

Furlough leave: Q&A

On **20 March 2020** the Chancellor Rishi Sunak, announced a raft of rescue measures for UK businesses, collectively referred to as the Coronavirus Job Retention Scheme (CJRS).

By far the most important measure for employers was the government's promise to fund 80% of wage costs for any employee who *"would otherwise have been laid-off"* due to coronavirus, up to a cap of £2,500 per month. The Government say that it will last at least 3 months from **1 March 2020**, but will be extended if necessary.

The new scheme describes any employee for whom this funding is claimed as placed on "furlough leave" or as being "furloughed".

Guidance on the scheme was published on **26 March 2020**, and updated on **4 April 2020** (available online [here](#)).

It is important to remember that this guidance has been put together very quickly and has been issued by HMRC rather than BEIS (which normally leads on employment law policy). Therefore, at this stage there are inevitably some legal 'grey areas' which require clarification. Detailed draft legislation is expected in due course which will hopefully fill these gaps.

Furlough Leave: Eligibility

Which categories of employer can apply?

The government guidance states that any UK organisation with employees can apply, regardless of their size or sector, including businesses; charities; recruitment agencies (where agency workers are paid through PAYE); and public authorities. The guidance states that the scheme *"is designed to help employers whose operations have been severely affected by coronavirus"* but goes on to recognise that different businesses will face different impacts, and to confirm that all employers are eligible.

In order to claim an employer must have created and started a PAYE scheme by 28 February 2020 and have a UK bank account. Employers must also have signed up to [PAYE online](#) which can take up to 10 days.

Are there any special considerations for the public sector?

Yes. There had previously been some confusion over whether the funding scheme would apply to the public sector at all. The guidance confirms that public sector employers are eligible. However, the government expects that the scheme will not be used by many public sector organisations, as most are required to remain operational and continue to provide public services. Where employers currently receive public funding for staff costs (whether or not these costs are expressly related to the coronavirus response) the guidance makes clear that these staff should not be furloughed.



Which staff are eligible under the scheme?

It appears that any member of staff who is paid by PAYE through your payroll system will be covered. This will include employees (both full-time and part-time); workers; and even zero-hours staff.

Agency workers can be placed on furlough leave by employment agencies (as long as they are paid through PAYE).

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed. However, an Apprentice must be paid at least the Apprenticeship Minimum Wage, National Living Wage, or National Minimum Wage as appropriate for all the time they spend training. Employers must make up any shortfall between the funding received under the furlough scheme and this minimum level of pay.

Guidance issued on 4 April 2020 confirms that office holders (including company directors), and salaried members of Limited Liability Partnerships (LLPs) will also be eligible for funding. The guidance contains further details about the practicalities of placing these individuals on furlough.

Is there a minimum/maximum furlough period?

Yes. The guidance states that employees must be placed on furlough for a minimum of **3 weeks**. No maximum furlough period is specified.

Can we furlough an employee who has accepted a job offer but has not yet started?

No. To be eligible for furlough leave, employees must have been added to your payroll no later than **28 February 2020**. This means that you cannot use furlough leave or claim funding for recent or imminent starters (even if you have no work for them to do).

Can we furlough an employee who joins our organisation through TUPE after the 'cut-off' date?

The government guidance does not address this situation and the position remains unclear. Legally, this seems unlikely. Employees joining through TUPE preserve their continuity of employment, their work for their previous employer and their work for you will be regarded as separate for PAYE purposes. As far as we know, employees who are not on your organisation's payroll by 28 February they will not be eligible for funding. It is possible (although by no means certain) that the government may make special provision for this situation when draft legislation is published.

How does the furlough leave scheme apply to agency workers?

Agency workers can be placed on furlough leave by employment agencies (as long as they are paid through PAYE). However, the mechanics of this for employment agencies are likely to be difficult.

Government guidance states that furlough should be agreed between the agency (as the deemed employer) and the worker, although is advised to discuss the need to furlough with any end clients involved. As with employees, agency workers should perform no work at all, through or on behalf of the agency that has furloughed them while they are on furlough leave, including for the agency's clients.

Where an agency worker is 'on assignment' at the point they put on furlough, it seems likely that the agency will be able to claim a refund based on 80% of their average wages (see below re calculating furlough pay for workers with irregular hours). The guidance makes clear that the whole of the refunded sum must be given to the worker and no fees may be taken.

The position is less clear where an agency worker is 'between assignments', or has not been placed on an active assignment for some time, at the point they are placed on furlough, as agency workers generally have no right to pay between assignments. This issue may potentially be clarified by draft legislation.

Agency agreements and pay arrangements vary widely. If you have any questions about how the furlough scheme will impact agency workers in your organisation, please contact your usual Weightmans advisor.

Can I furlough an employee who is working their notice period?

Yes. Nothing in the guidance expressly prevents this. However, this would seem to run contrary to the stated aims of the scheme (namely '*job-retention*' and subsidising the wages of employees who would "*otherwise been laid-off*"). This issue may potentially be clarified by draft legislation.

What if an employee has two jobs? Can they be furloughed from both?

If an employee has two different jobs with two different employers, they can be furloughed from both roles. Both employers may apply separately for a refund of wage costs. Each employer will separately benefit from the £2,500 cap.

Calculating the refund sum and the refund mechanism

How is the £2,500 calculated? Is the amount calculated gross or net?

The guidance states that employers will receive a grant to cover the **lower** of 80% of an employer's regular wage or £2,500 per month. Salary is assessed as of **28 February** so, presumably any pay rises awarded after that date should not be counted.

This sum is calculated on a gross basis. The employee is required to pay tax on the sum received as usual.

Additionally, HRMC will also reimburse the associated employer National Insurance Contributions and minimum automatic enrolment employer pension contributions on the subsidised wage.

What do employees' "wage costs" cover?

Government guidance issued on **4 April 2020** states that employers can claim for any regular payments they are obliged to pay their employees. This includes wages, past overtime, fees and compulsory (presumably contractual) commission payments.

However, discretionary bonuses and commission payments (including tips) and non-cash payments (e.g. the value of health insurance or a car) should be excluded.

It is unclear exactly what 'past overtime' or 'fees' mean in this context. Salary is assessed at **28 February 2020**. So, presumably, any overtime an employee has worked **before** this date which the employee has not yet been paid for can be included as part of the refund claim. Hopefully this will be clarified by draft legislation.

As stated above, employer NICs and minimum automatic enrolment employer pension contributions will be reimbursed separately.

Any 'top-up' salary over and above 80% (and employer NICs and automatic enrolment contributions on that top-up salary) will not be refunded. The guidance also makes clear that employers cannot claim any voluntary automatic enrolment contributions above the minimum.

What about the remaining part of the employee's salary? Must the employer 'top up' the remaining 20% of pay?

No. The guidance states that employers "*can choose to provide top-up salary in relation to the grant*" making clear that this is not compulsory. Similarly, the guidance for employees states that: "*Your employer could choose to fund the difference between this payment and your salary, but does not have to.*"

How does the refund scheme apply to employees who work irregular hours?

For employees whose pay varies, an employer may claim for the **higher** of either the same month's earnings in the previous year OR average monthly earnings for the **2019–20** tax year. If the employee has been employed for less than 12 months, their employer can claim for an average of their monthly earnings since they started work.

Can we reduce employees' pay down to 80% even if this takes them below the National Minimum Wage (NMW)?

Yes. The guidance makes clear that employees are only entitled to the National Living Wage (NLW) or 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. Importantly however, the guidance specifies that if workers are required, for example, to complete online training while they are furloughed, they must be paid at least the NLW/NMW for the time spent training, even if this is **more than the 80%** that will be subsidised.

What is the mechanism for claiming funding under the scheme? Must an employer pay employee's wages up-front in order to claim them back later?

Employers will be able to use an online portal to claim refunds under the scheme. The portal is not yet 'live' but is expected to be ready for use by the end of April 2020. The guidance details the information an employer must provide to HMRC to claim a refund. Importantly, claims can be backdated to **1 March 2020**.

However, there are still question marks over how the funding mechanism will work in practice. Will employers be required to pay wages upfront (and evidence what they have spent in order to claim)? Or does the scheme allow employers to claim for wages that it was unable to pay, or which fall due for payment in the near future?

Unfortunately, this is still not completely clear. The guidance does not specifically state that payment to employees **must** be made by an employer before HMRC will release funds. It refers to claims being made "*shortly before or during running payroll*" which seems to suggest that claims can be made for imminent payment of salary (allowing employers to wait until funds are received before making payment to staff).

The guidance states that, to make a claim, employers need to know the *“amount claimed (per the minimum length of furloughing of 3 consecutive weeks)”*. This suggests that a claim can be made in advance for a whole period of furlough before that period starts. Further specific guidance is anticipated before the payment portal goes ‘live’ shortly.

The guidance makes clear that, where employees are to be placed on furlough on 80% pay, this adjustment should be made within payroll before payment is made. This adjustment will not be made by HMRC.

Placing employees on furlough leave

Can furlough leave be imposed, or does the employee need to agree to be furloughed?

Our view is that, if you already have a clause in your contracts of employment allowing you to place employees on unpaid ‘lay-off’ then you can impose furlough leave.

However, if you do not have this contractual authority, employees must agree to be placed on furlough leave. Current government guidance for employers states that *“employers should discuss with their staff and make any changes to the employment contract by agreement”*.

You **must** write to employees to inform them that you intend to place them on furlough leave and explain what this means. This written notice must be retained for **5 years**. Please do not hesitate to contact us if you need support with this.

In reality most employees are likely to readily agree to be furloughed where the alternative is redundancy.

Is ‘implied agreement’ enough to place employees on furlough?

In other words, can you write to employees and state that, if they do not respond to you, you will presume they have agreed to be placed on furlough leave? The answer is probably not. Implying agreement to any kind of contractual change is a risky strategy. The risk of ‘implying’ agreement is much lower if you are planning to ‘top-up’ furlough pay to 100% of your employees’ normal pay. However, obtaining employees’ express agreement is always preferable.

If an employee refuses to agree to furlough, can we terminate their contracts and re-engage them on different terms?

Yes, you probably can, but this should be a last resort. The furlough leave scheme requires that employees must be on your payroll at 28 February 2020 to be eligible for a refund. The position of employees who have been terminated and then re-engaged on new terms is currently unclear. There is a risk that re-engagement will mean that they were not effectively on your payroll on the required date. If you are considering terminating employee contracts and re-engaging on new terms it is imperative that you seek legal advice first.

Do employees have to be put on Furlough Leave for a continuous period? Is it possible for employees to be placed on and off Furlough Leave?

Each individual period of furlough leave must last at least 3 consecutive weeks, and employees must not do any work while they are furloughed.

However, government guidance issued on **4 April 2020** confirms that employees can be furloughed multiple times. When they return to work, they must be taken off furlough.

So, for example, if your organisation runs two separate shifts, you may wish to furlough one and then the other. Operating furlough rotationally in this way is likely to be fairest and most popular from an employee relations angle. The guidance confirms that this is acceptable, as long as employees are taken off furlough when they return to work, and each individual period of furlough lasts at least 3 consecutive weeks.

Can we bring employees back from furlough leave early if high levels of sickness absence among those still at work mean that we have insufficient cover?

The guidance states that employees must be placed on furlough leave for a minimum of 3 consecutive weeks. The guidance makes clear that an employee must not work during furlough leave (so you cannot ask an employee to work the occasional day or shift during furlough leave). It is currently unclear whether, by bringing an employee back from furlough leave early (for example after 2 weeks), an employer will forfeit the right to a refund for any part of that employee's furlough leave.

It is therefore safest to assume that once an employee has been placed on furlough leave, they are out of the workforce entirely for at least 3 weeks. You will need to think carefully about which employees, and what percentage of your workforce, you wish to place on furlough leave, building in some flexibility where you can in case of high sickness absence levels. If you need any support with this process, please do not hesitate to let us know.

Employee rights and obligations during furlough

Can an employee work while on furlough leave?

No. The guidance makes clear that a furloughed employee must **not** work for their employer whilst on furlough leave.

However, a furloughed employee can *"take part in volunteer work if it does not provide services to or generate revenue for, or on behalf of your organisation"*.

An employee can also be required to complete training during the furlough period. Remember that, if an employee is required, for example, to complete online training while on furlough leave, they must be paid at least NLW/NMW for the time spent training (even if this is more than the 80% of their normal wage which will be subsidised).

Of course, employers have an ongoing duty of care to employees. It is therefore highly likely that employers can keep in touch with employees by phone or email without breaking the 'no work' rule.

Government guidance issued on **4 April 2020** confirms that, if your contracts of employment permit, your employees are allowed to work for another employer while they are on furlough from your employment. Where you take on a new starter, they must indicate on their **Starter Checklist for PAYE** if they are furloughed from other employment.

Note that the performance of statutory duties by a company director will not count as work for the purposes of the scheme (although it is unclear how far this exception will stretch).

If an employee does perform work during furlough, will this bring the furlough period to an end and/or prevent an employer from claiming a refund?

This is not clear from the guidance we currently have. However, HMRC has promised to take a robust approach to potential fraud under the scheme. HMRC will of course have visibility of pay records, and therefore we would anticipate that if an employee earns wages during a furlough period, it will result in the employer not being reimbursed for any furloughed wages paid.

Will furloughed employees retain continuity of service and other benefits of being an employee?

The guidance states that furloughed employees will remain employee during the furlough period. Given that the rationale of the scheme is to avoid redundancies, our view is that continuity of service will be maintained. The fact that employees will receive back-dated pay in the form of the government grant also suggests that employment should be regarded as continuous.

In principle, a furloughed employee should retain all contractual benefits (with the obvious exception of their right to full pay). Exceptions might include allowances which are expressly linked to work performed (e.g. a night shift allowance, or a car allowance where the vehicle is strictly for work use only). The position may potentially be clarified in draft legislation. Please do not hesitate to contact us regarding specific pay arrangements for your staff during furlough.

Government guidance makes clear that employees on furlough still have the same rights at work such as Statutory Sick Pay; maternity and other parental rights; rights against unfair dismissal; and redundancy payments.

Can we continue with disciplinary and grievance procedure during a period of furlough?

This is not clear from the guidance we currently have. Employees are not permitted to work during a period of furlough leave, and there is a possibility that continued engagement in these internal processes might be regarded as 'work' by HMRC. Further, an employee is only entitled to furlough pay if they "would otherwise have been laid off". A dismissal for a reason other than redundancy (e.g. conduct or capability) during the furlough period might mean that the right to claim a refund is forfeited. Hopefully draft legislation will clarify the position on this. In the meantime, whether to continue or suspend internal proceedings during furlough will be a judgment call on a case by case basis. Please do not hesitate to contact your usual Weightmans advisor for support.

Furlough and other types of leave

Can I furlough an employee who is already on unpaid leave?

No. The guidance states that employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February 2020. For more detail on the interaction between furlough leave and unpaid 'lay-off' please see below.

Can I furlough an employee who is already on sick leave?

No. The guidance states that employees who are on sick leave or self-isolating in accordance with government guidance are entitled to SSP but cannot be furloughed. They can be furloughed when their period of sickness absence comes to an end.

Can I furlough an employee who is 'shielding'?

Public health guidance states that people in extremely vulnerable groups should stay at home at all times and avoid face to face contact for a period of 12 weeks (see online [here](#)). This is referred to as 'shielding'.

Government guidance published on **4 April 2020** confirms that an employee who is 'shielding in line with public health guidance' (or needs to stay at home with someone who is shielding) can be placed on furlough, if they are unable to work from home and would otherwise be made redundant.

The position is more difficult where an individual who is shielding (or staying at home with someone who is shielding) is NOT able to work from home and would NOT otherwise have been made redundant – i.e. they are in a business critical role and/or there is still work available for them to do. If you have an employee in this position we would be happy to advise you.

Can I furlough an employee who needs to stay at home due to caring responsibilities?

Yes. Government guidance issued on 4 April 2020 makes clear that employees *"who are unable to work because they have caring responsibilities due to COVID19 can be furloughed. For example, employees that need to look after children can be furloughed"*.

There does **not** seem to be any requirement here that the employee would otherwise have been made redundant. This broadens the scope of the furlough scheme in comparison to previous guidance.

What if an employee falls sick while they are on furlough leave?

The position is currently unclear. If an employee is entitled to full pay during sick leave under company sick pay arrangements, it might be attractive to them to move off furlough leave and onto sick leave. On the other hand, if they are entitled to receive only SSP during sickness absence, it will be more attractive to remain on furlough.

It is currently unclear whether, if a period of furlough is 'interrupted' by a period of sick leave, this will bring the furlough period to an end, or whether the employer will forfeit its right to a refund for all or part of the furlough period. Draft legislation may potentially clarify this.

Can I furlough an employee who is on maternity leave?

It is currently unclear whether furlough leave and maternity leave can run concurrently, or whether an employee must either be on furlough leave OR maternity leave.

The government guidance seems to suggest that an employee on maternity leave **can** be placed on furlough leave at the same time. This is presumably because, while employees on maternity leave are protected from redundancy to some extent under 'normal' redundancy arrangements, they might still in some circumstances be made redundant.

However, the guidance makes clear that normal rules apply, and employees on maternity leave remain entitled to 39 weeks SMP or maternity allowance, and will still be eligible for 90% of their average weekly earnings in the first 6 weeks of maternity leave. We interpret this as an entitlement to 90% of their **normal pay** (as opposed to 90% of their reduced pay during the furlough period). Hopefully draft legislation will clarify the position here.

The guidance states that any enhanced (earnings related) contractual maternity pay will be included in the ‘wage costs’ that can be claimed back from the government scheme.

Selecting employees for furlough leave

How should I select which employees to place on furlough leave?

Where you only need to furlough part of your workforce, the issue of who to select, and how to select them, is challenging. Some employees may see furlough leave as a benefit (as they will receive 80% pay in return for performing no work). Others may see it as a detriment, as they will lose the opportunity to earn 100% of pay.

There may be some roles critical to the continuity of your business which cannot be furloughed. Outside these roles, a good starting point is to ask for volunteers for furlough leave. If you are oversubscribed, some kind of matrix selection might work well (this need not be as refined as a redundancy selection process). However, this is not essential and may depend on numbers and the composition of your workforce. If you need any assistance please let us know.

Can I prioritise for employees who are unable to work anyway (e.g. those who are shielding in line with government guidance, or those employees with childcare responsibilities following school closures)?

The government guidance states that *“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”*. This means that it is as important as ever to be mindful of discrimination.

The government guidance makes clear that employees in both these groups **can** be furloughed. However, employers must take care when prioritising these employees for selection.

Bear in mind that employees who are ‘shielding’ are more likely to have long term health conditions, and be disabled under the Equality Act. Any decision to prioritise employees with childcare responsibilities may indirectly discriminate against women (who are statistically more likely to be primary carers).

In reality though, furlough leave is likely to be an attractive option to employees who find themselves in this position (especially where they are currently taking unpaid leave to look after their children) and they may readily agree to be furloughed.

There is an argument that prioritising disabled employees for furlough is effectively a reasonable adjustment (although this may depend on the employee’s subjective view of whether furlough leave is a benefit or a detriment). Our view is that health and safety is the overriding concern here. Prioritising disabled employees or those who are ‘shielding’ at home is likely to be a proportionate means of achieving the legitimate aim of keeping them safe.

Selecting employees for furlough may give rise to a number of sensitive issues specific to the circumstances of individual employees. Please do not hesitate to get in touch and we will be happy to support you.

How do I deal with an employee who wants to be on furlough leave but as an employer I need them working?

This should not be a problem. The decision to designate an employee as 'furloughed' rests with the employer. An employee has no right to insist that they be placed on furlough leave, and has no right of redress if they feel that an employer has unreasonably refused to furlough them (unless it can be shown that this decision was tainted by discrimination).

However, there may still be resentment from employees who are not furloughed, if they see their colleagues being paid for doing nothing (even at a reduced rate). From an employee relations perspective, you will need to explain that your organisation has been forced to make difficult choices to ensure business continuity and that some employees are required to remain in work. It may help to offer some kind of reward or incentive to employees who continue working whilst others are furloughed (perhaps on a deferred basis) if this is commercially possible.

What if an employee refuses to be furloughed because they want a redundancy payment?

For some employees, generally older and longer serving, redundancy may remain an attractive option.

If an employee refuses to be furloughed, you can require them to come to work (if there is sufficient work for them to do).

If there is insufficient work for them to do, you could consider placing them on a period of 'lay-off'. This is unpaid, but some employees may prefer this, as 'lay-off' generally gives rise to a right to request a redundancy payment after a period of 4 weeks. This is not the case with furlough leave. If you do not have a contractual right to 'lay-off' employees, they will need to agree to this.

Alternatively, you may wish to conduct a redundancy exercise, subject to usual rules and processes, for employees who refuse to be furloughed. If your business may lack funds to make statutory redundancy payments, employees should be informed of this. This may encourage them to agree to furlough leave. If your organisation is in this difficult position, please do not hesitate to get in touch and we will be happy to advise you.

Furlough, lay-off and redundancy

What is the difference between the new furlough leave scheme and the existing legal concept of 'lay-off'?

The key difference seems to be that lay-off is very often a pre-cursor to redundancy. Employees who are laid-off have the right to request a redundancy payment after a period of 4 weeks of lay-off. There is no suggestion that 'furlough leave' is a pre-cursor to redundancy in a similar way. Also, 'lay-off' is unpaid, while furlough leave allows employers to claim a refund of 80% of the employee's wage costs directly from government.

Would it be unfair to make an employee redundant as opposed to placing them on furlough Leave?

There is no clear answer to this. Employment law requires that the size and administrative resources of an employer must be taken into account when determining whether dismissal for any reason (including redundancy) is fair. The fact that employers now have recourse to public funds to subsidise employees' wages may potentially be a factor for employment tribunals assessing the fairness of redundancy dismissals further down the line. Our view, is that employees can still be fairly made redundant, despite the availability of furlough leave as an alternative. However, this will depend on the facts and circumstances of the case, including the employer's cash-flow position.

Where an employee has refused to be furloughed, our view is that it will be fair to make them redundant as an alternative.

The existence of furlough leave may make it harder to argue that an employer did not have time to carry out full and proper redundancy consultation for the purposes of s188 TULRCA (as the scheme effectively buys employers some 'breathing space' to follow the correct procedures). See below for further details.

If an employer intends to place more than 20 employees on Furlough leave, will they need to collectively consult with those employees in accordance with section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")?

Under section 188 of TULRCA, where an employer proposes to make large scale redundancies of 20 or more employees from one establishment within a period of 90 days or less, it must consult with representatives of the affected employees. Where an employer proposes 100 or more redundancies, consultation must begin at least 45 days before the first dismissal takes effect. Where less than 100 redundancies are proposed, consultation must begin at least 30 days before the first dismissal takes effect.

The guidance states that it "*may be necessary to engage collective consultation processes*" when placing employees on furlough, which is vague and unhelpful.

Our view, is that collective consultation obligations are not triggered simply by inviting employees to agree to furlough leave as, at that stage, no redundancies are being proposed. However, any written communications inviting employees to agree to furlough leave will need to worded very carefully.

Where an employer has been unable to obtain consent from employees to be placed on furlough leave, those employees who did not agree will be candidates for redundancy. Our view is that the obligation to collectively consult with employees will kick in at that stage (where sufficient numbers of employees are impacted) as redundancies are being proposed.

Can an employer place its employees on Furlough Leave and then make the employees redundant?

There is nothing in the guidance to suggest that employees cannot be made redundant following a period of furlough leave, or that collective redundancy consultation cannot take place during a period of furlough.

Re-hiring ex-employees to access the furlough scheme

Are employees that have already been made redundant or laid off eligible for furlough?

The stated aim of the scheme is to subsidise the wage costs of employees who "*would otherwise have been laid off*". The guidance states that employees on paid leave can be furloughed, as long as they were placed on unpaid leave after 28 February.

Therefore, our view is that employees who are already on lay off remain eligible for furlough. Our view is that, where an employer has a contractual right to 'lay-off' employees, furlough leave can be imposed instead. If employees were laid-off by agreement (in the absence of a contractual right to lay-off) then agreement will have to be obtained a second time to place them on furlough leave instead.

Remember that claims for furlough pay can be backdated to **1 March 2020**. This suggests that, where employees have already been laid off, employees can re-designate that period of lay-off as furlough leave and claim wage costs for that period. However, this is not explicitly clear from current guidance and we will need to see draft legislation to confirm this.

The guidance makes clear that the scheme covers employers made redundant by their employer since **28 February 2020**, if they are **re-hired** by their employer.

If we bring back an employee who was previously made redundant, can we ask them to pay back their redundancy payment?

There is nothing in the guidance to suggest that this type of ‘claw-back’ arrangement is possible. Currently there is no legal basis for an employer to claim back a statutory redundancy payment which has already been paid to the employee. The draft legislation may potentially make provision for the claw-back of any enhanced redundancy pay paid by an employer, but we will need to wait and see.

The guidance makes clear that the whole ‘wage costs’ sum claimed back from the government must be paid to the employee, and no deductions may be taken by the employer.

What about employees who left the business for different reasons (other than redundancy)? Are they eligible for furlough?

Yes. The original guidance issued by the Government (issued on 26 **March 2020**) stated that only employees **made redundant** after **28 February 2020** could be re-hired and placed on furlough. However, updated guidance issued on 4 April 2020 broadened the scope of the scheme. The guidance now states that;

*“If you made employees redundant, **or they stopped working for you on or after 28 February 2020**, you can re-employ them, put them on furlough and claim for their wages through the scheme”.*

This seems to capture an exit for any reason including resignation and dismissal on conduct/capability grounds. This may mean that you receive enquiries regarding furlough from former members of staff who you do not wish to re-employ.

Remember that there is no obligation on employers to re-hire ex-employees. However, you will need to be careful when considering such requests, particularly so as to avoid allegations of discrimination.

If there was a sound, non-discriminatory reason for the dismissal at the time, then that should still hold true now. The risk increases if you choose to take back some dismissed employees, but not others. We would be happy to support you during this process.

What about employees who left through voluntary redundancy/settlement agreement?

It is currently not clear whether the government’s promise to include in the scheme those employees made redundant since 28 February 2020 will extend to those who have taken voluntary redundancy in this period or whose employment has been terminated by mutual agreement (for example through a settlement agreement). However, the broad phrasing used in the government’s latest guidance suggests that voluntary exits would be captured under the scheme. Hopefully draft legislation will clarify this.

How do we 're-hire' an employee for the purposes of placing them on furlough? Is continuity of employment preserved? What do we do when the furlough scheme comes to an end?

The government guidance contains no detail at all on the practicalities of re-hiring an ex-employee for the purposes of putting them on furlough. The guidance does not specify whether continuity of employment should be preserved in these circumstances.

Where employment has already been terminated, it is unlikely that you can simply 'revive' the old contract of employment. You will need to 're-hire' the employee on a new contract, probably under different terms.

Our view is that, unless future draft legislation states otherwise, continuity of employment will be broken in these circumstances, provided that there is a gap of at **least 7 days** between the last day of employment under the old contract and the first day of employment under the new contract.

The most effective approach may be to re-hire an ex-employee on a fixed-term contract, which will allow you to release them easily when their wages will no longer be funded by the furlough scheme. However, this may not be suitable in all circumstances. Please do not hesitate to contact us to talk through your options.

Furlough leave and holiday

Will employees continue to accrue holiday whilst on Furlough Leave?

In our view, employees will continue to accrue holiday entitlement whilst on furlough leave as they remain employed during this period.

Can an employee take holiday in the furlough period? What should an employee be paid for periods of holiday taken during furlough?

Guidance issued by ACAS seems to suggest that holiday **can** be taken during a period of furlough. However, this issue is not covered by the government guidance and there is no clear answer.

Allowing employees to take holiday during furlough may be an attractive option from an operational perspective. You may not want employees to return from furlough with the bulk of their annual leave left to take. However, you should think carefully before requiring or allowing employees to take leave.

It is unclear what employees should be paid for annual leave during furlough. In our view, it is likely that employees are entitled to their 'normal pay' during furlough leave (as per existing holiday pay case law) and should therefore receive 100% of salary. HMRC will only reimburse 80% of the employee's salary during furlough leave. If you cannot afford to make up the difference between 80% and 100% of salary, it may be unwise to insist that employees take annual leave during furlough, or to allow them to do so.

Further, it is important to remember that an employee must be placed on furlough for **a minimum of 3 weeks**. It is currently unclear whether HMRC will allow periods of annual leave and periods of furlough leave to run concurrently. There is a risk that HMRC will refuse to reimburse employers for any part of the furlough period designated as annual leave.

In the worst case, HMRC may refuse reimbursement for the **whole furlough period** if it considers that (because of interspersed periods of annual leave) the employee has not been properly furloughed for a minimum 3-week stretch.

However, this would seem very harsh given that ACAS guidance seems to provide for holiday being taken during a period of furlough.

Until we know more, it is safest to specify that any annual leave you allow your employees to use must be taken before and/or after any period of furlough leave, ensuring that furlough leave is taken in an unbroken stretch of at least 3 weeks.

Please do not hesitate to contact us to talk through this difficult and uncertain issue.

An employee wishes to take some of their holiday entitlement during the furlough period. Can we refuse?

Yes. Our view is that you are able to refuse a request for annual leave during a furlough period in the same way as during a period of work.

What about bank holidays that fall in the furlough period? Will furloughed employees be entitled to them.

This issue is not covered by the guidance and there is no clear answer. As above, there is a lack of clarity over whether employees on furlough are entitled to 80% or 100% of pay for periods of holiday taken during furlough (including bank holidays). A simple approach would be to state that employees are not entitled to bank holidays that fall during the furlough period and to instead offer a day in lieu when the furlough period is over. Again, please do not hesitate to contact us to talk through your options.

How is furlough pay treated from a tax perspective?

From a tax perspective, the government grants (of up to £2,500 plus employers NICs and associated automatic enrolment pension contribution) are to be included as income of the business for income tax/corporation tax purposes. This is because payments to furloughed employees will still go through payroll and therefore be tax deductible against business profits for income or corporation tax purposes. To the extent however these wage costs are being effectively paid for by the government this tax deduction will be matched by an income receipt. If the grant payments were not treated as income the business would in addition to having the wage bill funded by the government also get a tax deduction against profits for those payments. This therefore prevents businesses getting an additional income tax/corporation tax deduction for payments that are funded by the Coronavirus Job Retention Grant.

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Data Protection

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