

Furlough Leave and the Coronavirus Job Retention Scheme

There is growing interest from employers about furlough leave following the Government's announcement about the Coronavirus Job Retention Scheme in response to COVID-19. The situation is rapidly changing and therefore employers must consider how to act.

We have therefore prepared this briefing note for employers to assist them with dealing with the newly created concept of furlough leave. This is up to date at the time of issue.

What is the Coronavirus Job Retention Scheme?

As a result of COVID-19, many businesses have been advised to temporarily shut down or have suffered from a reduction in demand, thereby creating issues with cash flow.

One option for businesses is to consider short-time working, i.e. a reduction of an employee's working hours on a temporary basis. Alternatively you could consider laying-off employees, i.e. provide your employees with no work or pay. A further option is to consider furlough leave through the newly introduced Job Retention Scheme.

The purpose of the scheme is to pay employees who would have been made redundant, by instead designating them as being furloughed.

The Job Retention Scheme is a temporary scheme, open for at least three months between March and May 2020. The Government have indicated that they will extend the scheme if necessary, although this will largely depend on how the situation with COVID-19 develops.

It is open to all UK employers with an online PAYE scheme in place as of 28th February 2020. The Government will issue further guidance on the mechanics on claiming monies under the Job Retention Scheme in due course, although it expects the scheme to be up and running by the end of April 2020.

The scheme is not open to employers in the public sector who receive public funds to pay salaries.

What should I be doing now if I want to furlough employees?

Subject to an employee's contractual terms (see below) you are legally required to maintain paying employees their full salary until you have their express written consent to be placed on furlough leave, otherwise they might have a claim for unlawful deduction of wages and breach of contract.

As a result, it is important to start undertaking steps now.

Who can be placed on furlough leave?

Any employee who is employed as of 28th February 2020 through your PAYE scheme on any type of contract is eligible. This will include full-time and part-time employees, apprentices, employees on agency contracts and employees on flexible and zero-hour contracts.

Directors who receive a salary are also eligible, but this would have to be sanctioned by fellow directors at board level.

Any individuals who were dismissed, including for redundancy after 28th February 2020 can be rehired and placed on furlough leave. However you must consider the implications of rehiring members of staff, even on furlough leave, particularly for those who dismissed for misconduct and those who might accrue more than 2 years' service.

Furlough leave must be taken in blocks of three weeks. There is nothing which prohibits rotating furlough leave amongst employees, provided each employee is off for a period of at least three weeks.

Employees who are working, but on reduced hours or pay, will not be eligible for the scheme.

In addition, employees on furlough leave are not permitted to work at all for your business. They are however permitted to undertake voluntary work, provided they do not provide services or make money for your business.

For directors, they are permitted to fulfil their statutory duties; otherwise they too are not permitted to work for the business.

What will employees on furlough leave be entitled to?

Employees on furlough leave will be entitled to at least 80% of their wages, subject to a cap of £2,500 gross per month. The cap is also subject to the usual income tax and employee national insurance deductions.

You can top up an employee's salary once they have agreed to be furloughed, but there is no legal obligation to do so.

For employees whose pay varies each month, they are entitled to either the same month's earnings from the previous year, or by taking the average monthly earnings from the previous tax year, whichever is higher.

What is included in the 80% and £2,500 cap?

Payments such as fees and discretionary commission and bonus payments are not included in the cap, apart from compulsory guaranteed commission and bonus payments. In addition, employer national insurance and statutory pension contributions are not included, although these can also be reclaimed from the Government under the Scheme.

What happens if an employee has a job with another employer?

The position is unchanged if an employee has more than one job with multiple employers, as they can be furloughed for any of their jobs without impacting their other jobs, as each job is separate. As such the 80% and £2,500 per month cap applies to each employer.

Can employees on furlough leave work for another employer?

Employees are able to work for other companies during furlough leave, subject to any restrictions in their Contract of Employment.

Although many employers are not recruiting, some firms in particular are desperate for staff, such as the food and care industries. It is potentially quite lucrative for employees, as they would still be able to get 80% of their salary, capped at £2,500 per month for their existing job, as well as income from alternative sources.

Employees will still be subject to any confidentiality and restrictive covenants during their employment, even if they have been furloughed. If these restrictions are not in place, it might be worth introducing these at the same time as updating or amending Contracts of Employment.

Are there are repercussions as a result of the national living or minimum wage?

Employees who are placed on furlough leave are not entitled to the national living or minimum wage. Therefore you should have not any issues if an employee's salary (80% of wages) falls below the national living or minimum wage.

However, if training is required whilst an employee is on furlough leave, for example online training, they must be paid at least the national living or minimum wage. If this is more than 80% of their wages, you will have to top up the difference.

How can I reclaim the monies for those on furlough leave?

Through a portal (further details to be provided by the Government), you can reclaim up to 80% of wages up to a cap of £2,500 gross per month, plus the associated national insurance contributions and statutory minimum employer pension contributions. Payments such as discretionary bonuses, tips, discretionary commission payments and benefits in kind are not included in the cap.

For employees whose pay varies each month, you can either claim for either the same month's earnings from the previous year, or by taking the average monthly earnings from the previous tax year, whichever is higher.

As furlough leave can only be taken in minimum blocks of three weeks, they can equally only be claimed back from the Government once every three weeks. Claims can be backdated to 1st March 2020 and employers can use the scheme at any point during the months of March, April and May 2020.

The payments received from the Government are grants, not loans.

Information which you will need in order to make a claim under the Job Retention Scheme include your ePAYE reference number, the number of employees being furloughed, the start and end date for furlough leave, the amount being claim, your bank account number and sort code, your name and telephone number.

Once you have submitted your claim and have been approved, it is anticipated the monies will be reimbursed to your nominated account by BACS. All monies that are rightly owed to your employees should be paid accordingly. It is not permitted to deduct any monies for admin purposes.

As you will be responsible for calculating the amount of money you are claiming under the Job Retention Scheme, HMRC will reserve the right to inspect and audit all aspects of your claim, either during or after the process. As such, you must keep and retain accurate records.

It has been confirmed that employers have to retain evidence that employees have been furloughed in writing for up to 5 years. It is highly likely after COVID-19 that HMRC will undertake substantive investigations to check for any fraud.

What is the position for those who are absent from work due to sickness, self-isolating or staying at home due to childcare issues?

Employees who are in receipt of Company sick pay, SSP or are self-isolating cannot be furloughed, but can be furloughed afterwards, i.e. when they are no longer sick and are no longer self-isolating. However employees who are shielding (social distancing such as those in vulnerable groups) can be placed on furlough leave, i.e. the 1.5 million people who have been contacted by the Government to stay at home for 12 weeks.

In addition, you can furlough individuals who are staying at home because of caring responsibilities, especially in light of school and nursery closures.

What is the position in relation to those who are pregnant and are on or about to go onto maternity leave?

Employees who are on or about to take maternity leave must continue to take 2 weeks off work immediately following the birth of their baby, 4 weeks if they work in a factory or workshop. Similarly the usual rules surrounding statutory maternity pay continue, i.e. 90% of average weekly earnings in the first 6

weeks, followed by 33 weeks of pay, either at 90% of their average weekly earnings or the statutory rate of £148.68 (£151.20 from 6th April 2020), whichever is the lowest.

There is nothing that prohibits a woman on maternity leave to return to work early and then being furloughed.

Similar arrangements apply for those on adoption, paternity and shared parental leave.

How do I place employees on furlough leave?

This depends on the Contract of Employment.

If you have a lay off clause in the Contract, you do not need to seek agreement from the employees for them to be designated furlough status.

For those who do not have the contractual right, it is necessary to obtain their express written consent, as it will amount to a variation of their Contract of Employment. In these situations, you will be required to consult with employees to seek their agreement to be furloughed. During the process, you would also have to advise them of the alternative to furlough leave, namely redundancy.

If there are a large number of employees involved, i.e. over 20 employees, it may be necessary to engage in collective consultation to obtain agreement on the changes to the terms of employment. However if this is not reasonably practical or viable, for example your business could go under, you should seek legal advice from ourselves on your options.

After the consultation process, correspondence should be sent to each employee, asking them to sign and return a copy of the letter providing their consent.

In any event, notification of placing an employee on furlough leave must be set out in writing in any event, regardless of the contractual position, as HMRC may require evidence of this in the future.

Please note that when deciding who to place on furlough leave, the usual discrimination and equality laws apply. However it is unlikely that a discrimination claim would arise if vulnerable employees are prioritised in the first instance, i.e. those over 70. However there is a possibility that the failure to place or the act of placing someone on furlough leave could amount to a detriment.

Please do not hesitate to contact us if you require bespoke advice and assistance about the process to follow regarding consultation, as well as template documentation to be used for the consultation process and correspondence to those placed on furlough leave.

Can employees request to be placed on furlough leave?

There is no legal right under the Job Retention Scheme for employees to request to be placed on furlough leave. However, one way of avoiding the tricky process of deciding who to place on furlough leave is to ask for volunteers who would like to be placed on furlough leave.

What is the position for those on apprenticeships?

Apprentices can be furloughed and are also permitted at the same time to continue with their training through distance-learning tools where possible and practical. However if this occurs, furloughed apprentices will be entitled to the minimum wage for the time spent when training, which may mean having to top up their salary.

If there is disruption to an apprentice's learning for more than 4 weeks, this must be reported as a formal break in learning. This may be required if you temporarily change an apprentice's job and allocate alternative duties and responsibilities, thereby preventing them from completing their training.

Similarly apprenticeships can continue their apprenticeship if they are able to work from home. Some temporary flexibility has been introduced by the Government in order to assist apprentices in these situations, such as alternative training and assessment methods.

What is the position on annual leave?

At present, there is no guidance about the position regarding annual leave. As such, it should be presumed that employees continue to accrue annual leave if they are on furlough leave. The Government has already announced that accrued untaken annual leave, capped at 4 weeks, can be carried over to the next 2 years.

What happens at the end of furlough leave?

For avoidance, the Government may extend the scheme beyond May 2020.

However, once the scheme comes to an end, there will be further considerations about what to do. Depending on your circumstances, you may request employees to return to their duties. If not, you may need to consider the possibility of further short-term working, lay-offs and/or dismissals, which may require redundancy consultations.

How can we help you

Please contact us if you require any advice on any of the employment and HR issues referred to above. The team is on hand to advise and assist.

In addition we can assist you in drafting a bespoke advice and documentation for your business. Please contact Sally Morris on 01905 610410 or at sally.morris@mfgsolicitors.com to discuss this offer further and any frequently asked questions.

mfg Solicitors LLP

Advice is up-to-date as of 07.04.2020.

mfgsolicitors.com 0845 55 55 321  @mfgsolicitors

Offices in Kidderminster, Worcester, Bromsgrove, Telford, Ludlow and Birmingham.

mfg Solicitors LLP is a Limited Liability Partnership registered in England, number 0C317146 Registered Office:
Adam House, Birmingham Road, Kidderminster, Worcestershire. DY10 2SH

mfg Solicitors LLP is authorised and regulated by the Solicitors Regulation Authority. SRA Number: 440475

Calls to mfg may be recorded for training or monitoring purposes.