



A Guide to Furlough

June 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. From 1 July claims are restricted to employers currently using the scheme for employees who they have previously furloughed before 10 June.

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 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 and from 10 June the furlough scheme is effectively closed for employees who have not been previously furloughed.

From 1 July claims are restricted to employers currently using the scheme for employees who they have previously furloughed before 10 June. This means that the only employees who can be furloughed are those who have already completed a full three-week furlough period before 30 June (i.e. starting on or before 10 June). There is a further deadline of 31 July to make any claims for the period prior to the end of June.

The scheme Includes:

- 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
- are on sabbatical or unpaid leave
- were recently made redundant or laid-off
- are pregnant or on maternity leave or adoption/paternity/shared parental leave pay
- are caring for children
- are 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 government grant percentage 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 government grant percentage 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 a 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 the rates set by the Government in terms of pay.

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. Others may be resentful that they are classed as dispensable whilst others are working and receiving their full package; this issue 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 was operational from the end of April. The scheme is backdated and will apply from 1 March up to 31 October 2020.

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 online 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 will have:

- Designed a process and agree a furlough policy;
- Decided which employees are affected perhaps using criteria similar to redundancy selection;
- Decided whether to pay the government rate of salary or to supplement it;
- Gained the employees' written consent even if contractual provisions already cover lay off; express agreement is advisable especially if salary is not being topped up;
- Stopped the employees from working;
- Checked 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;
- Continued to 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).

What happens during furlough?

Length of Furlough

The scheme has now been extended to run up to 31 October 2020.

Working

People who get furloughed can now work part time during the period of furlough. The deadline is 31 July to make any claims for the period prior to the end of June.

Flexible Furlough Being Introduced - when will it start and end?

From 1 July the furlough scheme becomes more flexible before it ends completely on 31 October 2020. The flexible scheme applies to employers currently using the scheme for previously furloughed employees.

Employees will continue to receive 80% of their salary, subject to the cap, but employers will need to share the burden of paying NI and salaries from August onwards.

As under the original scheme, employers can top up the wages above the grant for fully furloughed staff if it is feasible for them to do so. Employees can work part-time under the revised flexible scheme. Government guidance says that the capped figures apply in proportion to the hours not worked.

Continued Contributions to Pay and Contributions to NI and Pension

Timeline for the flexible scheme and associated government payments:

Five key stages - outlined month by month - with each month introducing changes.

June

From 10 June the furlough scheme is effectively closed for employees who have not been previously furloughed. Until June 30 employers can claim for 80% of furloughed employees current salary, up to £2,500 but the employee must not work for the employer. Employer National Insurance Contributions and certain pension contributions can be claimed too. Employers are not required to contribute anything towards furloughed employees' salaries for June.

July

The new flexible scheme applies only for previously furloughed employees. These people can now return to work part time, but employers can still claim the grant for normal hours not worked.

Any amount of working time and any shift pattern can be agreed with the previously furloughed staff. Until July 31 employers can still claim for 80% of the furloughed employees' current salary, up to £2,500 as well as employer National Insurance Contributions and pension contributions. This only applies for the hours the employee doesn't work. Employers must pay employees for the hours they work.

August

The main change is that from 1 August, **employers will have to pay employee's National Insurance Contributions and pension contributions** and can no longer claim a grant for these.

Until August 31 the government will pay 80% of furloughed employees wages up to a cap of £2,500 for hours not worked. Employers must pay employees for the hours they work. Employers funding of employers' NICs and pension contributions applies to both the hours not worked and hours worked if any.

September

From 1 to 30 September **the government will only pay 70%** of furloughed employees wages up to a cap of £2,187.50 for hours not worked. Employers will pay 10% of wages to make up 80% total up to a cap of £2,500 plus employers' total NICs and pension contributions.

October

From 1 October until the **end of the scheme on 31 October the government will only pay 60% of wages up to a cap of £1,875** for the hours the employee does not work. Employers will pay 20% of wages to make up the 80% total up to a cap of £2,500 plus employers' total NICs and pension contributions.

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 carryover 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 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 Statutory Sick Pay (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 counter 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 was originally set to run until 30 June 2020 but has been extended to run up to 31 October 2020. Employees can be moved in and out of furlough on a three-week basis or longer as required.