



FURLOUGH LEAVE – ANSWERS TO (SOME OF) THE DIFFICULT QUESTIONS

This publication has been written in general terms and may not include all relevant information. In particular there are a number of areas where we expect further clarification in the coming days and weeks in relation to the process of defining and agreeing the relevant scheme's details, specifications and eligibility, and therefore information is subject to change. This information is not a substitute for taking your own legal advice on your particular issue.

The basics

What is furlough leave and the Coronavirus Job Retention Scheme?

On 20 March 2020, the UK Government announced details of a temporary Coronavirus Job Retention Scheme (CJRS) for workers placed on "furlough leave". Further guidance was issued by HMRC on 26 March 2020.

Furlough leave currently has no technical meaning in UK law - it has been created as part of the CJRS in order to allow all UK employers to access financial support for those employees who would otherwise have been made redundant as a result of Covid-19. All UK employers are eligible for this scheme, including businesses, charities, recruitment agencies (where agency workers are paid through PAYE) and public authorities. The employer must have created and started a PAYE payroll scheme on 28 February 2020. The new guidance makes it clear that where there is public funding for staff costs, the expectation is that the scheme should not be used.

How much does the Government pay?

Employers can claim a grant of 80% of the wages of employees placed on furlough leave, up to £2,500 per month gross (when paid to the employee this will be subject to deduction of tax and employee national insurance contributions). Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out. The grant to the employer will also include the associated Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions. The scheme will cover the cost of wages backdated to 1 March 2020. It will be open for three months from that date and may be extended by the Government. The employer will need to pay the agreed amount of pay during furlough leave and apply to the CJRS to recover the grant.

Who is entitled to furlough leave?

A furloughed employee must have been on the employer's payroll on or before 28 February 2020. Eligible employees include full-time and part-time employees, employees on agency contracts and employees on flexible or zero-hours contracts. Provided the individual is on the payroll, the rules do not distinguish between workers and employees.



Making a claim

How will claims be made?

There will be a new HMRC portal and HMRC is working urgently to set up the system. It is expected that the scheme will be up and running by the end of April. In the meantime employers will need to fund the furlough payments to their staff, perhaps using other government financial support. Employers will be able to submit only one claim every three weeks, which is the minimum period of time for which an employee can be furloughed. Claims will be able to be backdated to 1 March where applicable.

How can companies without cash flow pay their workers' wages?

The Government expects companies to borrow in the short term to fund the furlough pay until the CJRS is running and claims can be made. The main source of funds for this will be the deferral of VAT payments for the quarter ending June 2020, which do not have to be paid until March 2021. If a business needs short term cash flow support, it may be eligible for a Coronavirus Business Interruption Loan, which supports SMEs with access to loans, overdrafts, invoice finance and asset finance of up to £5 million and for up to six years.

How do we work out what to claim?

The basic rule is that it is 80% of the worker's wages up to a cap of £2,500 a month. £2,500 is 80% per cent of £3,125, equivalent to a gross salary of £37,500.

For full time and part time salaried employees, the employee's actual salary before tax, as of 28 February, should be used to calculate the 80%. Fees, commission and bonuses should not be included.

For employees whose pay varies, including zero hours and flexible workers, if the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, the employer can claim for the higher of either:

- the same month's earning from the previous year
- average monthly earnings from the 2019-20 tax year

If the employee has been employed for less than a year, the employer can claim for an average of their monthly earnings since they started work, and if the employee only started in February 2020, the employer should use a pro-rata for their earnings so far to claim.

Once the salary has been calculated, the employer must then work out the amount of employer NICs and minimum automatic enrolment employer pension contributions that they can claim in addition to the wages element of the grant.

Will CJRS cover zero hours and casual workers?

Yes, see above for how to calculate the amount to claim.



Does the employer need to top up to 100%?

No, however they will need to reach agreement only to pay at the 80% rate. The employer should pay the employee all of the grant they receive for the employee's gross pay, which is 80% of the worker's wages up to a cap of £2,500 a month once they have been furloughed, deducting tax and employee's NICs under the pay as you earn (PAYE) system. If the employer wants to top up pay levels, they can, but they will not be able to claim for more than 80% of £3,125, equivalent to a gross salary of £2,500. It should go without saying but employers are not permitted to deduct any fee from the furlough payments.

Reaching agreement

Do we have to get agreement to the reduction in pay?

Yes. Employees will need to be placed on furlough by agreement. If the employer wishes to pay at a reduced rate, there will be a contractual change, and the employee will need to agree to this. The furloughed employee should be asked to sign a furlough agreement, in order to avoid a claim of unlawful deduction of wages later on.

How long can furlough leave last?

If an employee is asked to go on furlough leave, their period of leave should be specified by the employer but must be for a minimum period of three weeks. The scheme will run until the end of May and many employers may wish to designate the whole of this period as furlough leave. The period should be set out in the furlough agreement or letter. If there is a requirement to extend any period of furlough leave, or, if the needs of the business require it, for the furlough leave to be ended so that the employee can return to work, the employee's manager should contact the employee to discuss this. The employer should try to give adequate notice but timing on this will be heavily reliant upon business needs.

Does the employer still have to pay employees on the National Living Wage (NLW) or National Minimum Wage (NMW) 100% of their weekly NLW/NMW earnings if it furloughs them since, if they receive only 80%, it is below the NLW/NMW?

No. Individuals are only entitled to the NLW or NMW for the hours they are working. Since furloughed employees must not be working in order to receive the furlough payment, the NLW/NMW is not relevant because no work is being performed. However the new guidance states that if workers are, for example, required to complete online training courses while they are furloughed, the NLW/NMW would need to be paid for those hours, even if this is more than the grant.

How does an employer decide who is furloughed and who is not?

It depends on factors like the availability of useful work to be performed, the ability of some staff to work remotely and the capabilities and qualifications of staff relative to the business needs. Discrimination law will apply to the decision-making process so employers should be mindful of their obligations under the Equality Act not to discriminate because of protected characteristics.



What about collective consultation?

This will need to be considered where there are 20 or more employees who are being furloughed. If agreement is reached with the employees that they will accept a variation to their contract leading to reduced pay and no requirement to work while on furlough then it may not be necessary to undertake collective consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. However, if there is a clear risk that contract change will need to be imposed, or where the alternative to furlough would be a redundancy programme, the consultation requirements are likely to be engaged. It will be difficult for employers to carry out a full consultation exercise, which may include an initial stage for the election of employee representatives, in time for furlough to be meaningful. However in some cases it may be sensible to start the collective consultation process at the same time as seeking agreement to furlough. We imagine the tribunals will be forgiving in terms of awards if the statutory time scale for consultation is not met but we strongly recommend taking specific advice on your situation.

Can furlough leave be imposed by an employer?

No, the employer can only designate an employee as a furloughed worker by agreement with that employee. However, where the alternative for employees is that they are made redundant, or laid off without pay, we would expect that most will agree to the scheme, particularly as the Government is providing quite substantial financial assistance for employees on furlough leave who are not required to do any work for their employer.

Can employees put themselves on furlough leave?

Not without the agreement of their employer.

Can an employer's failure to offer furlough leave lead to an unfair dismissal claim?

An employee has no right to be furloughed: it is an agreement by the employer as much as by the employee. That said, employers should be careful to ensure that they act in a non-discriminatory manner when deciding who to ask to go on furlough leave.

Further, if an employee is required to work in circumstances where they believe they are in serious and imminent danger, and they are subsequently dismissed as a result of their refusal to work, they would be able to bring a claim for automatic unfair dismissal for health and safety reasons. Employers who require staff to continue to work in situations where they might be at risk should carry out proper risk assessments and consider requests from individuals to be furloughed.

If employees are offered furlough and refuse, is it possible that the alternative could be to make their role redundant?

Further discussions should be held with the employee should they not agree to take furlough leave. However, given the current circumstances, the likely outcome would be that it would result in the termination of their current employment due to the fact that the employer cannot afford to pay full wages at this time and/or has no work for them to do and is operating the furlough scheme as an alternative to lay-off and compulsory redundancy. Please see above for comments on collective consultation.



Can an employer rotate furlough leave amongst staff, and can employees dip in and out of it?

There is nothing in the current guidance to suggest that employers cannot rotate furlough leave amongst staff although the minimum period of furlough leave is three weeks, so working “one week on, one week off” would not be possible.

Can the employee take on other work during the period of furlough leave?

It is the employer’s decision as to whether or not to allow the employee to take up work with another employer during the period of furlough leave. If the employee takes up other work, the employer should make clear that it will remain the employee’s primary employer and may recall them for duty at any time, with reasonable notice. They may not carry out any work for the primary employer while on furlough leave, and can receive furlough pay from more than one employer, if they already have more than one job.

If an employee is asked to take furlough leave, can they swap with someone else who has not been asked to take furlough leave?

This is a matter for the employer but we suggest that requests are considered on a case by case basis. An employee has no right to be placed on furlough leave.

What happens to the employee’s service and other entitlements during furlough leave for the purpose of accruals?

The period of furlough leave does not affect a furloughed employee’s continuity of service with their employer. The period will therefore be counted as service for the purposes of accrual of benefits and in respect of employment rights.

Can employees be called back from furlough leave? If so, will they be reimbursed for the portion of unpaid wages from this period of furlough leave?

Employees must be on furlough leave for a minimum of three weeks. They can then either be called back from furlough leave permanently, or could be called back on a temporary basis for a minimum three week period after which they could resume furlough leave. There would be no obligation to top up their wages for the period on furlough.

If an employee is being asked to take furlough leave and is on a fixed term contract, what happens?

If the term of their employment ends during the furlough period then their contract of employment will end in accordance with the contract, unless it is renewed. There would be no ongoing obligation to pay furlough pay. Remember that the ending of a fixed term contract is a dismissal, and the usual considerations about fairness will apply.



Specific cases

Can employees on long-term sick leave announce they want to return to work, to take advantage of the furlough leave scheme?

Employees who are in receipt of SSP cannot be furloughed until they have returned to work. We think it is contrary to the purposes of the CJRS to allow the employee “back to work” to take advantage of the grant. The employer should take careful steps to ascertain that the employee is truly fit for work before making a decision on furlough.

Does holiday accrue during furlough leave, and can we require employees to take their holiday? We are worried about the amount of accrued holiday when things return to normal.

Although the new guidance does not deal specifically with this point, we believe that holiday entitlement will continue to accrue as normal during furlough leave. If it is not practicable for an employee to take their leave before the end of a holiday year for reasons related to coronavirus, then new regulations permit them to carry over the leave rather than use it: and the carried over leave can be taken in the next two holiday years. Employers will be able to refuse requests for carried over leave to be taken at a specific time provided they have good reasons for doing so. The guidance does not address the issue of whether employees can take, or be required to take, holiday during furlough leave. In the absence of clear guidance on this point it may be safer for employers to ensure that any days taken as holiday are spaced more than three weeks apart (as the guidance states that periods of furlough must last for a period of at least three weeks). Alternatively, they could arrange for the holiday to be taken either at the beginning or the end of the furlough leave period. Whatever method is chosen, the furlough letter, which the employee agrees, should be clear.

If an employee is currently on annual leave, can they be asked to go on furlough leave?

If they are on annual leave, they should be contacted by their manager whilst on leave to discuss what this means for them. Their leave will continue as normal and any agreed period of furlough leave will commence at the end of their annual leave.

If an employee is currently on unpaid leave, can they be asked to go on furlough leave?

Employees who are already on unpaid leave cannot be furloughed unless the leave started after 28 February 2020.

What is the position of employees on maternity leave?

The usual rules about maternity leave and pay would apply and SMP would not be claimed under the CJRS. An employee on maternity leave could not be placed on furlough until she returned to work. The same principles apply to paternity leave, adoption leave and shared parental leave.

What happens if an employee becomes ill whilst on furlough leave?

Since the employee would be on furlough leave rather than working, we do not think they would be eligible to apply for SSP. If the employer operates an enhanced company sick pay scheme, it is not obliged to make this available to the employee during any periods of furlough leave as the employee is not required to work during this time.



And in conclusion...

What happens once the CJRS ends in May? Should the employer revert to collective consultation?

Yes, if there is no work, or a need for fewer employees. The employees would need to be paid their normal wages for the appropriate consultation period unless an alternative agreement can be reached.

If the employer needs to make redundancies at the end of the furlough period, would it follow that those who are put on furlough would be the ones who would be made redundant or does the employer have to carry out a further formal selection process?

Our view is that, depending on the length of the furlough period, business circumstances may have changed meaning that a further formal selection process should be carried out and further consultation will be necessary.

If a contractor has furloughed its employees but the company to which the contractor is contracted terminates the contract (which means that the employees should TUPE transfer to the company), how does the company deal with the furloughed staff, and in particular can it require them to start working again from the point of transfer? Is requiring them to start work again as soon as the transfer is complete a “measure”?

The employees transfer as they usually would under TUPE, as they remain employed. If they are furloughed but the company needs them to work, that could be perceived as a measure if they would have remained furloughed had the transfer not occurred, and the company should inform and consult in respect of it.

Is the system capable of abuse? What is the scope for fraud, for example, an employer suddenly employing family members, or increasing the entire workforce's salary for three months while the Government is paying?

As this is a cash reimbursement scheme rather than a set-off against NIC/income tax, the system is likely to be open to abuse. However, government officials say that companies will not be able to claim too much because they can cross-check the applications for grants against PAYE records. Companies will be required to: make one claim for the entire workforce; record how many workers are covered and maintain records; and can make only one claim every three weeks. However, some companies have concerns as to how HMRC would enforce the rules. *“What is to stop a perfectly fine firm from declaring that it put half its workforce on furlough even as they work like mad and collect the grant?”* is a question that has been asked. Government officials have said it would be easy to monitor large companies and they hoped that unions and employees would blow the whistle on anyone involved in such fraud. However, they recognised that it would be harder to police in smaller companies, especially family businesses. We would expect to see provisions outlining the circumstances in which the grant can be clawed back, particularly where it is shown that there has been abuse of the system.