



A Guide to Furlough

April 2020

What is Furlough

The word ‘furlough’ generally means temporary leave of absence from work. This can be due to economic conditions affecting one company, or matters affecting the whole country. Until now the expression has not carried any meaning in UK employment law but has been temporarily introduced in response to the unprecedented situation presented by the COVID-19 pandemic. This does not mean that the fundamentals of employment law have changed, simply that this scheme adds to them.

Furlough leave has been temporarily introduced by the government to provide employers with an option to keep employees on the payroll without them working. As the furloughed staff are kept on the payroll, this is different to being laid off without pay or being made redundant. The ability to furlough employees is designed to support employers who are severely affected by Coronavirus.

This provides employers with another option when reviewing the circumstances of their business (as an alternative to redundancies or being laid off without pay) and each employer will need to review this option carefully (alongside legal advice) to pursue the best option for them.

Which employers are eligible?

Any employer (of any size) is eligible for the scheme.

This includes:

- businesses
- charities
- local authorities

To be eligible the employer must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.

Public Sector

The government does not expect much public sector use of the scheme because many public sector employees are continuing to work throughout the coronavirus outbreak.

Non-public sector employers who receive public funding for staff costs are expected to continue to pay staff and not to place them on furlough. However, where staff cannot be redeployed to assist with the coronavirus response, then the furlough scheme may be applicable.

Which employees are eligible?

The employees that can agree to being furloughed are those working for businesses that would otherwise have to be dismissed as redundant or laid off.

The furloughed employees must have been on the employer's PAYE payroll on 28 February 2020, including:

- full-time employees
- part-time employees
- agency employees on agency contracts (provided they are not working at all)
- zero-hour contract workers (provided that they are employees albeit on flexible contracts).
- Employees that TUPED (after 28 February are eligible provided they were on the transferor's payroll on or before 28 February 2020)
- Foreign nationals

There are complexities for employees who:

- were not on the payroll on 28 February 2020
- on sabbatical or unpaid leave
- recently made redundant or laid-off
- are pregnant or on maternity leave or adoption/paternity/shared parental leave pay
- caring for children
- migrant workers

Employees who have been on sick leave can be placed on furlough leave after the period of sick leave has ended if there is no work for them to do and they would otherwise be laid off or made redundant. Employees who are shielding themselves in line with government advice can also be placed on furlough leave.

Employees who work elsewhere

Employees with two or more employers can be furloughed for each job separately but the £2,500 cap applies to each employer individually. This means that an employee with two jobs can have 80% of their salary reimbursed with a cap of £5,000, or more, if the employers top the salary up above the grant level.

If an employee works two days a week for Employer A and three days a week for Employer B they would receive their 80% of their actual salary for those two days if on furlough from Employer A. If their other role continues the employee could receive their normal salary from Employer B as well.

The guidance does specifically cover the position if the employee is then offered additional work from Employer B. Employees can be furloughed from one job and receive their 80% furlough payment, and work for another employer during the hours they would normally be working for the employer who has furloughed them. Therefore it seems that working elsewhere while on furlough from employer A is an inadvertent benefit for the employee. However normal legal principles apply too, as outlined below.

What if the employee does not agree to be furloughed?

If the employee does not agree then if necessary 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).

Coronavirus Job Retention Scheme

If furloughed employees work for another employer during the hours they would normally be working for the employer who has furloughed them payments by HMRC will be paid even if the employee picks up other work. The employee will receive the furlough payments from the first employer and their normal wages from the new employer.

The government details only prevent the employee from doing any work for the same employer that has furloughed them.

General legal position on working elsewhere

The scheme may pay a grant for the furloughed employee, but this is a different legal issue to the relationship between the employer and employee. In many employment contracts there is either an express or implied term that the employee should loyally and faithfully work for that employer and not work elsewhere.

It could technically be breach of contract with the employer if employees pick up work elsewhere. Similarly, it could be a breach of contract, including a breach of mutual trust and confidence, if the employer unreasonably refuses consent, especially if the employer only allows furlough on 80% pay.

Example

For example, two full-time employees have contracts with similar express restrictions on working elsewhere. The contracts say the employees must faithfully serve the employer and are prohibited from taking up additional work or directly or indirectly engaging in any competing business.

Employee A earns about £2,000 a month as an assistant for a film location company which has temporarily closed. He is furloughed on 80% of pay, receiving approximately £1,600. To supplement the furlough pay he takes a temp job as a supermarket delivery driver earning a further £2,000 per month (in addition to the furlough payment). The original employer should evaluate this and as there is no business threat can agree to the employee's proposed second job.

Employee B earns £6,000 per month as a business developer for a financial services company. She is furloughed on the maximum £2,500 payment but the employer does not top this up. Some other colleagues have not been furloughed and are receiving their full salaries. Employee B is concerned that she will not meet all her outgoings and takes a temp development job with a similar company earning £4,000 per month. The employer is concerned as there is a threat to its business by working for a competitor. If the employer refuses consent to the employee's proposed second job Employee B can seek another role or may try to refuse to agree to being furloughed given the pay cut. The employer then has a choice to pay the full salary, or reverse the furlough decision, or perhaps commence a redundancy process.

Ultimately what happens may be a question of negotiation between the employer and employee. Employees do have to agree to being furloughed, unless there are lay off provisions in their contract, so an informed employee may say they only agree to being furloughed and taking a 20% pay cut if the employer agrees to them working elsewhere during their normal working hours. The safest course of action is to agree with the employee the nature and length of any other work that may be done, ideally in writing.

Employers may ask employees to agree new or reconfirmed restrictions on working elsewhere, especially if for a competitor. The employer may agree to furloughed employees working in limited sectors, for example, food, health and social care or other essential services. Special rules also govern volunteering.

How to agree which employees are furloughed

Employees must be consulted and have to agree to be furloughed.

Changing the status of employees always is subject to existing employment law so it's important to bear this in mind. Depending on the employment contract wording there may be an ability to lay-off workers to impose a furlough period.

If there is no lay off provision in the existing contract the employer will need to agree with the employee that they going to become furloughed because no work is available. Most employees will agree to this as the alternative is dismissal by reason of redundancy (with the possibility of a delayed redundancy payment or no redundancy payment for employees who have worked for less than two years).

Unions may join in a consultation process to agree the furlough change. As normal employment laws apply when furloughing employees, equality and discrimination laws will apply and so employers will need to be aware of certain risks, for example, choosing a disproportionate amount of men or women, which could lead to discrimination claims later so employers need to exercise fairness and consistency.

There may be some negotiation, as for some employers some staff may be needed and others not. Some employees may be resentful that they are having to work as they are classed as being essential whilst others are being furloughed on 80% of salary. Others may be resentful that they are classed as dispensable whilst others are working and receiving their full package, this requires managing carefully.

If employees do not agree to be furloughed then employers can dismiss them by reason of redundancy (if the redundancy definitions are met and a proper and fair process is followed).

How to apply to the scheme

The ability to furlough employees under the Coronavirus Job Retention Scheme will be operational from the end of April. The scheme is backdated and will apply from 1 March for at least four months until 30 June (unless extended).

Once employers have reached an agreement with employees about being furloughed, they should write to the affected employees confirming that they have been furloughed and should keep a record of this for five years.

Employers access the scheme through an on line portal, providing details of the affected furloughed employees and information about their earnings and any other information required (such as the employee's NI number).

Employers should:

- Design a process and agree a furlough policy.
- Decide which employees are affected perhaps using criteria similar to redundancy selection/
- Decide whether to pay 80% of salary or to supplement it.
- Gain the employees' written consent even if contractual provisions already cover lay off; express agreement is advisable especially if salary is not being topped up.
- Stop the employees from working.
- Check communication details with employees to update them, perhaps with a list of answers to key questions such as what happens to discretionary payments, volunteering, working elsewhere etc.
- Calculate the amounts to be claimed from HMRC

To work out what amounts they are claiming employers will have to work out the employer NI and minimum automatic enrolment employer pension contributions for all employees.

When the portal is operational employers will apply with their PAYE reference number, bank account number and sort code and specify the:

- number of employees being furloughed
- claim period (start and end date)
- amount claimed (the minimum length of furlough is three weeks)
- employer's contact name and telephone number

Timing

- Employers are advised by the government to claim in advance of an imminent payroll or at the point when they run their payroll.
- HMRC will retain the right to retrospectively investigate and audit employers' claims.
- Once HMRC have the claim and agree the employer's eligibility a BACS payment will simply arrive directly into the bank account supplied.
- Employers make a collective claim for the group of furloughed employees under the scheme (not for individual employees) but employers will probably need to make more than one claim throughout the period of furlough.
- Employers will probably submit one claim at least every three weeks (as three weeks is the minimum length of time an employee can be furloughed for)

What happens during furlough?

Length of Furlough

The scheme is set to run for four months (until 30 June) but may be extended.

Working

People who get furloughed must not work for the employer during the period of furlough. They will usually return to their job afterwards (unless redundancies follow).

Pay

Under the scheme furloughed workers will receive either 80% of their regular wage or £2,500 per month, whichever is lower. Employers can choose to top up the employee's salary above 80% but they are not obliged to. Regular payments of wages, variable PAYE wages, fees, and compulsory payments including commission and bonuses, are included when working out the 80% figure.

However, current government guidance has confirmed that payments at the discretion of the employer such as discretionary bonuses and commission payments are excluded.

This means that the following payments are included when working out the 80% share:

- Regular wages
- Variable PAYE wages
- Fees
- Compulsory bonuses
- Compulsory commissions

While the following payments are excluded:

- Discretionary bonuses
- Discretionary commission
- Non-cash payments such as health insurance
- Use of a company vehicle

Employers who furlough employees can also claim employers' national insurance payments and minimum pension contributions.

For regular salaried employees, employers should base calculations on actual salary before tax, as at 28 February 2020. For employees with variable pay employers can claim the higher of either:

- the same month's earning from 2019; or
- average monthly earnings from the 2019-20 year.

If an employee with variable pay has been employed for under a year employer can claim for an average of monthly earnings since they started work. For workers who only started part way through February 2020, the wage will have to be taken pro-rata.

The furloughed employees are unlikely to receive £2,500 exactly. Employees who earn under £3,125 a month will receive less than £2,500. This is because for those earning £3,125 a month, 80% of salary would be £2,500:

- Employees who earn less than £3,125 a month normally, will get 80% of their salary for three months (or more).
- Employees earning in excess £3,125 a month will have the £2,500 cap applied. These employees will receive less than 80% of their salary for those three months (or more) unless the employer chooses to supplement it.
- The £2,500 a month figure has presumably been chosen as it is broadly £30,000 a year which is the national median net salary.

Employers will receive a grant to cover part of the salaries of any employees who would otherwise have been dismissed. Employers do not have to pay this grant back. Employers must pay over the entire grant received to the furloughed employees, plus any top up payment they are choosing to pay.

Pension Contributions for Furloughed Staff

The Pensions Regulator has made it clear that both employer and employee pension contributions should continue whether staff are on furlough or not, although it has acknowledged that it will take a "proportionate and risk based approach" towards enforcement decisions.

Under the CJRS, as well as 80% of furloughed employees' usual monthly wage costs, up to £2,500 a month, employers can also claim the associated employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. The amount received by staff will be subject to deductions for their pension contribution, employee NICs and tax.

If the employer was paying more than the auto-enrolment minimum and decides not to top up the pension contribution there is a potential breach of contract risk and technically there is a requirement to consult for 60 days.

Annual leave

The recently updated Acas guidance on holidays, which has no statutory force, states that those who are furloughed can still request and take their holiday in the usual way, including bank holidays. The Acas guidance makes it clear that employees and workers must get their usual pay in full for any holidays they take.

If furloughed workers do not book any holiday time their statutory minimum holiday entitlement of 5.6 weeks per year will accrue while they are furloughed. The exact amount will vary depending on how much leave the employee has already taken. Employers can ask for employees to agree to any contractual (as opposed to statutory) holiday not to accrue during furlough.

Special provisions govern the current situation which mean that workers can carry-over up to four weeks' holiday into the next two holiday years. It is thought that employers can alternatively insist employees take holiday during the furlough provided the appropriate notice is given and that employers would then have to pay the holiday pay in full and could claim for the 80% grant towards this.

Employers compelling employees to use their holiday entitlement when they can only leave their house for limited purposes may be unpopular with employees.

Training

If employees are required to complete any job-related training while they are on furlough leave (which is permitted as long as it doesn't involve them in providing services to, or generating revenue for or on behalf of their organisation) they should be paid at least the National Minimum Wage rate. Similarly, apprentices should receive at least the National or Apprenticeship Minimum Wage or the National Living Wage.

Sick Leave

The guidance makes it clear that furloughing is not to be used for short-term absences for sick leave, especially as there is a three-week minimum period. However, an employer can choose whether an employee is on SSP or is furloughed. SSP and the furlough grant cannot be claimed for the same period of absence. The guidance also confirms that those on long-term sick can be furloughed.

If a furloughed employee becomes ill then it is up to the employer whether they place them on SSP or leave them as furloughed. As it is likely that most employees will be much better off as furloughed it is difficult to see a situation when employers would do so.

- Staff on sick leave are either furloughed or in receipt of SSP and cannot receive both.

Shielding & Sick Leave

If an employee believes they should have been told to shield then they should contact their GP.

If they are self-isolating in accordance with Public Health England's guidance or are otherwise too sick to work then they should be paid statutory or company sick pay. If a fit note suggests that their working arrangements should be reviewed rather than saying that they are not fit to work, then you should consider if any adjustments can be made to their role, or potentially consider redeploying them, if possible, on a temporary basis. If an employee is fit then you should consider whether they can work from home or if they can be allocated other work to enable them to work from home. If not then you can consider furloughing.

Redundancy

Should you be reinstating people who were made redundant on or after 28 February?

The CJRS guidance states that "if you made 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. There is no obligation to do this.

The potential risk in not considering this is that people may challenge the redundancy decision on the basis that furloughing has offered the employer another option (albeit a temporary one). However, the reason for the redundancy may not be related to the coronavirus pandemic (for example it could be due to a re-organisation), or the employee may have been disciplined and dismissed, or dismissed for capability reasons.

In all of these instances it is likely to be counterproductive to re-employ them and provided the proper processes were followed, there will be a concrete reason behind their dismissal which should defeat any suggestion of unfairness.

Can you make an employee redundant because of Coronavirus impact rather than placing them on furlough leave?

Yes, this is still possible but you will need to consider furlough leave as an alternative to redundancy as part of a fair process.

An employee left after 28 February 2020 to take up another role but that has fallen through and they have asked us to take them back - can we and do we have to?

The guidance confirms that you can take back employees who left your employment for any reason on or after 28 February 2020 and furlough them. However, you are not obliged to do so.

If you dismissed them for gross misconduct then there is going to be less enthusiasm to re-engage them. Also consider the basis on which you bring them back - is this just a delay to their termination date or are you bringing them back permanently? If the latter and you do not need them going forward, you will then have to dismiss them for a fair reason at some point in the future and give them notice.

Any break in service of more than a week (Saturday to Saturday) will, as a matter of law, break continuity of service.

Also consider any obligations you have made in filling the role as this too could have legal ramifications should you renege and any other actions that maybe reasonable in such circumstances.

Returning to work

The scheme is set to run until 30 June 2020 but may be extended. Employees can be moved in and out of furlough on a three week or longer as required.