

Coronavirus Business Update: Employment Law

The Coronavirus Job Retention Scheme (CJRS) allows employers affected by the Covid-19 pandemic to place employees on “furlough”.

Furloughed employees are not permitted to carry out any work that makes money or provides services for the employer or any linked or associated organisation whilst they are on furlough leave. They may undergo training or work for a different employer if their contract allows that.

HMRC will pay the employer up to the lower of 80% of the employee’s salary or £2,500 per month. The employer is not required to make up the 20% difference in pay to the employee but you are advised to agree the reduction in salary with the employee first (see below). The pay is taxed and subject to pension contributions as normal.

Who is eligible?

In order to be eligible, the employer must have:

- created and started a PAYE payroll scheme on or before 19 March 2020
- enrolled for PAYE online
- a UK bank account

Eligible employees include those on zero hour contracts, full or part-time, and agency staff. They must have been employed on 19 March 2020 and on the 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.

There is also scope to re-employ and furlough staff who were made redundant or stopped working for the employer or those on fixed term contracts.

An employee who is shielding or on long-term sickness absence can be furloughed.

How to furlough

As an employer you may need to retain some staff rather than furlough all. This will mean selecting some staff to be furloughed over others that you may need to retain in the business. Employers should take normal employment rights, including discrimination law, into account when deciding who to furlough. It is therefore sensible to apply objective criteria when reviewing which staff to furlough to demonstrate that you have chosen based on sound business reasons. For example, you may want to choose based on the skill set you wish to retain within your business.

Employers should confirm the furlough arrangement in writing and importantly obtain agreement from the employee. This agreement can be done by way of a simple letter or email setting out the dates of the furlough and what you have agreed. If the employer is not making up the difference in pay, and therefore the employee will be receiving 80% of their monthly salary or £2,500 (whichever is the lower) then this also needs to be agreed and should be included in the written agreement with the employee. It’s important that you always obtain agreement because failing to do so could mean that the employee has a claim against your business for an unlawful deductions from wages.

Putting someone on furlough is a difficult conversation to have especially where you are not topping up the salary, however in order to secure agreement it is best to explain the financial circumstances and impact of Covid-19 on your business and confirm that by using the furlough scheme you hope to avoid having to make compulsory redundancies. Most employees will understand the context of the current situation and faced with the potential of redundancy are likely to agree.

The minimum period an employee can be furloughed for is three weeks. There is no upper limit, other than the CJRS is currently due to end in October 2020 and the rules of the scheme are likely to change after July 2020 so you need to look out for a change in eligibility criteria once it is released by the Government.

Employees can return to work and be re-furloughed or the furlough period can be extended with their agreement.

Employers should keep a record of furlough communications for five years.

If you want to know more about furloughing there is detailed guidance on furlough available on the [government website](#).

Annual leave

Furloughed employees and those who are not furloughed retain their rights to annual leave during the Covid-19 pandemic. This note covers the statutory minimum holiday entitlement of 4 weeks that employees are entitled to under the Working Time Regulations. Workers' contracts may give them additional rights or leave entitlement so always check their employment contracts.

The government has brought in new regulations which permit workers to carry forward their minimum 4 week leave entitlement for up to two leave years if it was not reasonable that they could take this leave because of Covid-19. For example, the employee may not have been able to take leave if the business has faced an increase in demand, it was disrupted by the virus, or the worker's health prevented leave from being taken. Employers must give workers the opportunity to take any leave they cannot carry forward before their leave year ends. Employers should also give workers the chance to take carried forward leave at the earliest opportunity.

Cancelling leave or requiring workers to take it

Employers can require workers on furlough or working normally to take or cancel leave. Taking leave does not break the furlough period.

Unless the worker agrees otherwise, the minimum notice period and employer needs to give if they need an employee to cancel or take is as follows:

- to take holiday, twice as much notice as the length of the holiday;
- to cancel holiday, the length of holiday booked.

The [guidance](#) states "the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday." Employers should ensure they have a good reason for taking these steps and should discuss the decision with the employee and take account of the individual's circumstances.

What pay is due?

Workers are entitled to their normal pay during any period of holiday - as if they had been working. The employer must therefore "top up" a furloughed worker's pay if necessary whilst still continuing to claim 80% of the wage from HMRC.

If the worker leaves employment, they are entitled to a payment in lieu of leave accrued but not taken, including any leave carried over from previous leave years.

Sickness pay

During the Covid-19 pandemic, workers retain their contractual and statutory rights to sick pay.

In addition, workers are entitled to [statutory sick pay](#) (SSP) from the first day off (rather than have the usual 7 days waiting period) if they cannot work and are:

- self-isolating
- staying at home on GP or NHS advice because they're at high risk of severe illness from coronavirus – known as 'shielding'

Certain employers may be able to reclaim up to two weeks' SSP through the Coronavirus Statutory Sick Pay Rebate Scheme. The rebate scheme applies for employees off sick or self-isolating or shielding on or after 13 March 2020. The government [website](#) has details.