



Employment Law Newsletter - Furlough leave - 22nd March

What is furlough leave?

It is the term given to leave taken by workers under the government's Coronavirus Job Retention Scheme. The scheme is part of the Chancellor's measures to help businesses through the Coronavirus crisis. It enables UK employers to continue paying part of the salary of those employees that would otherwise have been made redundant or laid off. They will be 'furloughed' instead. Employers will be able to claim back up to 80% of a furloughed employee's employment costs, up to a maximum of £2,500 per month.

Which employers can claim it?

Any employer, whether a sole trader, partnership, limited company or LLP. The only criteria are that you have employees, and you place them on 'furlough leave'.

How much will the government reimburse? What will it include?

HMRC will reimburse 80% of furloughed workers' wage costs, up to a cap of £2,500 per month. The government hasn't made clear whether this will include pension and employer national insurance contributions, but it is likely that it will.

Will the payments to employees be subject to normal tax and national insurance deduction?

There is nothing in the guidance to suggest that they won't, so we believe that the employee's salary will be subject to usual deductions.

How long will the scheme last?

The government intends for the Scheme to run for at least 3 months from 1 March 2020, but has said it will extend it, if necessary.

Can you insist on putting someone on furlough?

Yes, if you have a clause in their contract that allows you to introduce lay off that would cover the situation – you need to check the contract. If you do not have an applicable lay off clause in the contract, you would need the employees' consent. However, if the alternative is redundancy then most employees are likely to consent.

How do you select for furlough?

Taking furlough leave remains subject to normal employment law. Employers should consider asking for volunteers for furlough. If it is necessary to select employees, employers may wish to use redundancy selection criteria. That way, if an employee refuses furlough, you can then select them for redundancy using the same criteria (subject to usual consultation). Employers should avoid discriminatory criteria for selection.

Can an employee undertake work whilst furloughed?

No, employees cannot work whilst on furlough leave

Will it be unfair to make someone redundant rather than place them on furlough leave?

Employees must consider alternatives to redundancy and furlough leave is one of them. An employer would need to justify its decision not to agree furlough leave as an alternative to redundancy. Failure to do so could result in an unfair dismissal.

Can we put people on furlough leave part time, and have them work part-time?

There's no guidance on this yet. It will be helpful for many businesses if you can. We will need to see what the detailed guidance says when it is published. This may make it harder for HMRC to administer the scheme, and so may not be allowed.

Can you rotate employees on furlough?

There's no guidance on this yet. It will be helpful for many businesses if you can. We will need to see what the detailed guidance says when it is published.

Can you furlough employees who can't work owing to childcare issues?

We believe this is likely to amount to a breach of the time off to care for dependants rules, and may amount to discrimination. However, childcare difficulties may prompt employees to volunteer for furlough leave if their current circumstances make it difficult for them to work.

What should you do if you want to implement furlough leave?

The fact the employee will be on furlough leave should be recorded in writing. If you have the right to lay off the employee in your contracts, you should notify the employee of the date that their furlough leave will start, in writing. If you need consent, we recommend that you ask the employee to sign something that confirms the furlough arrangement. This could be a letter from you that they sign, to confirm their agreement to the arrangements.

My employees are already working at home. Can we recover their salary?

No, employees can't undertake work whilst on furlough leave. You could transfer the employee to furlough leave instead, and the business could start reclaiming the employment costs for the period of furlough.

Can employees serve their notice period whilst on furlough leave?

The guidance so far doesn't address this point, but we believe that employees under notice of termination may be excluded. The purpose of the scheme is to avoid redundancies and to ensure individuals retain employment. It could undermine the purpose of the scheme if employers could use the scheme to reclaim the costs of employees' notice periods.

Could furlough leave increase the overall costs of redundancy, if that becomes necessary in the future?

If employees cannot serve their notice whilst on furlough leave, the employer would have to pay the employee during the notice period after the Furlough period. If the employer is able to reclaim the employee's furlough costs from HMRC, the redundancy costs would be delayed, but not necessarily increased (although any statutory redundancy payment may increase if the employee is older or has longer service at the point of dismissal). However, if an employer tops-up an employee's salary above the amount that it can reclaim, this would be an additional cost which it would not have incurred if it had commenced the notice period now, instead of using furlough.

Our employee is already serving notice. How can we transfer them to furlough leave?

It is not clear whether an employee serving their notice period can take furlough leave. If you wish to place an employee currently serving notice on furlough leave, until further guidance is provided, you may wish to obtain consent to withdraw their notice and transfer them to furlough leave instead. Employers will be conscious that if the employee is still redundant after the furlough period, they may need to re-commence the notice period. This may result in additional costs if the employee's salary is topped up above the £2,500 recovery cap during the furlough period. A solution could be to agree to vary their contract to reduce the notice period at the end of the furlough period. The employee may be willing to do so as an alternative to redundancy.

Can employees who have already left the business owing to redundancy benefit from furlough leave?

Employees who have already been dismissed for redundancy could appeal their dismissal. Employers should consider whether to reinstate the employee on furlough leave. If they decide not to they should be clear about why, since the employee may rely on this as part of an unfair dismissal claim. Employees that are reinstated may be entitled to pay they would have received between their dismissal and reinstatement. It is not clear whether employers will be able to recover any of this amount under the furlough scheme.

Will collective consultation apply to furloughed employees?

Not if furlough leave is by consent. However, if you enforce furlough leave without the contractual right to do so, or consent obtained now, this might amount to a constructive dismissal, and if more than 19 employees at one establishment are affected, the collective consultation obligations could apply.

How will employers get their money back?

Employers will need to submit information to HMRC about the furloughed employees through a new online portal. The portal is not up and running yet.

Is the new system open to abuse?

Yes. Anti-fraud measures are expected, which might include public naming and shaming for those who abuse the rules, as well as penalties.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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