

## An Employer's Guide to Furlough

Under the Coronavirus Job Retention Scheme, all UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis. At present the scheme is open to all UK businesses and applies to all employees listed on your PAYE payroll as of 28<sup>th</sup> February 2020. Payments under the scheme will be backdated from 1<sup>st</sup> March 2020. The ability to furlough employees under the Coronavirus Job Retention Scheme will be operation from the end of April. The scheme is backdated and will apply from 1<sup>st</sup> March for at least three month until 31<sup>st</sup> May (unless extended).

The scheme is intended to apply to employers who cannot cover staff costs due to COVID-19. These employers can access support to continue paying part of their employee's wage, in order to avoid redundancies. It is not known if any evidence is required to demonstrate eligibility or if there is any room for dispute with HMRC concerning whether the employer would otherwise have made redundancies. It is not known if a large company with sufficient cash flow will be eligible if there is doubt as to whether redundancies would have been made, or if grants will be repayable if employers plan to make redundancies immediately after the coronavirus lockdown and furlough periods come to and end. The government have stated that the payments are grants and not a loan.

Detailed treasury guidance is expected imminently. This should clarify the mechanics of the scheme; all employers are clearly eligible to apply but we do not know the extent of the evidence required.

It has not yet been clarified with regards to a small business owner / Operator / Director who pays themselves a salary is covered. It may be that they can furlough themselves, although the self-employed are not covered. If certain amendments to the Coronavirus Bill are passed then a similar scheme may apply to the self-employed but we do not know if this legislation will be enacted in its present form.

Where a company is in administration, the administrator will be able to access the Coronavirus Job Retention Scheme.

If both employee and employer agree, you may be able to keep your staff on the payroll if your business is unable to operate or has no work for your employees to do because of coronavirus (COVID-19). This is known as being 'on furlough' or being 'furloughed'. Check if you are eligible below.

The word furlough generally means temporary leave of absence from work. This can be due to economic conditions affecting one particular company or matters affecting the country as a whole. Until now the expression has not carried any meaning in UK employment law.

Furlough leave has been temporarily introduced by the government during the coronavirus pandemic to mean leave offered which keeps 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.

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

If you qualify for the Coronavirus Job Retention Scheme, you could claim back 80% of your employee's wages through scheme, up to a monthly cap of £2,500 per employee.

Under this scheme, employees will still be paid at least 80% of their wages by their employer and will still continue to pay taxes from their income. Employees cannot undertake work for their employer while on furlough. The Govt expect the scheme to be up and running by the end of April 2020.

For employees who have been furloughed employers can choose whether to:

- Only make the salary payment reimbursed by the government.
- Pay all of the difference between the grant and the employee's normal salary.
- Pay part of the difference between the grant and the employee's normal salary.

Any extra payment the employer chooses to make will be either the additional 20% of salary, or any amount in excess of £2,500. If management choose to pay more, it will depend upon the business' overall health and cashflow affecting the ability to fund payments. Concerns about staff retention once the crisis has passed may also affect decisions being made.

The employers affected will have greatly reduced or eliminated income during these three or more months. So many employers will not be able to supplement the government's payment.

There is no reason why employers could not choose to supplement the salaries initially and then choose not to in later months, although presumably then the employee's consent to the furlough could theoretically be withdrawn. An employee would be unlikely to withdraw consent when the alternative is redundancy.

### **Eligibility**

Employers must seek agreement from employees to be placed onto furlough – employees cannot apply for the scheme themselves. Once agreed, employers must write to their staff confirming they have been furloughed to be eligible to claim (HR Services Scotland have a template letter which can be utilised for this process).

Any UK employer with a UK bank account will be able to claim, but employees must have been on their employer's PAYE payroll on 28 February 2020. Employees can be on any type of contract, including a zero-hour contract or a temporary contract.

If any employees are on sick leave or are self-isolating because of coronavirus (COVID-19), they will be entitled to statutory sick pay from day one of absence whilst they are on sick leave or self-isolating. Employers can place them on furlough leave after the sick pay period if there is no work for them to do and they would otherwise be laid off or made redundant.

The government guidance says that employees who are shielding themselves in line with public health guidance can be placed on furlough. This means employees who are extremely vulnerable (for example, due to organ transplants, lung cancer, severe chest conditions or immunosuppressed conditions) and who have been notified by the NHS to isolate for 12 weeks.

The grant will start on the day you placed your staff on furlough and this can be backdated to 1 March 2020.

### **Accessing the scheme**

Employers access the scheme through an online portal. Employers should have written to the affected employees confirming that they have been furloughed and should keep a record of this. The employer provides details of the affected furloughed employees online and submits information to HMRC about their earnings and any other information required, which will presumably include the employee's NI number. Employers should probably:

- Fairly select employees affected for being furloughed (the government have not said this but it seems sensible).
- Decide whether to pay 80% of salary or to supplement it.
- Gain the employees' written consent unless contractual provisions already cover lay off.
- Stop the employees from working if they are now working from home, or send them home from the workplace.
- Calculate the amounts they are claiming from HMRC (this is important).

To work out the 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 ePAYE 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.

### **Public Sector Staff**

The government expects that the scheme will not be used by many public sector organisations, as the majority of public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.

Where employers receive public funding for staff costs, and that funding is continuing, we expect employers to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them.

This also applies to non-public sector employers who receive public funding for staff costs. Organisations who are receiving public funding specifically to provide services necessary to respond to COVID-19 are not expected to furlough staff.

In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the scheme may be appropriate for some staff.

Any staff who work for the public sector can get more information about how the scheme works from their UK Government Department, employer or, in the case of employers funded by the Scottish Government, Welsh Government or Northern Ireland Executive, through their respective administration.

### **Staff made redundant after 28 February 2020**

Employers can agree to re-employ staff whom they have placed at risk of redundancy or have already made redundant, and reverse this process to place those staff on furlough instead. In this instance, employers will still be able to claim a grant to cover 80% of their employee's monthly earnings, up to a monthly cap of £2,500 per employee.

Employers cannot backdate the furlough period for all employees. The scheme is only backdated to 1 March to cover employees who have already been made redundant as a result of the coronavirus restrictions.

Employers are only eligible to claim the reimbursement once they have agreed the furlough with employees and they have stopped working.

Employers who have just made a group of employees redundant can reinstate those employees and put them on furlough leave.

The government has confirmed the coronavirus retention scheme covers employees who have already been made redundant after 28 February 2020, if they are rehired by the same employer. It is not mandatory for employers to reinstate employees and place them on furlough, but for redundancies that are still in the pipeline, there is a risk of unfair dismissal claims if the furlough option is not considered along with all the usual method of avoiding redundancies.

Employers should remember that as part of the redundancy process they have to explore alternatives. Bearing in mind that the aim of the scheme is to ensure that employers who cannot afford to pay staff wages do not make redundancies, employees could at least argue that any redundancy decisions made between the scheme being announced on the 20 March and during the three month period of the scheme, would be unfair.

Employers who decide they have no alternative but to press ahead with redundancies now, despite the existence of the scheme, should fully consult and keep careful records to show why the redundancies will still be needed despite the scheme's availability.

When the government ends the job retention scheme at the end of May (unless extended) employers can decide whether there is sufficient work for employees to return. If the work has ceased or diminished, or is expected to cease or diminish, then redundancies can be implemented at that stage following full redundancy procedures for notice, consultation and selection.

### **Staff with more than one employer**

Employees can be placed on furlough by one employer and continue to work for another, if it is expressly permitted within their employment contract.

If staff are put on furlough by more than one employer (and providing they were on the PAYE payroll of both employers on 28<sup>th</sup> February 2020, they will receive separate payments from each employer. The 80% of an employee's normal wage up to a £2,500 monthly cap applies to each job.

**Staff on Family Leave (including maternity leave, contractual adoption pay, paternity pay or shared parental pay)**

Employees must take at least 2 weeks maternity leave (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their maternity leave before they give birth and can do so on agreement from their employer.

If employees are eligible for statutory maternity pay (SMP) or maternity allowance, the normal rules apply, and they will be entitled to claim up to 39 weeks of statutory pay or allowance.

If employees qualify for SMP, they will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

Some employers 'top up' statutory maternity pay and their employees are eligible for an enhanced, earnings related rate of pay. If employees are eligible for enhanced (contractual) maternity pay from their employer, this is included within the wage costs that an employer can claim through the scheme. The same principles apply if staff qualify for contractual adoption pay, paternity pay or shared parental pay.

**Pregnant employees due to start Maternity Leave**

Employees will start maternity leave as usual. If their earnings have reduced due to a period on furlough or statutory sick pay prior to commencement of maternity leave, this may affect their statutory maternity pay. The same principle applies to contractual adoption pay, paternity pay and shared parental pay.

**How much will employers claim through the scheme**

Employers will get a grant to cover 80% of their employee's monthly earnings, up to a maximum of £2,500 per employee. Firms will be eligible for the grant once their staff have been furloughed, from 1 March 2020.

- Employers will pay their employees at least 80% of their usual monthly earnings, up to a maximum of £2,500, which will be paid like their normal wage
- Employers can claim for a minimum of 3 weeks and for up to 3 months - but this may be extended dependent on Govt directive
- Employers can choose to pay their employees more than the grant (for e.g. a further 'top up' payment of 20% to make their wage up to 100% - but they do not have to do this

Employees will still pay income tax, national insurance contributions and any other deductions from their wage.

Employers are still liable for employer NI and employer pension contributions on behalf of their furloughed employees.

The reimbursement from HMRC covers wages equal to the lower of 80% of the employee's regular salary or £2,500 per month, plus the associated employer NI and pension (minimum automatic enrolment) contributions.

If employers choose to top-up the 20% of salary above the 80% grant, then employer NI and pension contribution on the top-up amount will not be funded through the coronavirus job retention scheme.

HMRC will issue more detailed guidance on this before the scheme is online.

Employers also pay employee's NI and automatic enrolment contributions unless the employee has opted out or has ceased saving into a workplace pension scheme.

Employees also pay their automatic enrolment pension contributions unless opted-out.

The Coronavirus Job Retention Grant payments are made to offset deductible revenue costs and must therefore be included as income for Income and Corporation Tax purposes. The amounts paid out as salary are still deducted as employment costs as normal when calculating taxable profits.

### **Calculation of monthly earnings**

If staff have been employed (or engaged by an employment business in the case of agency workers) for a full year, employers will claim for the higher of either:

- the amount their employees earned in the same month last year (2019)
- an average of their employee's monthly earnings from the last year (2019-20 tax year)

If staff have 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 an employee's monthly pay varies such as if they are on a zero-hours contract.

If an employee started work in February 2020, employers will pro-rata their earnings from that month.

The government guidance has confirmed that for both full time and part-time employees, the employee's actual salary before tax, as at 28<sup>th</sup> February, is used to calculate the 80% payment. Fees, commission and bonuses are not included as part of an employee's monthly earnings and so should not be used in calculation the amount.

### **During furlough**

Employers are required to formally notify their staff in writing before placing them on furlough.

Once an employee is put onto furlough, they will not be able to carry out any work for their employer, however they can undertake training or volunteer subject to public health guidance, as long as they are not:

- making any money for their employer

- providing any services to their employer

If workers 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.

Any activities undertaken while on furlough must be in line with the latest Public Health guidance during the COVID-19 outbreak.

Employers can still make staff redundant whilst they are on furlough or afterwards. Employment rights for staff are not affected by them being on furlough, and this includes redundancy rights.

Once an employer chooses to place their employees onto furlough, they will need to remain on furlough for a minimum of 3 weeks. However, employers can place staff on furlough more than once, and one period can follow straight after an existing furlough period, while the scheme is open. The scheme will be open for at least 3 months.

Employers make a collective claim for the group of furloughed employees under the scheme, but it is anticipated that employers may need to make more than one claim throughout the period of furlough.

It's anticipated that employers will submit one claim at least every three weeks. Three weeks is the minimum length of time an employee can be furloughed for.

Employers have to pay over the entire grant received for gross pay to the employees plus any top up employers are choosing to pay.

### **Staff refusing to be placed onto furlough**

If an employer seeks agreement from their employees to go onto furlough and any staff refuse this, they may be at risk of redundancy or termination of employment, depending on the circumstances of that employer. However, this must be carried out by following due process in line with statutory legislation and normal redundancy rules and protections.

### **Reduced workload**

The coronavirus support scheme does not cover the wages of employees who are still working, but are doing less because work has reduced during the pandemic restrictions. If an employee is working, but on reduced hours, or for reduced pay, they are not eligible for support under the scheme.

Employers must therefore continue paying staff who are still working but working less, unless they vary the employee's contract by consent. Reducing hours and pay without consent for those who are still working on a reduced basis would be a contractual breach, leaving the employer open to constructive unfair dismissal claims in accordance with normal principles.

### **New Starts**

In the event an employee starts a new job the employer cannot immediately then furlough that new employee and claim reimbursement of 80% of their pay under the coronavirus job retention scheme. The scheme is only open to all UK employers that had created and started a PAYE payroll scheme on

28 February 2020. The relevant employees must have been on the payroll on that date and would otherwise be dismissed as redundant or laid off.

The situation covering new employees would be relatively unusual but some employers may have a recruitment process already underway and have made job offers which have just been accepted. The following applies:

- Employees hired after 28 February 2020 cannot be furloughed or claimed for under the scheme.
- Employees on unpaid leave cannot be furloughed, unless placed on unpaid leave after 28 February 2020.
- Employees already made redundant or laid off between 28 February and 20 March (when the scheme was announced) are eligible under the scheme if reinstated.
- Employees on schedule to be made redundant after 20 March 2020 can be furloughed instead of proceeding with the redundancy process.

The scheme will then cover the cost of wages backdated to 1 March. This ensures that those people who already been made redundant as a result of the coronavirus are covered.

### **Annual leave and furlough**

During any period of furlough, all workers will accrue statutory annual leave and bank holiday entitlement as if they had been at work.

Currently, almost all workers are entitled to 28 days holiday including bank holidays each year. However, most of this entitlement cannot be carried between leave years, meaning workers lose their holiday if they do not take it. Ordinarily, under current Working Time Directive rules, 4 weeks of annual leave cannot generally be carried between leave years, with exceptions when a worker cannot take annual leave due to being on long term sickness or maternity leave.

Workers who have not taken all of their statutory annual leave entitlement due to COVID-19 will now be able to carry it over into the next 2 leave years, under measures introduced by Business Secretary Alok Sharma on Friday 27 March 2020.

The new regulations will allow up to 4 weeks of unused leave to be carried into the next 2 leave years, easing the requirements on businesses to ensure that workers take their statutory amount of annual leave in any one year. This will mean staff can continue working in the national effort against the coronavirus without losing out on annual leave entitlement.

The changes will also ensure all employers affected by COVID-19 have the flexibility to allow workers to carry over leave at a time when granting annual leave could leave them short-staffed in some of Britain's key industries, such as food and healthcare.

The changes will amend the Working Time Regulations, which apply to almost all workers, including agency workers, those who work irregular hours, and workers on zero-hours contracts.

The change is aimed at allowing businesses under particular pressure from the impacts of COVID-19 the flexibility to better manage their workforce, while protecting workers' right to paid holiday.

There is an obligation on an employer to ensure that their workers have an adequate opportunity to take their holiday. This holiday cannot be replaced with a payment in lieu unless the worker is leaving employment. There is also an obligation on employers to ensure their workers take their statutory entitlement in any one year – failure to do so could result in a financial penalty.

The Working Time (Coronavirus) (Amendment) Regulations 2020 amends the Working Time Regulations 1998 to create a further exemption relating specifically to COVID-19. Where it is not reasonably practicable for a worker to take some, or all, of the holiday to which they are entitled due to the coronavirus, they have a right to carry the 4 weeks into the next 2 leave years.

All employers are subject to the Working Time Regulations 1998, and thus will be subject to the changes in the Working Time (Coronavirus) (Amendment) Regulations 2020.

### **Emergency Volunteering Leave**

The Coronavirus Bill, published on 19 March 2020, introduces a new statutory right for workers to take emergency volunteering leave to help support essential health and social care services - but it isn't yet known when this legislation will come into force.

#### **Who is entitled to take emergency volunteering leave?**

Workers who have been certified by an appropriate authority (a local authority, the NHS Commissioning Board or the Department of Health) to act as an emergency volunteer in health or social care can take emergency volunteering leave.

Except for businesses with fewer than ten staff, there is no provision for employers to refuse leave, for example because of operational need.

#### **How can emergency volunteering leave be taken?**

It can be taken in blocks of two, three or four weeks, and workers can take one period of leave in each "volunteering period". Initially there will be one 16-week volunteering period (beginning on the day the legislation comes into force). Subsequent volunteering periods may be set.

To take the leave, workers must give their employer three working days' notice and produce the certificate confirming that they have been approved as an emergency volunteer.

#### **Are emergency volunteers entitled to paid leave?**

No, the right will be to statutory unpaid leave, but a UK-wide compensation fund will be established to compensate these volunteers for loss of earnings (if they suffer loss of earnings due to volunteering), travel and subsistence. It isn't clear yet whether the compensation offered by the government will replace volunteers' full pay or whether it will be subject to a cap.

#### **What employment rights and benefits will volunteers have?**

During emergency volunteering leave, workers remain entitled to the benefit of all of their terms and conditions of employment which would have applied if they had not been absent - except for terms

and conditions relating to remuneration. The period of absence will be deemed not to have any effect on their pension or benefit entitlements.

These volunteers will have a statutory right to return to the job they were employed in before taking this leave, on terms and conditions no less favourable than those which would have applied if they hadn't been absent. So, volunteers will be in a similar position to employees on maternity leave, and other types of family leave.

In addition, volunteers will have the right not to be subjected to a detriment or dismissal on the grounds of taking emergency volunteering leave.

**What does this mean for employers?**

Aside from the issue for employers of the potential impact of the volunteers' absence on the business, some employers may consider whether to offer to top-up an individual's pay if the compensation offered by the government is subject to a cap. However, we will need to wait for further information about the compensation scheme to see whether workers will be able to claim full loss of earnings from the government.

**If we can help you with this or any other HR issue, please do not hesitate to contact a member of our HR Team at HR Services Scotland Ltd on 0800 652 2610**