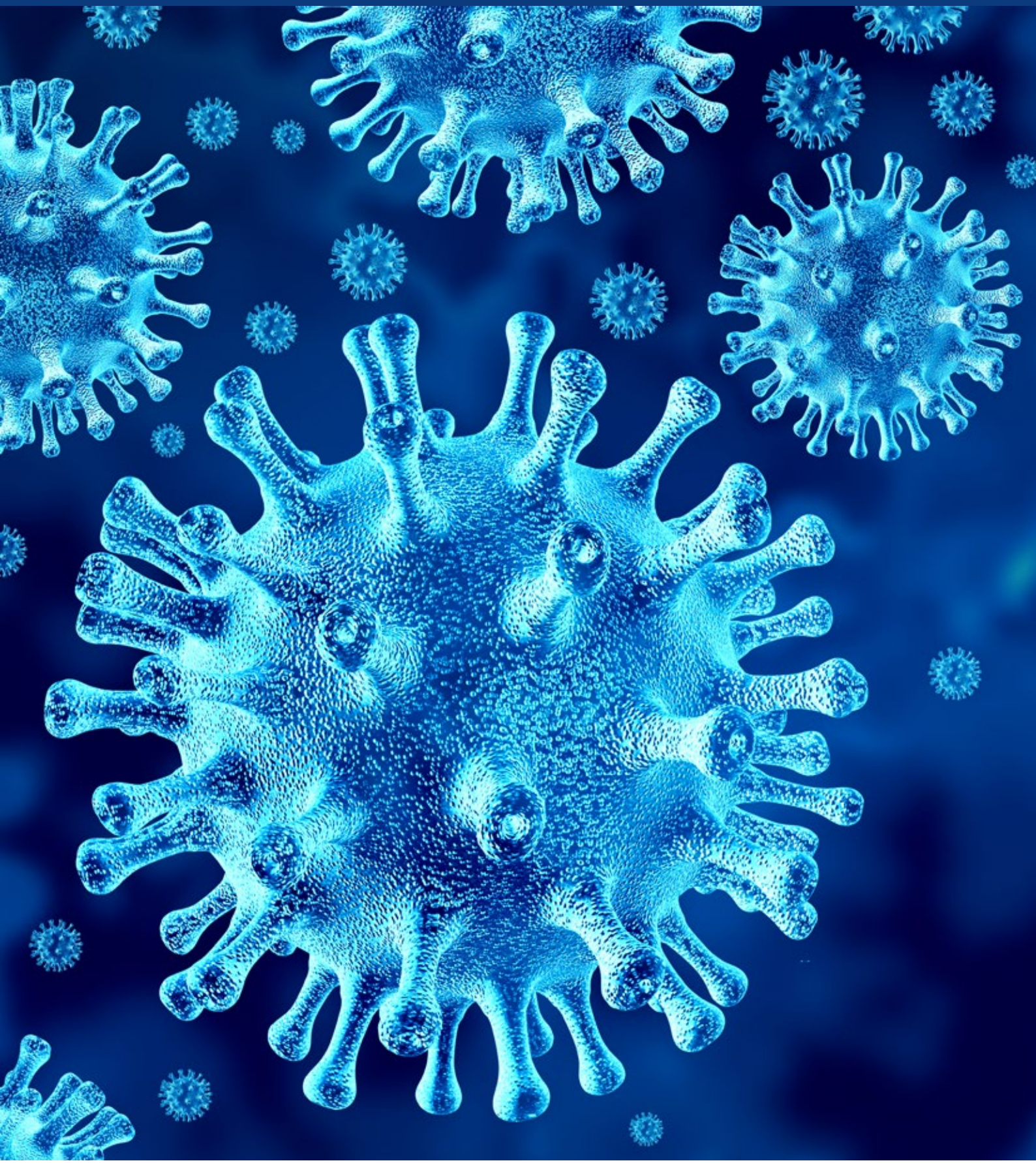

THE CORONAVIRUS CRISIS:
THE FURLOUGH SCHEME

The Coronavirus Crisis: The Furlough Scheme

The Government has published its Guidance on the operation of the Furlough Scheme, entitled Claim for wage costs through the Coronavirus Job Retention Scheme.

It appears that there will not be Regulations that will set out the entitlement and operation of the Scheme. The Guidance document is at https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme.

The Guidance sets out in broad terms the manner in which the Scheme will operate, the period for which employees must be absent before they are entitled, anti-avoidance measures and the way in which a claim is to be made.

There is much in the document that is left unsaid and which needs to be considered by employers. In particular, the interaction with discrimination, holiday, maternity, part time work and the selection process for the Scheme (which will involve consideration of these factors) will need to be addressed.

This Bulletin sets out the Guidance and then contains a worked example, which identifies some of the considerations and pitfalls that may need to be taken into account. Reference should also be made to the first bulletin that dealt with SSP, frustration, collective consultation and special circumstances.

Advice should be taken on the practical application of the scheme as there are a number of employment pitfalls, especially in relation to selection and consultation for furlough or redundancy.

This bulletin will consider the following

The Furlough Guidance

In this section we have set out the content of the Guidance in full (in blue so that it is clear) and commented on some of the issues that we see as likely to arise. These issues are further illustrated by the worked example in the next section.

Guidance for employers on the coronavirus (COVID-19) Job Retention Scheme.

Published 26 March 2020

From:

HM Revenue & Customs

Contents

The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at least three months starting from 1 March 2020. We expect the scheme to be up and running by the end of April. It is designed to support employers whose operations have been severely affected by coronavirus (COVID-19).

Clearly, the Government is hoping that the Scheme will be temporary and will cover a 12-week period from 1st March 2020 to the end of May 2020. Bear in mind that the Government has opted for furlough to be implemented in at least three-week tranches. As will be set out below, unless there is some provision in the contract of employment, **consent** will be required. Employees may be happy to consent to being paid 80% of their salary, rather than redundancy, but the process becomes more difficult when some employees are to be furloughed and some to be made redundant.

Employers can use a portal to claim for 80% of furloughed employees' (employees on a leave of absence) usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers can use this scheme anytime during this period.

The scheme is open to all UK employers that had created and started a PAYE payroll scheme on 28 February 2020.

It appears that the £2500 per month is to be calculated gross and then you add on NI and the pension contributions. The limits on the Scheme will mean that a higher earner will not be receiving 80% of their wages.

Given that the ceiling for 80% is £2,500 per month, this is £30,000 on an annualised basis. This means that someone on £36,000 will get £30,000 (on an annualised basis) or £2500 a month, which will be 80% of £36,000.

Someone on £50,000 will get £30,000 on an annualised basis which will be 60% of the actual wage. Thus the higher earning employee will not in fact receive 80% of their wages. Nevertheless, this appears to be in contrast with self-employment where the proposal is that anyone who earned over £50,000 will be **disqualified** from receiving anything.

There is nothing to stop employers from topping up the 80%. From a costs point of view it may be that employers can manage their cash flow to some degree, going forward. For example, an employer who has ten employees that earn £3000 a month would be able to claim 80% or £2500 a month leaving £500 to be topped up. This means that the employer with the 10 employees on £300 a month can claim £25,000 a month furlough and pay £5000 top up. Given that the employer is topping up to the full salary there are unlikely to be any arguments about breach of contract. The guidance also states that the 80% "plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage" can be claimed.

Who can claim

Any UK organisation with employees can apply, including:

- businesses
- charities
- recruitment agencies (agency workers paid through PAYE)
- public authorities

You must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme.

Public sector organisations

The government expects that the scheme will not be used by many public sector organisations, as the majority of public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.

Where employers receive public funding for staff costs, and that funding is continuing, we expect employers to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.

It is to be noted that the Guidance says **we expect** employers not to furlough their employees where they receive Government funding. There is not an express disqualification.

Organisations who are receiving public funding specifically to provide services necessary to respond to COVID-19 are not expected to furlough staff.

In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the scheme may be appropriate for some staff.

Employees you can claim for

Furloughed employees must have been on your PAYE payroll on 28 February 2020, and can be on any type of contract, including:

- full-time employees
- part-time employees
- employees on agency contracts
- employees on flexible or zero-hour contracts

The Scheme has been drawn as widely as possible to cover all types of employee.

The fact that it will cover those on flexible or zero hour contracts is particularly welcome. However, it is not clear how this will work. It is for the employer to decide to furlough a person and to make a claim. Where someone is on zero hours contract the whole point is that if there is no work then the employee is not paid. The Scheme does not give employees a right to bring a claim. On the face of it the employer may decide not to furlough someone on zero hours even through there is nothing for that person to do and there appears to be no recourse for the employee.

The scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.

To be eligible for the subsidy, when on furlough, an employee can not undertake work for or on behalf of the organisation. This includes providing services or generating revenue. While on furlough, the employee's wage will be subject to usual income tax and other deductions.

The Guidance does not explain what is to happen where employees have been made redundant and already paid a redundancy payment. Nor is it clear what is to happen about redundancy payments where the employee's contract has already been terminated, they are entitled to a redundancy payment, but it has not yet been paid. Strictly speaking, the employee was entitled to a redundancy payment on termination (provided they have the qualifying service). Since the entitlement is a matter of law under the Employment Rights Act 1996 we cannot see how it can, as a matter of strict law, be made a condition that the payment is waived if the employee is to be furloughed.

The Guidance also states that "To be eligible for the subsidy, when on furlough, an employee can not undertake work for or on behalf of the organisation". What is the position if the employee does some work for another organisation? For example, the employee may decide to carry out some shelf stacking at Tesco to supplement income. It appears, from the answer to the question of what happens if the employee has more than one job, that this is permitted, as the response states "If your employee has more than one employer they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually."

There may also be problems of scrutiny where the employee does some work from home as it is difficult to see how this can be policed by HMRC, especially where the employee's salary is being topped up to a full salary.

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

Does this mean not working for that organisation or does the fact that the agency worker does some work for organisation B rule out payment under furlough by organisation A? It appears from the answer dealt with in the last section that agency workers may do some work for one employer whilst getting the furlough pay in relation to another organisation.

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme and you will have to continue paying the employee through your payroll and pay their salary subject to the terms of the employment contract you agreed.

We see this as one of the most difficult issues, as set out in our worked example. Where an employee is placed on reduced hours and paid as such, he or she may be worse off than employees who have been furloughed which may act as a disincentive. Given that changes may be a matter of **consent** we can see various contractual issues as set out below. There may also be serious issues about selection.

Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.

The Guidance refers to changes by agreement so that consultation is clearly envisaged, and the situation will be more acute where employees are treated differently.

The Guidance confirms that equality and discrimination laws will apply as normal. We have already come across one case where the employer wished to furlough a female employee because of child care difficulties and the capacity to work at home with young children and a baby, whilst continuing to employ a male employee on full pay; both were on large salaries which meant that the £2500 a month was just over 25% of their salary. Clearly, this raises issues about fairness of selection and discrimination. We will discuss the issues in the worked example.

To be eligible for the subsidy employers should write to their employee confirming that they have been furloughed and keep a record of this communication.

Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme.

You do not need to place all your employees on furlough.

However, those employees who you do place on furlough cannot undertake work for you.

If your employee is on unpaid leave

Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February.

There does not seem any reason why employees cannot return to work then be put on furlough.

If your employee is on Statutory Sick Pay

Employees on sick leave or self-isolating should get Statutory Sick Pay, but can be furloughed after this.

Employees who are shielding in line with public health guidance can be placed on furlough.

It is important to note that the above comment implied that employees who are self-isolating (See our first Bulletin) and are deemed to be incapacitated **cannot** be furloughed until after they are out of self isolation. However, given that many people may be self-isolated because they have mild symptoms and could be regarded as fit to work it is not clear what the position would be if the employee presents him or herself as fit to work at home so that the employer then wishes to furlough. It would appear that, as long as there is deemed incapacity, furlough cannot take place.

If your employee has more than one job

If your employee has more than one employer they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

On the basis of the above, there does not appear to be anything to prevent an employee from working elsewhere whilst on furlough?

If your employee does volunteer work or training

A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of your organisation.

However, if workers are required to for example, complete online 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.

Presumably if you are being paid for an online training course you do not meet the requirements that would enable an employer to furlough since you are being paid for work.

If your employee is on Maternity Leave, contractual adoption pay, paternity pay or shared parental pay

Individuals who are on or plan to take Maternity Leave 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. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth.

If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

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 scheme.

The same principles apply where your employee qualifies for contractual adoption, paternity or shared parental pay.

The above deals with the general principles of leave and pay for maternity etc. However, it does not deal with the question whether an employee who has exhausted the 90% of average earnings for the first six weeks would wish to come back to work and then be furloughed. If the employee was to be paid the statutory flat rate for the balance of the 33 weeks that would amount to £4,989.60. Given that the cap on the 80% for furlough is £2500, if an employee was furloughed for 2 months that would exceed the 33 weeks SMP, as it would be £5000. Of course, if the Furlough scheme is extended beyond May an employee would be even better off (since the

employee would receive £2500 a month if the 80% cap is reached as opposed to £604.80 a month SMP).

It also has to be born in mind that employees have to agree to be furloughed. An employee on enhanced maternity pay may not wish to be furloughed if the enhanced pay is more than the £2500 cap. If an employee is made redundant the Statutory Maternity Pay would still be payable and the employee would be likely to have a claim for discrimination under section 18 of the Equality Act 2010 as the real reason for the termination was to avoid the contractual enhanced pay.

Work out what you can claim

Employers need to make a claim for wage costs through this scheme.

You will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage. Fees, commission and bonuses should not be included.

At a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. An employer can also choose to top up an employee's salary beyond this but is not obliged to under this scheme.

We will issue more guidance on how employers should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions, before the scheme becomes live.

Full time and part time employees

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.

This is likely to hugely disadvantage some employees, who receive a very small salary and whose earnings are primarily based on commission.

Employees whose pay varies

If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, you 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, you can claim for an average of their monthly earnings since they started work.

If the employee only started in February 2020, use a pro-rata for their earnings so far to claim.

Once you've worked out how much of an employee's salary you can claim for, you must then work out the amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions you are entitled to claim.

It is likely that many employees will be able to argue that their pay varies, taking into account such matters as contractual overtime, shift allowances and other allowances of a similar nature to those we have seen in the holiday case litigation. Once an employee gets to the £36,000 a year or £3000 figure, the £2500 cap will apply (80% of £3,000 = £2500 a month) so that we can see arguments as to why various elements should be included to bring the annual figure up to the cap.

Employer National Insurance and Pension Contributions

All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

You can claim a grant from HMRC to cover wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on paying those wages.

You can choose to provide top-up salary in addition to the grant. Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

The Government has left it to the discretion of the employer to provide 'top up salary' if it wishes. It is to be noted that the Guidance does not say that a further 20% can be paid but that it can be **top up salary**. We query, in our example given earlier whether an employer may simply pay the balance to get the employee to their normal salary; ie, if it was £60,000 or £5000 a month – the employee would get the £2500 cap a month furlough which would be 50% of the salary; can the employer simply pay the balance?. There does not seem to be any reason why not. This may be relevant when one comes to arguments about breach of contract and the ability to reduce salary as set out in the worked example.

National Living Wage/National Minimum Wage

Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for the hours they are working.

Therefore, furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW.

However, if workers are required to for example, complete online 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.

The example above would appear to indicate that employees can carry out training courses without being treated as being in breach of the conditions for the furlough retention.

What you'll need to make a claim

Employers should discuss with their staff and make any changes to the employment contract by agreement. Employers may need to seek legal advice on the process. 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.

To claim, you will need:

- your ePAYE reference number
- the number of employees being furloughed
- the 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
- your phone number

You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim.

Claim

You can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1 March if applicable.

This is an important addition to the requirements for furlough. It means that employers cannot alternate employees on a weekly basis (though they could on a three-weekly basis).

It is to be noted that employees have no right to bring a claim under the Scheme

What to do after you've claimed

Once HMRC have received your claim and you are eligible for the grant, they will pay it via BACS payment to a UK bank account.

You 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.

When the government ends the scheme

When the government ends the scheme, you must make a decision, depending on your circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider termination of employment (redundancy).

If the Government terminates the Scheme at the end of May then many employers and employees may find at that point that the redundancy situation has simply been deferred for 12 weeks. We deal with this issue in the worked example.

Employees that have been furloughed

Employees that have been furloughed have the same rights as they did previously. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments.

Once the scheme has been closed by the government, HMRC will continue to process remaining claims before terminating the scheme.

Income tax and Employee National Insurance

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.

Tax Treatment of the Coronavirus Job Retention Grant

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.

The Furlough Scheme: A Practical Example

The Guidance set out above gives us the bare bones of a Scheme and, not surprisingly, does not attempt to deal with issues such as discrimination that may arise. Taking the sequence of events logically we consider the following scenario:

- The employer has a number of employees who have had to self-isolate, as well as a number of employees who have operated social distancing because of vulnerability issues, before the Government announced the 'shutdown'.
- The Shutdown has led to employees having to work from home where they are able to do so.
- The employer does not need all the employees because of the downturn in business and wishes to furlough some employees and ask others to continue to work from home.
- The employer will wish some of those people to work from home on a part time basis with a reduced salary.
- The employer does not wish to make redundancies until it finds out what is going to happen to the continuation of the scheme and/or its business.

The workforce

Taking a simplified example, the employees that are under consideration consist of the following :

- Adam, who is in self-isolation but considers that he is fit to carry out work. He is in receipt of SSP.
- Barry who is at home, exercising social distancing and is able to work from home. He has a young family and his children are now being home schooled.
- Charles, who is fit and well and able to work from home. He is not as qualified as the others and his turnover has not been as great.
- Diane, who is fit and who is at home. She is a single mother with a child and baby and no longer has childcare because of social distancing. She is much better qualified and has a greater turnover than Charles, but it is accepted she could not work much more than a couple of hours a day during the core hours when clients are in contact.
- Elsie, who is fit and able to work from home. She is a high earner and has significant private expenses. She received a large bonus which is contractual the previous year.
- Frances, who is about to go on maternity leave.
- Graham, who is disabled and in relation to whom it will be necessary to consider reasonable adjustments to enable him to work from home.
- Harriet, who is on maternity leave and has already been paid for the first six weeks. She is now on SMP.
- Ian, who has been absent on long term sickness and is no longer entitled to sick pay but would be happy to be furloughed.

Stage One: Consent and the Contracts of Employment

The contracts of employment provide as follows:

- None of the contracts provide for a right of lay off.
- All of the contracts contain a provision for variation of contract, which is in the following terms:

  "The Company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation. A copy of the handbook is displayed on the colleague communication board in your store and on Pipeline, and replacement copies are available from your People Manager." (see *Bateman v ASDA Stores Limited* [2010] IRLR 370).
- There is an Enhanced Redundancy Scheme in relation to some employees.

It is clear to us that if the employer wishes to furlough then it will have to be with the consent of the employees. Whilst the above clause was held in *Bateman v ASDA Stores Limited* [2010] IRLR 370 to empower the employer to amend contracts to rationalise a pay structure no employee lost out and the case law has generally held that general clauses do not permit unilateral variations, such as reduction in pay or hours (See *Risk Management Services (Chiltern) Limited v Shrimpton* [EAT 803/77; *Brechin Bros v Kenneavy & Strang* [EAT 373 & 374/82]; *Simmonds v Dowty Seals Ltd* [1978[IRLR 311 where changing hours of work amounted to a breach of contract).

The fundamental change of placing someone on furlough will have to be agreed. If any of the employees, named above, make it clear that they would not be prepared to go on furlough or reduced hours working from home, the employer will have no real option other than to consider redundancy or retention on full pay.

As a first stage therefore we think that the employer should:

- Make it clear that if the employee is not prepared to **consent** to being furloughed, there is the possibility of redundancy.
- Ascertain whether the employees are prepared to be furloughed.

In the above example, Elsie may refuse to go onto furlough because she takes the view that she will lose so much salary. On the other hand, the employer may consider she is too expensive, at the present time, and that is why she is not being selected to work from home, but the employer wants to furlough her. It seems that an impasse may be reached, and the employer may decide to consider redundancy.

Second Stage: Selection for Furlough

At this stage, the employer will be considering who it wishes to continue to work – from home – to meet the needs of the business during the crisis. Assuming the employer wants four employees who can devote the maximum time to the business and work from home in as efficient a manner as possible. It reviews the position of the eight employees and decides on the four that it considers best equipped to carry the business through this difficult time. It seems to us that the following issues then arise:

SSP and Sickness

Adam is on SSP because he has manifested symptoms. Adam cannot get SSP and be furloughed at the same time. Ian is on long term sick leave and has exhausted his sickness entitlement. He considers himself fit to carry out full time work from home. However, he has a Fit Note which states that he is still not fit for work, and the employer would be entitled to reject his contention. In any event, there seems little benefit in permitting Ian to return to work so that he then goes on to furlough.

Maternity

In the case of Frances and Harriet, Frances is about to go on maternity leave whilst Harriet has exhausted the first six weeks of her maternity pay and is now on statutory maternity pay. It may of course be the case that the employer pays enhanced maternity pay for a longer period, but it would appear that Harriet will be better off if she comes back and is then furloughed.

Can Frances be furloughed? The entitlement to statutory maternity leave is a matter of right provided that the provisions of the ERA 1996 and the Maternity and Parental Leave Etc Regulations 1999 [SI 1999/3312] (MAPLE) are met. The right to statutory maternity pay exists provided that the conditions in the Social Security Contributions and Benefits Act 1992 and the SMP (General) Regulations 1986 are met. **(see Duggan QC on Contracts of Employment (4th Ed)** at Chapter K for a full exposition of the rules). Section 164(1) of the 1992 Act states that where the conditions are satisfied "she shall be entitled" to SMP. When Frances has her baby she must be given compulsory maternity leave of 2 weeks (s 72 ERA 1996, MAPLE, regulation 8). The employer may decide to offer furlough to Frances in the meantime. However, this is potentially discrimination under section 18 of the Equality Act 2010 and, should Frances refuse, she cannot be subjected to a detriment because of her pregnancy.

Can Harriet come back? Where an employee wishes to come back early from OML the employer may insist on 8 weeks' notice (MAPLE, regulation 8) and the employer can postpone so that this is complied with. There is nothing to stop the employer permitting the employee to return straightway so that Harriet could return and be immediately furloughed. Of course, the employer is more interested in who it is going to select to continue working from home so that the return of Harriet early will not advance matters.

Note that we considered maternity and suspension of pay in the First Bulletin.

Sex Discrimination

In the case of Diane, whilst she worked from the workplace and had childcare cover, she proved herself to be the highest earning employee and brought in more work than her counterparts. She cannot do so whilst at home, looking after her toddler and baby. The employer may decide that she is the least productive and that she will therefore be furloughed. Diane was earning £150,000 a year. She would be subject to the furlough cap of £2500, or about a fifth of her salary.

Diane may claim indirect discrimination contrary to section 19 of the Equality Act 2020. It would be for the employer to show that the decision to furlough Diane is a proportionate means of achieving a legitimate aim. In light of the nature of this crisis, is that defence likely to succeed?

If Barry and Charles are selected to continue to work there may be a claim for direct discrimination under section 13 on the basis that Diane has been less favourably treated than Barry or Charles. However, the employer would argue that sex had nothing to do with it and it was the fact that Barry and Charles were able to work full time from home. No doubt Diane can point to the fact that Barry has children at home, but if it can be shown that he is still able to work full time, for example because his partner is also at home and is carrying out the schooling, this may be the answer.

Disability Discrimination

Graham is disabled and is not able to work in a sedentary position for long periods of time without a special chair. Given that the employer knows that Graham is disabled the employer is under a duty to consider reasonable adjustments. For example it may be a reasonable adjustment to have his work chair couriered to his home – this is unlikely to be expensive compared to the cost of purchasing a new chair.

The law relating to disability discrimination, in particular reasonable adjustments, remains fully in place and the employer will need to have this in mind during the selection process. Advice should be taken where the employer has disabled employees before any steps to furlough or in relation to redundancy are implemented.

Age discrimination

There may also be age discrimination issues where a vulnerable person is social distancing because he or she are over the age of 70 and the employer therefore chooses the individual for redundancy and/or furlough as opposed to continuing to work. We are of the view that the employer cannot simply adopt a blanket approach but must look at each individual on the facts. If the person is able to work from home this must be taken into account. By the same token the employer should not use the current crisis as a reason to make someone redundant as opposed to furlough them, because of their age. The legislation remains in full force.

Comment

The above are simple examples of issues that may arise where the employer wants to keep some employees working from home and furlough some. The employees may not wish to be furloughed because they will lose salary overall. However, that is likely to be better than the alternative of redundancy.

The other side of the coin is where the employer is deciding who to make redundant and who to furlough. We suggest that, at this stage, the employer will be following a more traditional redundancy selection process. The employees may now wish to be furloughed so that they are retained in the business rather than dismissed. See further below.

Homeworking

In our first Bulletin we made the point that the relevant statutory provisions still apply (and this is acknowledged by the Guidance) so that employers must have in mind matters of health and safety, a safe working environment etc.

On the other hand, the employer will want to ensure that the employee is properly carrying out his or her duties from home.

A draft checklist and policy is contained in **Duggan QC on Contracts of Employment** at **chapter 5.7.** and the various issues raised by home working are considered in detail.

Section 195, Trade Union and Labour Relations (Consolidation) Act 1992

The employer may seek to apply other alternatives, such as part time working, shorter days or reduced pay. Unless there is express contractual provision these approaches cannot be imposed unilaterally as that will amount to a breach of contract if the employee does not accept a change which the employer insists upon.

If the employer decides to dismiss and offer new terms and conditions, then it must be borne in mind that the collective consultation provisions of TULR(C)A 1002 will apply.

Collective consultation

We dealt with collective consultation in the first Bulletin. We have since been asked on a number of occasions about the 'special circumstances' defence.

To recap, by section 188 of TULR(C)A 1992 where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals, in good time and in any event

- where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least [45] days, and
- otherwise, at least 30 days,

before the first of the dismissals takes effect.

The consultation shall include consultation about ways of—

- avoiding the dismissals,
- reducing the numbers of employees to be dismissed, and
- mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

- the reasons for his proposals,
- the numbers and descriptions of employees who it is proposed to dismiss as redundant,
- the total number of employees of any such description employed by the employer at the establishment in question,
- the proposed method of selecting the employees who may be dismissed,
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure
- including the period over which the dismissals are to take effect,
- the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by

or by virtue of any enactment) to employees who may be dismissed,

- the number of agency workers working temporarily for and under the supervision and direction of the employer,
- the parts of the employer's undertaking in which those agency workers are working, and
- the type of work those agency workers are carrying out.

That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.

The employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

We question the fitness of purpose of these provisions for the current crisis. Employees will need to be elected as representatives and to discuss the position with the workforce. This is going to be very difficult where the workforce is on lockdown at home and there is a very large workforce.

Can the special circumstances defence apply? Section 188(7) states that "If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection [(1A), (2) or (4)], the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."

We dealt with the problems in our first Bulletin. The reader is also referred to *Shanahan Engineering Ltd v UNITE* UKEAT/0411/09, [2010] All ER (D) 108 (Mar), in which one of the authors was involved. The employer in this case was a sub-contractor working on two plants. When it was told by the main contractor that work was to stop on one plant so that the work was to be done sequentially and that the workforce was to be off site that day, it made some 50 of the workforce redundant out of 145 craft employees. A procedure agreed with the Union was followed but the dismissals were a fait accompli. The Employment Tribunal stated:

"The fact that a sudden situation arises may or may not, depending on its circumstances, amount to special circumstances relieving the employer of the duty to consult, either entirely or in part. We are satisfied that the Respondents were faced with this sudden situation. Why it may have been that Alstom chose to drop this bombshell quite as quickly and suddenly as it did is a matter upon which we can only speculate, since we have had no evidence from them, but we are satisfied that in those circumstances, it was sufficient to relieve the Respondent from the obligation to consent to start consultation at least 30 days before the dismissals took effect."

The Tribunal held that it was "not satisfied, however, that it relieved the Respondent in any other respect from the obligation to consult. Quite plainly the situation of 50 or so employees for whom there was no work is not something an employer could countenance for very long. We are not blind to the economic realities of life, but on the other hand we have no evidence before us that the Respondent's financial position was such that it had to dispense with the services of these individuals quite as quickly as it did. We see no reason why it would not have been open to the Respondents to have carried out some consultation with the appropriate representatives so as to comply with the other requirements of s 188. Although the ordinary requirement would be that the consultation should start at least 30 days beforehand, there is no requirement that it should last for 30 days. Consultation may be quite adequately completed within a matter of only a few days, depending on the circumstances and we see no reason why in this situation, this Respondent could not have consulted with the Union representatives commencing on 1 May and continuing perhaps only for a very few days thereafter, taking account of the fact that there was Bank Holiday. In the event the Respondent was accepting liability to pay a week's wages in lieu of notice. We have no evidence to suggest that would have placed them in any great difficulty if that period has been extended, perhaps by no more than two or three days, whilst consultation took place. There was an agreed selection procedure in place, and we do not think that the consultation process would have taken very long. . . certainly no more than a few days."

In the EAT, HHJ Richardson stated that "In this case, while there was a complete failure to consult, there was material in the tribunal's own findings which would justify a lesser protected period. There were, as the tribunal found, special circumstances lying behind that failure – namely, the sudden and unexpected direction by Alstom to cease work on one of two generators and to reduce resources on the site. That, to our mind, is at least potentially a mitigating circumstance of considerable power and importance. In an ordinary case of complete failure to consult there will not be a special circumstance brought about by an outside agency."

However:

"However, when assessing the seriousness of a default, it is relevant both to consider the culpability of the employer and the harm or potential for harm of the default. The tribunal should take into account all the circumstances and make such award as is just

and equitable. It is relevant that no consultation took place at all. It is also relevant (for example) that the consultation could in any event have taken place over a short period by reason of the special circumstances of this case; and that there was already an agreed redundancy selection procedure which the employer operated. Taking into account such factors does not, we emphasise, mean that the award should be tailored to the length of time consultation would have taken. It should not. But the tribunal in assessing the seriousness of the default should take into account all the circumstances in order to reach a rounded judgment as to what is just and equitable."

The case was remitted to the Tribunal, which reduced the protective award from 90 days to 30 days. It can thus be seen that **there is a serious risk of an award even if there are special circumstances if there is no consultation.**

Advice should be taken about this aspect of the process before there are collective dismissals.

Redundancy, furlough or working from home: who to select

We considered the issue of frustration, collective consultation and special circumstances in the first bulletin and reference should be made to this.

The employer may decide that it has to select some employees for redundancy, some for furlough and others to work from home to pull the business through. Those who are asked to continue to work may object if their terms and conditions are changed to their detriment and they are worse off than if they had been furloughed.

So far as a redundancy process is concerned, we envisage that this will have to be a process with proper selection criteria and meaningful consultation. We have been asked whether a refusal to co-operate with any notion as to furlough may be taken into account. Provided that the employee is made aware of this, we consider, in this altered climate, that it may be a legitimate matter to take into account provided that the employee has been warned that this may be so. Whilst refusal to co-operate may be dangerously close to subjective criteria, in *Graham v ABF LTD* [1986] IRLR 90 the employer's criteria of "quality of work, efficiency in carrying it out and the attitude of the persons evaluated to their work" passed the reasonableness test. The employee had displayed hostility to new tasks.

We also think it needs to be borne in mind that this crisis is hopefully not long term so that an inability to do the job from home should be weighed against the value of the employee to the business before the crisis loomed.

At the end of the day, the business needs will dictate who is to be retained and who is to be made redundant.

We would point out that where the employer is choosing who to make redundant and who to furlough, it is effectively looking to a time when the crisis has passed and employees return to work (since the furloughed employees will not be working anyway during the crisis but the employer has in mind that they will return to the business).

We therefore do consider that rigorous selection criteria and procedures should be followed, in such circumstances, which are in reality no different from those where the employer is selecting as between persons it wants to retain to continue to work and those that are redundant.

Advice should be taken about how to proceed. It has become apparent that many employers are simply asking employees to work from home without thinking through the issues and we suggest that a structured approach should be taken as set out above.

The Self Employed

Whilst the Government announced the 'Furlough' package for employers and employees, considerable concern has been expressed about the impact of staying at home on the self-employed. To this end the House of Commons, Public Bill Committee had proposed an amendment to the Coronavirus Bill "Statutory Self-Employment Pay" which provided that there must be regulations to cover freelancers and the self-employed, who will receive guaranteed earnings of 80% of their monthly net earnings averaged over the previous three years, or up to £2917 a month, whichever is the lower.

The Government has now produced a Scheme for the self-employed.

The essential points are that:

- **You must be trading when you apply and intend to continue to trade, which is totally different from employees, who must not work.**
- **If your trading profits are more than £50,000 you cannot claim.**
- **The grant will be based on the last three years of profits.**

The self employed

On Thursday 26th March 2020, the Chancellor announced the nature of the help that would be given to the self-employed. We set out the nature of the Scheme below in blue.

Guidance

Claim a grant through the coronavirus (COVID-19) Self-employment Income Support Scheme

Use this scheme if you're self-employed or a member of a partnership and have lost income due to coronavirus.

Published 26 March 2020

From:

HM Revenue & Customs

Contents

This scheme will allow you to claim a taxable grant worth 80% of your trading profits up to a maximum of £2,500 per month for the next 3 months. This may be extended if needed.

Who can apply

You can apply if you're a self-employed individual or a member of a partnership and you:

- have submitted your Income Tax Self Assessment tax return for the tax year 2018-19
- traded in the tax year 2019-20
- are trading when you apply, or would be except for COVID-19
- intend to continue to trade in the tax year 2020-21
- have lost trading/partnership trading profits due to COVID-19

Your self-employed trading profits must also be less than £50,000 and more than half of your income come from self-employment. This is determined by at least one of the following conditions being true:

- having trading profits/partnership trading profits in 2018-19 of less than £50,000 and these profits constitute more than half of your total taxable income
- having average trading profits in 2016-17, 2017-18, and 2018-19 of less than £50,000 and these profits constitute more than half of your average taxable income in the same period

If you started trading between 2016-19, HMRC will only use those years for which you filed a Self-Assessment tax return.

If you have not submitted your Income Tax Self-Assessment tax return for the tax year 2018-19, you must do this by 23 April 2020.

HMRC will use data on 2018-19 returns already submitted to identify those eligible and will risk assess any late returns filed before the 23 April 2020 deadline in the usual way.

How much you'll get

You'll get a taxable grant which will be 80% of the average profits from the tax years (where applicable):

- 2016 to 2017
- 2017 to 2018
- 2018 to 2019

To work out the average HMRC will add together the total trading profit for the 3 tax years (where applicable) then divide by 3 (where applicable) and use this to calculate a monthly amount.

It will be up to a maximum of £2,500 per month for 3 months.

We'll pay the grant directly into your bank account, in one instalment.

How to apply

You cannot apply for this scheme yet.

HMRC will contact you if you are eligible for the scheme and invite you to apply online.

Individuals do not need to contact HMRC now and doing so will only delay the urgent work being undertaken to introduce the scheme.

You will access this scheme only through GOV.UK. If someone texts, calls or emails claiming to be from HMRC, saying that you can claim financial help or are owed a tax refund, and asks you to click on a link or to give information such as your name, credit card or bank details, it is a scam.

After you've applied

Once HMRC has received your claim and you are eligible for the grant, we will contact you to tell you how much you will get and the payment details.

If you claim tax credits you'll need to include the grant in your claim as income.

Other help you can get

The government is also providing the following additional help for the self-employed:

- deferral of Self Assessment income tax payments due in July 2020 and VAT payments due from 20 March 2020 until 30 June 2020
- grants for businesses that pay little or no business rates
- increased amounts of Universal Credit
- Business Interruption Loan Scheme

If you're a director of your own company and paid through PAYE you may be able to get support using the Job Retention Scheme.

We will update this Bulletin with new editions to keep up to date with developments.

MICHAEL DUGGAN QC

MDQC Employment,
Commercial & Business Protection
michael@dugganqc.com
07957365302

Michael is the author of Duggan QC on Contracts of Employment (4th Edition) obtainable at www.dugganpress.com. He is regularly instructed by HFW on employment matters.

NEIL ADAMS
HFW, Friary Court
65 Crutched Friars
London EC3N 2AE
United Kingdom

neil.adams@hfw.com

Neil is a partner at HFW and Head of the Employment Team. He can provide advice and assistance in relation to any of the above matters.

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about capabilities, please visit hfw.com

hfw.com

Americas | Europe | Middle East | Asia Pacific