

BRIDGE

Employment Solicitors | HR Specialists

CORONAVIRUS JOB RETENTION SCHEME

Summary of the new guidance



What does the scheme do for us?

THIS IS A TEMPORARY SCHEME:

- open to all UK employers;
- for at least three months;
- back dated to 1 March 2020;
- expected to be able to begin claiming by the end of April 2020;
- while on furlough, the employee's wage will be subject to usual income tax and other deductions; and
- It is intended to support employers whose operations have been severely affected by coronavirus (COVID-19).

Please note the underlined here, this we consider is limited to where you would otherwise have had to make an employee redundant or lay them off for four weeks without pay.

Also this week

Q & A'S VIA ZOOM

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THURSDAY TO ASK US
ANY EMPLOYMENT
QUESTIONS LIVE ON
ZOOM
ID 715-947-728**

Which type of 'employees' can we claim for?

Furloughed employees must have been on your PAYE payroll on 28 February 2020 and the scheme covers the following:

- full-time employees;
- part-time employees;
- employees on agency contracts; and
- employees on flexible or zero-hour contracts.'

Note: the guidance notes that:

"This scheme is only for employees on agency contracts who are not working."

Note: Employees who were made redundant since 28 February 2020 can be covered IF they are re engaged by the employer.

You should seek guidance if you wish to retract notice of redundancy or reengage any employee to ensure this is done correctly and legally addresses specific issues such as continuity of service. Especially if you have already paid redundancy as specific agreements and terms will need to be set up regarding the repayment of these monies if necessary.

Can furloughed employees do work for us?

To qualify the employee can't undertake work they cannot 'provide services or generate revenue' so that excludes: -

- undertaking any work, either on reduced hours, from home or otherwise; or
- undertaking work/different duties for reduced pay.

If you need your employees to undertake any work other than the exceptions outlined below regarding training then it appears they will not be eligible for the scheme and employers will have to continue paying the employee through payroll and pay salary etc. subject to their contractual terms.

This then becomes a reorganisation issue: how many employees do we need to cover the work we have?...then, how can we fairly select for furlough? We are helping clients with this and we urge you to take advice here, because there are many legal pitfalls to such processes including costly breach of contract and discrimination claims.

What we expect is where a business is not shut down completely that employees could be cycled in and out on furlough (subject to the minimum 3 week period) to potentially maintain key systems / undertake key duties from time to time on a monthly basis.

Can we just put them on furlough immediately without agreement?

As was stated from the outset by the government, usual employment laws and terms apply and whilst we are finding that most employees are consenting at this stage, we anticipate that there could be many, many disputes regarding:

- contractual agreement to vary terms and furlough;
- fair selection / rotation for furlough;
- correct consultation on the same.

Employers should: -

- use a proper process of consultation applicable to the numbers and impact on those involved regarding furloughing and selection; and
- you will need to secure express agreement or rely on contractual terms to do this; and
- -use lawful selection processes.

If you don't then there could be breach of contract claims, discrimination claims and unlawful deduction from wages claims to name but a few! Which, is the last thing any business needs at this time.

Also selecting for furlough has to be fair, if not, breach of equality and discrimination laws are more likely bringing with it discrimination claims.

If you have any concerns about such claims it is prudent now before you act to obtain legal advice and check for insurance to protect against employment tribunal claims and we can assist with expediting that.

So, whilst it may feel frustrating to need to jump through these hoops now it is vitally important to do so in order to protect your business in the future from these types of claims and put you in a strong position to defend any grievances your employees may raise about the selection process.

We are recommending a clear consultation process to:-

- secure express agreement to lay-off, then furlough and/or vary terms;
- to record and implement the process lawfully for employment law purposes; and
- to record the financials and process for HMRC purposes and justification of claims.

Note: Employees who have been placed on unpaid leave can't be furloughed, unless that took place after 28 February.

What about those on Statutory Sick Pay but who technically have no work anyway?

They can be furloughed after any period of SSP ends – note that this is only for people who are medically certified as unfit for work and not those choosing to isolate at home to reduce their risk.

Note: Employees who are “shielding” in line with public health guidance can be placed on furlough – at present this shielding programme is limited to a specific group of around 1.5 million people who have very specific risk factors and does not appear to extend to those who have been advised to observe social distancing due to risk factors which are those over 70, pregnant women or who specified health conditions making them more vulnerable.

Employees who are part of the shielding programme will have received a specific letter from the NHS telling them not to leave their house during this 12 week period and steps to take to minimise contact with others in their household – we are aware that this is for people with very chronic conditions, for example those who are part way through chemotherapy and have a reduced immune system, etc. If any employee thinks they qualify for the shielding program you should carefully review the information they have been provided, ensure it specifically states they are part of this program, before applying to have their salary subsidised through this scheme and keep detailed records of evidence of this to ensure that it stands up to audit in future.

What about those employees with two jobs?

They can be furloughed for each job and the cap of £2500 applies to **each** employer individually

Can an employee do volunteer work or training?

Yes, if it does NOT provide “services to or generate revenue for, or on behalf of your organisation.”

Note: The Government guidance also states that:

“.....if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the National Living Wage (NLW) or National Minimum Wage (NMW) for the time spent training, even if this is more than the 80% of their wage that will be subsidised.”

We recommend that this type of work be clearly documented, time sheets submitted, and records kept for future reference and you may want to consider consulting with these affected staff about varying their contracted rates of pay during this time if they need to undertake training during a period of furlough.

Employees can also volunteer work so long as they are not providing services or generating revenue on your behalf – you should also be aware that there are some specific rules for Volunteer Leave that have been published by the government. We can provide a fact sheet on this if required.

What about those on Maternity Leave, contractual adoption pay, paternity pay or shared parental pay?

For maternity leave, employees still must take the requisite 2 weeks off work or 4 weeks if they work in a factory or workshop - immediately following the birth that is the minimum H&S requirement - the birth automatically triggers statutory maternity leave and the normal rules still apply for administering this.

For those due to take or who are currently on taking Statutory Maternity Leave (whether you are paying Statutory Maternity Pay (SMP) or they are claiming Maternity Allowance(MA)) they are expected to continue as normal and can continue to claim up to 39 weeks of SMP or MA.

As a reminder, employees who qualify for SMP:

- are eligible for 90% of their average weekly earnings in the first 6 weeks;
- then followed by 33 weeks of pay paid at 90% of their average weekly earnings; or
- the statutory flat rate (whichever is lower); and
- the statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

Employees themselves claim for Maternity Allowance and you will still need to provide the SMP1 form for anyone who you consider does not qualify for SMP at the date of the expected week of childbirth.

Note: If you offer enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs that you can claim through the furlough scheme.

Note: The above framework applies to contractual adoption, paternity or shared parental pay.

How do we calculate what 'salaries' we can claim?

The grant from HMRC will cover:

- up to 80% of an employee's regular wage or £2,500 per month - whichever is the lower figure;
- plus the associated Employer National Insurance contributions; and
- the minimum automatic enrolment employer pension contributions on that subsidised wage.

Note: Fees, commission and bonuses should not be included.

Note: Top up over the 80% is optional, there is no obligation to do so.

Note: More guidance on calculating Employer National Insurance Contributions and minimum automatic enrolment employer pension is to follow.

What if the employee's pay is variable?

In which case the guidance says you can claim for the **higher** of:

- “the same month’s earning from the previous year; or
- average monthly earnings from the 2019-20 tax year; or
- if under a year’s service - an average of monthly earnings from the start date; or
- for February 2020 new starts only - use pro-rata for earnings so far.”

Note: Employers must calculate the correct Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions to claim based on the above salary calculations – this can be reclaimed on top of the 80% salary.

Note: Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded by the scheme neither will any voluntary auto-enrolment pension contributions above the minimum.

What about the National Living Wage and National Minimum Wage, what if it breaches that?

National Living Wage (NLW)/National Minimum Wage (NMW) are only due for hours actually worked, accordingly furloughed workers must be paid the lower of 80% of their salary, or £2,500 regardless - even where this would be below NLW/NMW.

Note: Where they are required to do online training courses whilst furloughed, given that may be work then they must be paid the NLW/NMW for the time spent.

Employee Income Tax and National Insurance

Wages for employees placed on furlough are still subject to: -

- Income Tax;
- National Insurance; and
- automatic enrolment contributions on qualifying earnings, unless they opt-out or reduce the amount they are saving into the pension scheme where they are overpaying.

Employers will still need to pay:

- Employer National Insurance contributions;
- automatic enrolment contributions on qualifying earnings - unless an employee has opted out or has ceased saving into the pension scheme;
- but these will be reclaimed for furloughed employees only via the HMRC portal.

How do we claim?

We are urging clients to take our legal advice on the process, there are many pitfalls and this is new guidance affecting the law. For example, if sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment in this way, the potential claims and awards can be very significant.

To prepare to and to claim the guidance lists the following information: -

- "ePAYE reference number;
- number of employees being furloughed;
- claim period (start and end date);
- amount claimed (per the minimum length of furloughing of 3 weeks);
- your bank account number and sort code;
- your contact name; and
- your phone number."

Note: You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim – this is why we recommend documenting a clear business case, consulting with affected staff and documenting the process entirely along with regular documented reviews.

Note: You can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for.

Note: The guidance clearly states that: "should make your claim in accordance with actual payroll amounts at the point at which you run your payroll or in advance of an imminent payroll. You must pay the employee all the grant you receive for their gross pay, no fees can be charged from the money that is granted. You can choose to top up the employee's salary, but you do not have to."

What happens after we have claimed?

If HMRC deem you are eligible then they will pay the grant via BACS payment to a UK bank account.

What do we do when the scheme ends?

We are advising clients now to prepare to consult on:

- reduced workloads;
- securing ability to vary terms to reduce hours and pay as you re-build; and
- producing a fair legal selection process for:
 - possible lay-offs;
 - possible short time working; and
 - possible redundancies.

Our view is that now is the time to consult and secure agreement with employees now on a process to apply when you need it later – when the scheme ends.

What about continuity of employment and sickness whilst on furlough?

All the same rights apply, they remain employed and thus those rights include:

- Statutory Sick Pay entitlement (including the changes regarding day one payment of SSP if you are required to self-isolate as a result of experiencing symptoms of coronavirus);
- maternity rights;
- other parental rights;
- rights against unfair dismissal; and
- right to redundancy payments.

How are the payments to be taxed?

The Government guidance makes clear that:

“Payments received by a business under the scheme are made to offset these deductible revenue costs. They must therefore be included as income in the business’s calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.

Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.”

Can I furlough whoever I like?

Firstly, it appears there needs to be a basis present that is, simply, no work for them (or one of the other basis like those who have to stay home by letter from the NHS)- do remember as we have already noted, HMRC will audit furlough grant claims so you’ll need to show they were designated as furlough, they did not work and the circumstances were present to justified furlough.

Secondly, when you have a pool of staff to select from for furlough, you need to ensure you have a fair selection criteria and process, just like a redundancy selection, for example, based on an objective assessment of skills etc. and business needs.

Can I rotate staff on and off furlough?

Furlough leave is for a minimum of 3 weeks.

Thus, rotation on a three-week basis appears viable, which can help to share the load.

You can of course accept volunteers for furlough too.

Practically, who decides to go onto furlough?

The employer decides this, it is the employer's decision. Employees can put themselves forward but the decision to designate the employee sits with the employer.

Can we force employees and workers onto furlough?

We advise against this, in practice you can of course BUT if you vary terms without agreement (say you don't have a lay off provision / valid contractual right) then you're reducing pay and varying terms unlawfully and thus, creating costly contractual and unfair dismissal claims.

Can I make employees redundant whilst on furlough?

You can do this at any point **BUT** please take advice, we are helping clients do two things now: -

- navigate the furlough process correctly; and
- at the same time plan to consult later.

We don't know what business structures will be needed later, when we're all back to work, if you need to make any staff redundant then a separate legal process is required and if it's more than 20 and you don't follow that process, it creates claims for 90 days' pay for each employee and criminal liability.

We know the need to act is imperative in such times but please contact the team and get help now and for later too, certain processes implemented now when staff need furlough and want to work with you can help you later on.