

COVID-19 FURLOUGH SCHEME Q&A

3rd April 2020

JOB RETENTION SCHEME Q&A

ISSUE/TOPIC/QUESTION	OUR VIEW	RELEVANT LAW
<p>The information contained in this note does not constitute legal advice. Please do get in touch with us if you have specific queries arising out of any of the issues mentioned in this note.</p>		
<p>SOURCES OF INFORMATION</p>		
<p>Guidance for employers Guidance for employees Government Business Support page Business Support FAQs</p>		
<p>A. ELIGIBILITY</p>		
<p>A1 <i>What is it?</i></p>	<ul style="list-style-type: none"> • A scheme set up to allow UK employers to access support to continue paying part of their employees' salary for those that would otherwise have been made redundant. • All UK businesses are eligible to participate including small or large, charitable or non-profit. It will be backdated to 1 March 2020 and will run for 3 months i.e. until end May 2020, but it has been indicated that this might be extended if necessary. • It will cover both workers and employees on PAYE. 	<p>Guidance for employers/employees</p>
<p>A2 <i>How does it work?</i></p>	<ul style="list-style-type: none"> • Employers will need to designate "furloughed workers" and notify them of this change – this ultimately comes down to changing terms and conditions of employment. • Employers will then submit information to HMRC about the furloughed workers and their earnings through a new online portal (which is currently being set up). It is limited to those on PAYE including those on zero-hour contracts. • HMRC will reimburse 80% of furloughed workers' wages up to a cap of £2,500 per month (HMRC are setting up this reimbursement scheme) in addition to associated National Insurance Contributions (NICs) and minimum automatic enrolment employer pension contributions. 	<p>Guidance for employers/employees</p>
<p>A3 <i>Eligibility criteria</i></p>	<ul style="list-style-type: none"> • Employee must have been on PAYE payroll at least since 28 February 2020. • Employee must not have been placed on unpaid leave before 28 February 2020. • Employee must not be working on reduced pay or hours. • Employee must not be receiving SSP. 	<p>Guidance for employers/employees</p>

A4	<i>What happens to furloughed workers?</i>	<ul style="list-style-type: none"> • They remain on payroll but must not undertake any work for the employer except for volunteering or training as per the Guidance. • To be able to claim, the employee must be placed on furlough leave for at least 3 weeks. This also means the employer can only make one claim every three weeks per employee. 	Guidance for employers/employees
A5	<i>Employer has reduced pay – can you bring them back to normal and then put them on furlough leave?</i>	<ul style="list-style-type: none"> • We think this is possible. Any employee who is working on reduced pay or hours may not be furloughed so if they were to be brought back to their normal pay or hours they should be eligible to be furloughed. 	Guidance for employers/employees
A6	<i>Can you put those who were working full time in March 2020 on furlough leave from April 2020 and backdate to 1 March 2020?</i>	<ul style="list-style-type: none"> • No, the eligibility criteria do not allow this to happen and this would amount to a fraud on the HMRC which we don't recommend. Employers can only claim back for the period for which the employee was furloughed in accordance with the Guidance. 	Guidance for employers/employees
A7	<i>We have a zero-hour contractor who worked regularly for us but didn't work in February 2020 and therefore didn't get paid that month. Does this mean this worker cannot be placed on furlough leave?</i>	<ul style="list-style-type: none"> • The Scheme does not state that the relevant worker must have been paid in February but rather "must have been on PAYE payroll on 28 February 2020" – we don't think this worker is disqualified from the Scheme. • Rather the worker probably is on variable pay which means the calculation of his wage costs depends on whether he worked for more than one year or not for the employer. Refer to the Guidance for how to carry out the calculation. 	Guidance for employers/employees
A8	<i>Can a UK branch of a foreign entity claim back from the Scheme?</i>	<ul style="list-style-type: none"> • Yes, so long as it meets all the eligibility criteria. 	
A9	<i>What does "shielding in line with public health guidance" mean in the Guidance?</i>	<ul style="list-style-type: none"> • Shielding is a measure to protect extremely vulnerable people by minimising interaction between those who are extremely vulnerable and others. This includes those who have a condition which makes them extremely vulnerable or have received a letter from the NHS England advising them to shield themselves. • Those who are shielding can be placed on furlough leave. 	Guidance on shielding and protecting people defined on medical grounds as extremely vulnerable from COVID-19
A10	<i>Can Tier 2 migrant workers benefit from the Scheme?</i>	<ul style="list-style-type: none"> • The Home Office has confirmed in writing to us, albeit not an official guidance, that they can be placed on furlough leave and not lose their status as a Tier 2 migrant worker. 	

B. COSTS

B1	<i>What aspects of pay are covered under the Scheme?</i>	<ul style="list-style-type: none"> • Employers can claim "employees' usual monthly wage costs, up to £2,500 a month, plus the associated NICs and minimum automatic enrolment employer pension contributions on that wage". • Bonus, fees and commission are excluded. 	Guidance for employers/employees
B2	<i>Must the employer top-up 80% being covered by the Government?</i>	<ul style="list-style-type: none"> • Employers have no obligation to make up the shortfall in wages but the employer must obtain consent in order to reduce the pay by 20% (see Section C below). 	Guidance for employers/employees
B3	<i>How does the £2,500 cap work?</i>	<ul style="list-style-type: none"> • If 80% of salary is £2,500 per month, the full salary would be £3,125 per month which amounts to £37,500 per year. Therefore wages earned in excess of £37,500 would not be covered. • All employers remain liable for associated NICs and minimum automatic enrolment employer pension contributions on behalf of the furloughed employees. 	Guidance for employers/employees
B4	<i>Do you have to continue to pay salary as normal and claim it back later or can you withhold pay until you claim back from HMRC?</i>	<ul style="list-style-type: none"> • Employers would be advised to pay the employee salary in the usual way and claim back from HMRC through the online portal which is being set up. • Withholding payment without an express and clear consent would land the employer in a sea of troubles from both contractual and statutory perspectives. 	Guidance for employers/employees
B5	<i>Should regular allowances be included in the calculation?</i>	<ul style="list-style-type: none"> • The only exclusions from the Guidance are bonus, fees and commission. We therefore take the view that other allowances that form part of the employee's normal pay can be included in the calculation. 	
B6	<i>Is overtime included as "wage costs" which the employer can claim back?</i>	<ul style="list-style-type: none"> • The answer to this depends on the frequency of the overtime payment: if it is a one-off payment, we don't think this could amount to "usual monthly wage costs". However, if the employee receives regular and consistent overtime payments, this could amount to usual monthly wage costs. • There is another consideration to this question: if the overtime payment is such that it has the effect of rendering the pay variable then the Guidance imposes a separate calculation depending on whether the employee has been employed for more or less than 12 months. 	
B7	<i>Are pension contributions calculated by reference to furloughed wages (if the employer is not topping up)</i>	<ul style="list-style-type: none"> • The employer "will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus ... minimum automatic enrolment employer pension contributions on that subsidised wage." 	Guidance for employers/employees

	<i>rather than the full normal wages?</i>	<ul style="list-style-type: none"> This suggests that the pension contributions are calculated by reference to furloughed wages unless the employer is paying the full wage which means the employer must pay pension contributions on full pay. 	
B8	<i>Can the employee opt out of their pension scheme for the period of furlough leave?</i>	<ul style="list-style-type: none"> Any opting out of pension scheme must be treated with care as the employer cannot be seen to be encouraging or steering the employee to opt out. The employee can opt out if he wishes. He must obtain an opt-out form from the pension scheme. The employer can remind employees that this is possible. 	
B9	<i>What happens to the pension contributions if the employee pays contributions through salary sacrifice?</i>	<ul style="list-style-type: none"> The answer may depend on how the salary sacrifice arrangement is worded but we would expect the same principles to apply. The employer would recover 80% of the reduced salary and pension contributions on the reduced salary but would have to pay the higher amount into the pension scheme. 	
C. CONSENT			
C1	<i>Do we need consent from our workers, and if so, how do we obtain it?</i>	<ul style="list-style-type: none"> Unless the employment contract allows the employer to reduce hours or pay (similar to a lay-off clause), then the employer will have to obtain consent to furlough proposed employees. The only circumstances where consent may not be needed is if the employer is topping up the remaining 20% and keeping all other terms and conditions of employment the same as before the furlough. Collective consultation requirement may be triggered if furloughing process is posed as an alternative to an eventual redundancy (see Section I below). Obtaining consent either individually or via representative would be crucial if there is no express term that allows the employer to vary the terms and conditions of employment. 	Guidance for employers/employees
C2	<i>What if we have a contractual clause to lay-off?</i>	<ul style="list-style-type: none"> In this case employers should write to each worker confirming that they are considered to be "furloughed", following the Chancellor's announcement of Friday 20 March 2020. We would still advise that it would be better to obtain some written consent from the employee to designate them as furloughed. 	

C3	<i>Can we rely on implied consent?</i>	<ul style="list-style-type: none"> We don't think this is sufficient legally to protect the employer, especially if the employer is not topping up the 80%. We advise obtaining an express consent. 	
D. TERMS AND CONDITIONS			
D1	<i>Is consideration needed to put employees in furlough?</i>	<ul style="list-style-type: none"> An agreement to vary the terms and conditions of employment must be supported by consideration or be executed as a deed. If the furloughed employee's alternative is being laid off or redundant, then consideration is certainly in existence. 	Guidance for employers/employees
D2	<i>Can a furloughed employee work for another employer during their furlough leave?</i>	<ul style="list-style-type: none"> If the employment contract prevents the employee from working for another employer then the employee should not undertake work for another employer. However, the Guidance allows employees with two jobs to be able to claim from the Scheme for each job. In the Employee Guidance under section "<i>If you currently have more than one employer</i>" it says "<i>You can be put on furlough by one employer and continue to work for another, if it is permitted within your employment contract</i>". We take the view that a furloughed employee can work for another employer so long as they are not prevented from doing so by their employment contract. 	Guidance for employers/employees
D3	<i>During a furlough leave, can an employee work on a witness statement for a tribunal case brought against the employer?</i>	<ul style="list-style-type: none"> This would constitute "working whilst on furlough leave" and therefore would breach furlough rules. It would be part of the employee's duties which they would have carried out as part of their working arrangements and does not amount to volunteering or training, the two exceptions to the rule. We suggest the employer pays them as normal and put them on furlough leave afterwards. 	Guidance for employers/employees
D4	<i>Can employees be rotated in and out of furlough?</i>	<ul style="list-style-type: none"> Yes, so long as they are placed on furlough for a minimum of three week period as per the Guidance. We would recommend that this discretion is retained in the variation agreement with the employee. 	Guidance for employers/employees
E. REDUNDANCY (AND TUPE)			
E1	<i>Does the Scheme allow us to make redundancies?</i>	<ul style="list-style-type: none"> Yes, the Guidance states that furloughed employees can be made redundant both during and afterwards but the usual rules on redundancy continue to apply including but not limited to the collective consultation rules (see Section I). 	Guidance for employers/employees

E2	Can you put those who were made redundant after 28 February and re-engaged on furlough leave?	<ul style="list-style-type: none"> • Yes, the Guidance specifically allows such employees to be placed on furlough leave. 	Guidance for employers/employees
E2.1	What if the reason for dismissal was not redundancy?	<ul style="list-style-type: none"> • There is no specific guidance on this. • We would want to know the specific circumstances of the dismissal/termination. 	
E2.2	In the scenario above (E1), can the employer backdate the pay to 1 March 2020?	<ul style="list-style-type: none"> • We take the view that it can because the Guidance specially allows those who were made redundant after 28 February and then re-engaged to be placed on furlough leave. Given that it allows employers to backdate the payments to 1 March, we think that both of these impliedly point towards the interpretation that the pay of these employees can be backdated to 1 March so long as the employee carried out no work from 1 March. 	Guidance for employers/employees
E2.3	Does this break the continuity of service?	<ul style="list-style-type: none"> • Generally, an employee's continuous employment will be broken by any week which does not account towards continuity: s.210(4) ERA. • Any week that an employee is "<i>absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in employment</i>" will also contribute towards continuity: s.212(3)(c). • However, an arrangement or custom cannot be made retrospectively, it must exist at the start of the absence: <i>Murphy v A Birrell & Sons [1978] IRLR 458</i>. • An arrangement will not bridge a gap between employment contracts unless it is in existence before, or arises at the start of, the gap: <i>Welton v Deluxe Retail [2013] IRLR 166</i>. 	s.210-219 ERA 1996
E2.4	Can the employee be compelled to pay back any statutory redundancy payment (SRP)?	<ul style="list-style-type: none"> • It can be agreed between the parties that SRP is paid back to the employer upon being re-engaged, which would have the effect of preserving continuity for the purposes of SRP: s.214 ERA 1996. • Receipt of a statutory redundancy payment (SRP) will sever continuity but only in relation to future claims for statutory redundancy pay. 	s.210-219 ERA 1996
E3	Can furloughed employees work as employee reps as part of a redundancy consultation during furlough leave?	<ul style="list-style-type: none"> • We don't think they can and if they were to do so they would be in breach of furlough rules. The employer has the option of paying them and allowing them to work for the duration of the consultation to avoid the risk of being disqualified from the Scheme. 	Guidance for employers/employees

E4	<i>If notice of redundancy is served during furlough leave, are employees entitled to be paid a week's wage for each week under s.88 and 89 ERA1996 or furlough pay only?</i>	<ul style="list-style-type: none"> • Yes, the Employee Guidance states that "Your rights as an employee are not affected by being furlough, including redundancy rights..." 	Guidance for employers/employees
E5	<i>If there was a TUPE transfer (either before or after 28 February) so that employees of the transferee were not registered on PAYE payroll on 28 February is the new employer still eligible to claim under the Scheme? (This includes the scenario where the employees were placed on furlough leave by the transferor before the transfer)</i>	<ul style="list-style-type: none"> • It seems from one HMRC source that the transferee in this case would not be eligible to claim from the Scheme as the employees were not registered on 28 February 2020. • However, the Guidance is not clear on this issue and we await further guidance. 	Guidance for employers/employees
F. HOLIDAY			
F1	<i>Do holidays accrue during furlough leave?</i>	<ul style="list-style-type: none"> • We think that holiday continues to accrue during any furlough period. It is possible that some employees and PAYE workers will remain entitled to full pay while on holiday rather than the reduced pay that will apply during furlough leave. 	Guidance for employers/employees
F2	<i>Does taking holiday during furlough leave break the furlough period?</i>	<ul style="list-style-type: none"> • According to the Business Support Helpline holiday taken during the furlough leave would not break or interrupt the furlough period. If this is right, then any holiday taken during the furlough leave would not interrupt the minimum 3-week period required to be eligible for the Scheme. • However, there is no definitive guidance on this and it's not entirely clear what the position is. We would advise that any holiday taken during the furlough period takes place at least after the minimum of 3-week period has run its course to avoid the risk of disqualification from the Scheme. 	Business Support Helpline
F3	<i>Can you require furlough employees to take holiday during the furlough leave?</i>	<ul style="list-style-type: none"> • We take the view that the usual rules on asking employees to take holidays applies during any period of furlough leave under reg.15 of WTR. • However, this is not clear from the Guidance and therefore we cannot provide a definitive view on this. 	Reg15 WTR
F4	<i>Do the new rules on carry-over, namely The Working Time (Coronavirus) Amendment Regulations 2020, prevent the employer from asking employees to take holiday during furlough leave?</i>	<ul style="list-style-type: none"> • The new regulations are not clear as to whether they prevent the employer from requiring employees on furlough leave to take holiday. • They permit carry-over where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus 	Working Time (Coronavirus) Amendment Regulations 2020

(including on the worker, the employer or the wider economy or society)".

G. SICKNESS

G1	<i>Can we put those currently on sick leave into furlough?</i>	<ul style="list-style-type: none"> The Guidance specifies that employees receiving SSP (either because they are sick or because they are self-isolating) cannot be furloughed but only after their sick leave ends. If an employer has an enhanced CSP scheme, it may wish to remove this provision in the variation letter to the employee for the duration of furlough leave (see below question). 	Guidance for employers/employees
G2	<i>What happens if a furloughed worker is sick during furlough leave?</i>	<ul style="list-style-type: none"> Although the Guidance is silent on this we take the view that the employee will be entitled to SSP at a minimum. In relation to CSP, employers may wish to vary this in the variation letter to the effect that only SSP will be payable during furlough leave. With such an amendment, it would be difficult to see why any employee would volunteer the information that they are sick. 	Guidance for employers/employees

H. EMPLOYEES ON FAMILY-FRIENDLY LEAVE

H1	<i>If we offer enhanced maternity pay, can we claim it back through the Scheme?</i>	<ul style="list-style-type: none"> Yes, the Guidance states that "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". 	Guidance for employers/employees
H2	<i>Can we put those currently on maternity leave on furlough leave?</i>	<ul style="list-style-type: none"> Given the answer to the above question, if you have an enhanced scheme then in order to claim back the wage costs the employer would have to put them on furlough leave to claim back although this is not clear from the Guidance. 	Guidance for employers/employees
H3	<i>An employee is currently on maternity leave but has exhausted her statutory maternity pay (SMP) insists on doing a keeping in touch (KIT) day which would allow her to be paid in full. Do we have to agree to this?</i>	<ul style="list-style-type: none"> There is no entitlement to do a KIT day, it must be agreed between the parties so unless there was a prior agreement there is no obligation to allow the employee to do a KIT day. Given the current situation, it would be difficult to do a meaningful KIT day with the employee in any event. 	

I. COLLECTIVE CONSULTATION

11	<i>When does this kick in?</i>	<ul style="list-style-type: none"> • s.188 TULRCA applies where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. • It obliges an employer to consult the appropriate representatives of employees who may be affected and to provide information. • Failure to comply may lead to a complaint being made to an employment tribunal under s.189 and the employer being liable to pay a protective award. 	s.188 and s.189 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)
12	<i>Does this apply to furlough?</i>	<ul style="list-style-type: none"> • Yes, the consultation obligation would apply if the employer is approaching furlough as being an alternative to an eventual redundancy for 20 staff or more. 	
13	<i>Would the "special circumstances" defence apply here?</i>	<ul style="list-style-type: none"> • s.188(7) provides a defence to failure where there are "special circumstances which render it not reasonably practicable for the employer to comply". • An employer may succeed in arguing that the current situation constitutes "special circumstance" (itself a hypothesis) but must still show that it was not reasonably practicable to carry out the consultation. • In other words, it must still fulfil those obligations which it is reasonably practicable to comply. Where full compliance is not reasonably practicable, the employer is still obliged to take all steps towards compliance as are reasonably practicable in the circumstances. 	
14	<i>What can we do to avoid triggering this obligation?</i>	<ul style="list-style-type: none"> • One is to stagger the dismissals so that there are fewer than 20 dismissals in any 90-day period. • The other is to make sure no dismissal takes place within a 90-day period and instead use the 90 day period to furlough the employees: this could only work if the currently proposed furlough period is extended beyond May 2020 as there are less than 90 days between now and end of May 2020. 	

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