this does not appear to be the case with a period of furlough. This makes sense as the whole purpose of the scheme is to avoid redundancies and most employees will be receiving 80% of their wages, well above the 50% pay level for short-time working which could trigger a redundancy.

How do you select who should be designated as furloughed workers?

Employees' attitudes towards furlough may differ significantly. Some may wish to avoid this given the drop in wages (assuming the employer does not make up the difference) whereas others may be happy to stay at home for 80% of their wages, especially because of the perceived risks of infection if they can't work from home and the impact of school and nursery closures. Employers will also want to ensure that they are retaining the skills they will need within the business at this most challenging time. They will therefore need to identify those with the specific skills they need to retain in work (with an objective reasoning behind this). For the remaining employees, they should discuss the situation (in line with the comments above regarding the existence of a right to lay off) and ask for volunteers. If they do not have sufficient volunteers, or if they have too many, it will be necessary to follow a selection process. It is important to take advice on this as, unlike lay off and short-time working, which can be shared on a rota basis, all the signs seem to be that employees will be designated furloughed workers and remain so until the period of furlough can be brought to an end.

Should the employer simply select those employees who have been identified as particularly high risk?

Whilst we can understand why an employer would want to do this with the best of intentions, they would in effect be choosing those individuals on the basis of health, age or pregnancy which could easily give rise to discrimination claims. If an employee has been identified as being in one of these groups, the employer should have carried out a risk assessment on them continuing to work. If this did not flag any issues, then there should not be any reason why they should not be able to work. They should therefore be included in the pool to be offered a period of furlough. However, if the employer receives too many requests to volunteer, selecting those volunteers who would be at the highest risk of continuing to work would seem to be a reasonable approach.

We are still waiting to see whether the government will apply the more stringent, 12 week isolation restrictions on these groups and how this period of absence is to be treated. It is likely that this form of self-isolation will also be treated as sickness absence.

Can an employee request to be furloughed?

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An employee can ask for this but it is entirely up to the business as to whether they wish to designate any employees as furloughed workers. If they decide to do so, they should not agree to this on an 'on request' basis as this may deprive others of the opportunity and it may be that they have additional needs which should have been considered when weighing up the decision.

Does the scheme apply to workers as well as employees?

Technically there is no need to furlough a worker unless there is an obligation to provide work (and generally this is absent from worker relationships unless it is on a very short term basis). However, we know that many individuals classed as casual workers / zero hours workers are actually variable hour employees. The Chancellor was specifically asked about this at the press conference and he said that the scheme was open to anyone on PAYE (therefore just ruling out the self-employed). When asked how their pay would be calculated, he said there would be detailed guidance on who would determine this and how it would be calculated.

Those who are self-employed are not eligible for the scheme and it will be interesting to see how this may affect many people's perception of their true employment status. At the moment it seems that, regardless of what their true employment status may be, they will still not be eligible for the scheme as they are not on PAYE.

Please continue to check with the Government website for any updates on a daily basis. We will update you as much as we can in the circumstances.