



PENINSULA

FURLOUGHING UNDER THE JOB RETENTION SCHEME

Guidance Note as at 9 October 2020

This guidance note deals with the mechanics of furloughing workers under the scheme in place from 1 March 2020, which closes to new entrants from 30 June 2020. **This means that no employees can be furloughed if they had not previously been furloughed at some point between 1 March 2020 and 10 June 2020.** The situation may differ for certain categories of employee which is discussed below in ‘Furloughing employees’.

This note also deals with making claims under the scheme.

On 29 May 2020, the Chancellor announced changes to the Scheme, which included a requirement for employers to contribute to furloughed workers’ wage costs, which are detailed in this note, and the introduction of flexible furlough.

Our separate guidance note ‘Flexible Furlough under the Job Retention Scheme’ deals with the mechanics of the flexible furlough scheme.

If as a result of the Coronavirus crisis you have a shortage of work, or insufficient funding to continue with full-time employment across your business, there are alternatives to compulsory redundancy. You may have been able to place employees on furlough under the Government’s Job Retention Scheme (“JRS”); you may be able to lay off some or all of your employees; or you may be able to place them on short-time working. In this document we consider the option to furlough under the JRS but in the event that you would like to consider any other options, please consult our Advisory Service.

Two Treasury directions have been released which set out how claims will be dealt with under the JRS. The first Treasury direction was issued

by the Chancellor on 15 April 2020 and applies to claims submitted before 22 May 2020 which are not compliant with the second Treasury direction.

The second Treasury direction was issued by the Chancellor on 22 May 2020. It amends and effectively replaces the first Treasury direction in respect of claims made on or after that date, or in relation to earlier claims that would have been compliant with the second Treasury direction in any event.

THE JOB RETENTION SCHEME

This involves designating some or all of your employees as ‘furloughed workers’. This means temporarily changing the status of employees so that they do no work but are retained on your books, to be brought back when you have work for them to do.

Employers who do this will be able to obtain a grant from the Government to cover 80% of furloughed employees’ wage costs, to a maximum of £2,500 per employee per month until the end of July 2020. New rules in place from the start of August 2020 mean that employers are required to contribute to the wage costs of furloughed workers. More information on this is included below under “The Amount Of The Grant”. There is no requirement to make up the pay to 100%, but employers can if they wish to.

FURLOUGHING EMPLOYEES

You needed to designate which employees are to be furloughed. This may be all of your workforce, or some of it. Theoretically, any employee can be furloughed and this includes full time, part time, zero hours, variable hours, fixed term and



apprentices. They must have been on your payroll on or before 19 March 2020, have been notified to HMRC via a RTI submission on or before 19 March 2020 and have been furloughed for the first time by 10 June 2020.

The following employees are not subject to the 10 June cut-off date:

- those whose maternity leave, paternity leave, adoption leave, shared parental leave and parental bereavement leave started before 10 June and ended after that date
- those whose period of mobilisation as a military reservist started before 10 June and ended after that date

In both of the above situations, the employee may only be furloughed for the first time after 10 June where the employer has already submitted a claim for any other employee in relation to a furlough period of at least 3 weeks taking place any time between 1 March 2020 and 30 June 2020.

Employees who are transferred under TUPE legislation after 10 June 2020 may also be furloughed for the first time after the cut-off date provided the employees being claimed for have previously had a claim submitted for them by their prior employer in relation to a furlough period of at least 3 consecutive weeks taking place any time between 1 March 2020 and 30 June 2020.

Each period of furlough must be at least 3 weeks in duration.

Under the first Treasury direction, if an employee went on unpaid leave on or before 28 February 2020, you could not furlough them until the date on which it was agreed they would return from unpaid leave.

If an employee started unpaid leave after 28 February 2020, you could put them on furlough instead.

Where the unpaid leave period began on or after 1 March 2020, restrictions on ending the unpaid

leave and commencing furlough did not apply under the second direction. More flexibility was also built in to ending a period of unpaid leave early, which was not included in the first direction, to place the employee on furlough.

Under the second direction, employers can decide to place employees who are on sick leave or self-isolation and receiving SSP on furlough at any stage. Whilst the employer has the choice, it is clear that it must be either one or the other. Where SSP is paid, no claim for wages can be made under the Job Retention Scheme, though you may be able to claim for SSP to a maximum of 2 weeks per employee via the SSP Rebate Scheme, which opened on 26 May 2020.

Employees who are 'shielding' (under advice from the NHS to remain at home and avoid face to face contact for a period of 12 weeks) can be furloughed if they cannot work.

Employees who were transferred to a new employer under TUPE legislation after 28 February 2020 can be furloughed and the new employer can use the Scheme to claim their furlough pay.

Foreign nationals on any category of visa can be furloughed.

It is your choice over who to designate as furloughed and employees cannot insist on it. If only a portion of your workforce is to be furloughed, you should consider carefully who it should be and you should seek advice from our Advisory Service prior to deciding on any selection process or criteria.

GETTING AGREEMENT FROM EMPLOYEES

In all cases, you should discuss the situation with employees and agree with them that you are designating them as a furloughed worker. It is especially important that you get agreement to any reduction in pay, otherwise this may give rise to claims of unlawful deduction from wages, breach of contract or constructive dismissal. Whilst a drop to 80% with a £2,500 cap may not appear an attractive option it is likely to be viewed



more favourably when it is explained to the employee that redundancy may be the only other option available.

Once agreement is obtained, you should confirm the temporary furloughed worker status to the employee in writing. The second direction states that the agreement should contain the main terms and conditions on which the employee will cease work, is incorporated (expressly or impliedly) into the employee's contract and that it must be kept until 30 June 2025 which is a more explicit instruction than that given in the first direction.

Collective agreement between an employer and trade union would be sufficient as evidence.

Employers should consider whether they will need to enter into a fresh agreement with employees who are to remain on furlough in light of the adjustments to the scheme and, in particular, if they wish to use the flexible furlough scheme.

EMPLOYEES WHO LEFT AFTER 28 FEBRUARY 2020

If employees stopped working for you on or after 28 February 2020, it was possible to re-employ them, put them on furlough and claim for their wages from the date on which you furloughed them, even if you did not re-employ them until after 19 March 2020. They must have been on your payroll as at 28 February 2020, which means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 28 February 2020.

If employees stopped working for you on or after 19 March 2020, it was possible to re-employ them, put them on furlough and claim for their wages through the scheme from the date on which you furloughed them. They must have been employed on 19 March 2020 and on your PAYE payroll on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020.

It was possible for an employee on a fixed term contract to be re-employed, furloughed and claimed for if either:

- their contract expired on or after 28 February 2020 and an RTI payment submission for the employee was notified to HMRC on or before 28 February 2020 or
- their contract expired on or after 19 March 2020 and an RTI payment submission for the employee was notified to HMRC on or before 19 March 2020.

Employees that started and ended the same contract between 28 February 2020 and 19 March 2020 were not able to qualify for this scheme. This is not specific to employees on fixed-term contracts, the same applied to employees on all other contracts.

A cut off date of 10 June 2020 was applied to first time furlough which meant that employers could not furlough an employee for the first time after this date. For information on which employees are exempt from this cut-off date, see "Furloughing Employees" above.

WORKING DURING FURLOUGH

Between March and the end of June, furloughed employees were not permitted to do any work for you or any linked or associated employer while they are on furlough. This means they couldn't do anything which made money for you or provided services to you or any linked or associated employer. They could undertake training and they could also volunteer for another employer or organisation subject to public health guidance. The second direction clarified that there was no requirement for the training to be directly relevant to the employee's employment or agreed with them before being undertaken.

You could not furlough an employee and then ask them to volunteer for you in their normal role or any other role.

If employees 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.

Trade union representatives or employee representatives can continue to perform that function while on furlough but they must not make money for you or provide services to you or any linked or associated employer.

The flexible furlough scheme in place since the start of July allows you to combine part-time work with furlough which may suit you if you have some work to offer the employee but not enough to make up their full hours.

It will be your decision over whether you allow your furloughed employees to find work for another employer during furlough considering any current contractual restrictions on this.

ANNUAL LEAVE AND FURLOUGH

On 17 April 2020, it was confirmed that annual leave can be taken during furlough. Employers must pay the employee's normal pay for any annual leave but will still only be able to claim 80% of pay through the scheme. Normal rules will apply to annual leave requests from employees which means that employers can refuse the request. Some employers may choose to do this in light of the requirement to 'top up' pay to 100% during annual leave. In guidance published on 13 May 2020, it was confirmed that employers can require employees to take annual leave while on furlough. However, it states that employers should first consider whether the aim of annual leave i.e. rest and relaxation, would be met if annual leave is enforced at a time during which the employee is under "restrictions" e.g. the need to socially distance.

THE GOVERNMENT GRANT

The Government's current guidance sets out that you need to submit information to HMRC confirming who your furloughed workers are. Once HMRC have received your claim and confirmed you are eligible for the grant, they will

pay it to you via BACS payment to a UK bank account within 6 days of the claim.

HMRC's online portal, which employers must use to claim the grant, opened on 20 April 2020. Employers will need to input the start date of furlough but the scheme allowed for claims to be backdated in respect of workers who were furloughed any time from 1 March 2020. As of 1 July 2020, claims to the scheme relating to furlough periods between March and end of June are no longer permitted.

You should make a claim in accordance with actual payroll amounts at the point at which the payroll is run or in advance of an imminent payroll.

The grant is a reimbursement to the employer therefore you should make the wage/salary payment to the furloughed worker as normal where you have the funds. Employers who are struggling with salary payments because of the current situation may be able to obtain assistance from the Coronavirus Business Interruption Loan Scheme (CBILS).

THE AMOUNT OF THE GRANT

From the start of the scheme until the end of July, the government paid 80% of wages up to a cap of £2,500 as well as employer NICs and pension contributions for the hours the employee didn't work.

During August, the government paid 80% of wages up to a cap of £2,500 and employers paid employer NICs and pension contributions for the hours the employee does not work.

From 1 September, the government pays 70% of wages up to a cap of £2,187.50 for the hours the employee does not work. Employers also pay employer NICs and pension contributions and 10% of wages to make up 80% total up to a cap of £2,500.

During October, the government will pay 60% of wages up to a cap of £1,875 for the hours the employee does not work. Employers will also pay employer NICs and pension contributions and



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20% of wages to make up 80% total up to a cap of £2,500.

The scheme will close at the end of October.

Calculating your claim

For full time and part time salaried employees, the employee's actual salary before tax, as in their last pay period before 19 March 2020, should be used to calculate the amount to be claimed. You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees, compulsory commission payments and piece rate payments. However, discretionary bonus (including tips) and commission payments and non-cash payments (benefits in kind) should be excluded.

Reference salary for employees returning from family related leave e.g. maternity leave, sick leave, sabbatical or unpaid leave is their salary, before tax, rather than what they received when on leave.

For claims made between the start of the scheme and the end of July, it was necessary to work out (i) the amount of Employer National Insurance Contributions and (ii) minimum automatic enrolment employer pension contributions for each employee in order for them to be claimed. However, it is no longer possible to claim these elements from the start of August. These payments must now be covered by the employer.

The total number of employees furloughed in one claim period after 1 July 2020 cannot exceed the maximum number of employees furloughed in a single claim period before 30 June. For example, if you had previously made two claims for 30 and 20 employees respectively, the maximum number of employees you can furlough in one claim period after 1 July is 30.

TAX, NATIONAL INSURANCE AND PENSIONS

Wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

Employers will be liable to pay Employer National Insurance contributions on wages paid, as well as automatic enrolment contributions on qualifying earnings unless an employee has opted out or has ceased saving into a workplace pension scheme.

Employer National Insurance Contributions and automatic enrolment contributions on any salary above 80% that an employer chose to pay could not be claimed from the scheme.

EMPLOYEES WHOSE PAY VARIES

If such an employee has been employed (or engaged by an employment business in the case of agency workers) for a full year the employer will claim for the higher of either:

- the amount the employee earned in the same month last year, or
- an average of their monthly earnings from the last year.

If such an employee has 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 the employee's monthly pay varies because they are, for example, a zero- hours employee.

If the employee has been employed for less than a month, the employer will pro-rata the earnings from that month.

NATIONAL MINIMUM WAGE /NATIONAL LIVING WAGE

National Minimum/Living Wage is a rate payable for hours worked. For as long as no hours are being worked by the employee it does not matter if 80% of their wage falls below the minimum hourly rate – but see the above note on training.

MAKING EMPLOYEES REDUNDANT WHILST ON FURLOUGH

Employees can be made redundant when they are on furlough. The Government has clarified, through legislation, that statutory redundancy pay must be calculated using the employee's full pre-furlough pay, rather than their reduced furlough rate.



EMPLOYEES ON MATERNITY LEAVE

Those about to go on maternity leave will go on leave as normal.

Those already on maternity leave can be placed on furlough. Individuals must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. If you offer enhanced contractual pay to women on maternity leave, this is included as wage costs that you can claim through the Scheme. The same applies to paternity, adoption and shared parental leave.

The position on assessing the level of payment to be made during leave was confirmed by the Government on 24 April 2020. Eligibility for Statutory Maternity Pay (SMP) is calculated with reference to earnings during a prescribed 8 week period. The Government announced that, where statutory maternity leave begins on or after 25 April 2020, entitlement to SMP will be calculated on the employee's normal, full earnings rather than their furlough pay.

The same applies to paternity leave, adoption leave, shared parental leave and parental bereavement leave.

As covered in "Furloughing employees" above, employees whose maternity leave began before, and ended after, 10 June are not subject to the cut-off date of 10 June for new entrants to join the furlough scheme. This only applies where the employer has already used the scheme to furlough employees.

This also applies to those returning from paternity, adoption, shared parental and parental bereavement leave.

JOB SUPPORT SCHEME

On 22 September 2020, the Chancellor announced his Winter Economy Plan which included the Job Support Scheme (JSS). The JSS will begin on 1 November 2020, replacing the Job Retention Scheme when it concludes at the end of October.

The JSS will continue to offer some financial assistance with employees' wages but will operate in a considerably different way to the Job Retention Scheme. For example, it will only offer a maximum of 22% wage cover and only where employees work for a minimum of one third of their normal working hours.

On 9 October 2020, the Chancellor announced an expansion to the Job Support Scheme to provide assistance to employers who are legally required to close their businesses due to a local, or possibly national, lockdown. Employers will be able to claim two thirds of an employees' wages, to a maximum of £2,100 per month. For more information on the Job Support Scheme, please see our separate guidance note.