

Q&A - Furlough Leave

What does furlough mean?

"Furlough" is an American term and has no prior meaning in UK employment law. In the US, it means to allow or force someone to be absent temporarily from work.

In this scenario, it means anyone asked to stop working during the coronavirus pandemic but who has not been made redundant.

What is the Coronavirus Jobs Retention Scheme (CJRS)?

Under the CJRS, employers can contact HMRC for a grant to cover 80% of the "wage costs" of "furloughed" workers up to a total of £2,500 per month. Employers can top up the remaining 20%, but there is no obligation to do so. The scheme will cover the cost of wages backdated to 1 March 2020 and will be open initially for 3 months. The Chancellor said in his announcement on 20 March 2020 that there will be no limit on funding available for the scheme.

Importantly, the Government statement said that "changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation."

What steps must employers take to put employees on furlough leave?

1. Decide which employees will be designated as furloughed workers.
2. Give notice to those designated as furloughed workers, preferably in writing. We have drafted a template letter for this purpose. Email sam@precisehr.co.uk for a copy.
3. Do employee representatives or trade unions need to be consulted?
 - Varying the contracts of 20 or more employees to reduce pay to 80% with the intention to dismiss if consent is not achieved would mean under section 188 of TULRCA these employees would be classed as dismissed by reason of redundancy. There would be a duty to inform and consult appropriate employee representatives.
 - We believe that it is not necessary to go down this route in these circumstances, though.
4. Exercise a contractual right to lay off. If necessary, vary contracts to introduce one.
 - Employees are likely to agree furlough leave on 80% pay but agreement is not necessary to unilaterally vary the contract.
5. Provide information to HMRC about the furloughed employees through the new online portal.

Further guidance is expected from HMRC as to what information is required.

What is the process for accessing funds?

The government has said that money will be claimed via HMRC and that they are setting up a portal to enable companies to do so.

How should we select the employees to be furloughed?

The CJRS involves "furloughing" designated workers who would otherwise have been "laid off" during this crisis. It is important that no discriminatory or otherwise proscribed reason is used for designating an employee as furloughed.

Otherwise, there is no set procedure that needs to be followed.

What is covered by the cap of £2,500 per month?

It is not clear as to whether the reimbursement is intended to cover anything other than the employee's basic salary. However, the official guidance uses the words "all employment costs" which could suggest that pensions and other additional benefits may be included.

We are currently awaiting further information and guidance on this specific point.

When it comes to furlough leave, what do we do about individuals with irregular earnings in regard to calculating salary? Should the salary calculations for furlough include overtime & commission, if so on what reference period (12 weeks/52 weeks etc.)?

At the moment, further information is required as to what 'pay' is defined as under the CJRS. For example, is it 80% of gross or net pay and is the employer going to have to pay income tax?

In other employment law areas, a week's pay is defined by reference periods, which often is over a 12 week period.

Do we have to pay back any of the money that will be paid by the government? Will this be via tax at a later date?

There is currently no information from the government or HMRC about any repayments. However, this seems unlikely.

Is it possible to make a claim under the CJRS if a furloughed worker is still working?

If the employee is still doing work for the company that furloughed them, then this will not count.

Would it be a breach of trust and confidence to lay staff off?

If there is an express contractual right to lay off, as long as this right is not exercised in any discriminatory or malicious way, this would not be a breach of trust and confidence.

Furthermore, case law establishes that there is no implied term as to how long an employer can keep an employee on lay off.

Can you tell me if an individual can undertake any other employment while furloughed e.g. a temporary position stocking shelves in the supermarket?

This might be possible as the only details currently released are that an individual cannot undertake any work for an employer that has furloughed them.

To be laid off, though, an employee must be "available for work."

The position is not certain however and it is expected that the government will elaborate on the rules regarding working elsewhere.

What about employees who are sick or self-isolating?

To be laid off, an employee must be "available for work."

If they are off sick before the period of furlough leave, they will not be available for work.

They are likely to be eligible for statutory sick pay (SSP), however this would usually be at a lower rate than furlough pay.

If an employee becomes sick whilst on furlough leave, this is only likely to become an issue if the employer asks them to return.

If they are self-isolating, in these circumstances we would expect them to be included in the scheme.

What about employees on e.g. maternity leave?

There would be no change to the status of employees on maternity or paternity leave.

Will we have to pay redundancy payments?

Furloughed workers are not redundant so in short, no.

However, if an employer exercises an express or implied right to lay off an employee, in certain circumstances, the employee becomes entitled to claim a statutory redundancy payment. The same applies to short-time working, the definition of which arguably applies here (if the employee will receive less than 50% of their pay, which is possible given the cap).

The employee must have been laid off or kept on short-time working (or a combination of both) for at least: four or more consecutive weeks; or a total of six weeks in any period of 13 weeks.

If an employer provides a contractually guaranteed rate of pay, an employee cannot be laid off for the purposes of claiming a redundancy payment under the statutory scheme. Whether this applies will depend on the contract.

How do we best consult staff when they are all at home?

We suggest where possible that you contact staff via telephone or if possible, by video conferencing. Alternatively, you could look to contact by email.

Is an organisation obligated to make up the difference between the 80% of wages that will be met by the government?

An employer could choose to fund the differences between this payment and your salary but does not have to.

Will there be a breach of trust and confidence if an organisation does not 'top up' the extra 20% under the CJRS is made by an employer?

Unlikely, given that you will have laid people off under an express contractual right to do so.

Can an employee be forced by their employer to take furlough leave?

If a contractual clause exists which permits the employer to either lay off, or bring in short time working, an employer can insist on furlough leave without consent.

Is it possible for an employee to ask their employer that they be placed on furlough leave?

Yes, but there is no obligation for an employer to agree to do this.

If employees are placed on furlough leave, can there be a rotation of furlough leave between members of staff?

It is not clear as to whether this will be permitted but we see no reason why not.

As business needs may change, it would appear sensible for rotation to be allowed but we do not yet know.

Can we furlough workers, and then take them back on if needed?

Yes, they will remain employees and the employer can end the period of lay off when needed.

If instead of furlough leave an employer wants to make somebody redundant, will this be deemed unfair?

If an employer wants to undertake a redundancy exercise, then they can do so.

The question then becomes whether the redundancy exercise has been fair. The CJRS is designed however to keep people in employment and to discourage redundancies. There is also a financial disincentive in making an employee redundant as it would also mean paying notice and any applicable redundancy payment.

Whether the redundancy would be fair would depend on the outcome of consultation. If the employee would rather be furloughed, a dismissal may well be unfair.

What if we've already made staff redundant?

The government announcement talked about staff being brought back into the workforce. So it would seem possible to re-employ staff and then furlough them.

Will all businesses regardless of size will be able to furlough their employees?

There is no indication that there will be any restriction by size of business; to the contrary.

What should we do about any employees who are still working but object to other colleagues receiving 80% of pay on furlough leave?

It is expected that you may have to deal with grievances being raised on this point, but there is nothing to prevent you from looking to resolve any issues informally should they arise.

However, there is no right for employees to insist on being placed on furlough leave.

What is the position in regard to individuals such as agency staff and zero-hour workers under the CJRS?

Whilst there is no explicit confirmation, it is expected that the CJRS will be applicable to all employees.

Will annual leave continue to accrue for furloughed workers?

Annual leave will continue to accrue if an employee is furloughed because they will remain employed as opposed to being made redundant.

It would require specific laws to enable furlough leave, to be classed as annual leave.

To manage this, you could agree with people that they take annual leave instead of furlough leave, but there may be little incentive to do so for many employees.

What about the National Minimum Wage (NMW)?

The NMW is a prescribed minimum hourly rate of pay which employers must legally pay to most of their workers. As furloughed employees won't be working, the NMW will not apply.

Will employees who have moved back home (to other countries) still be eligible to be put into this scheme, if they are still technically employees?

If someone has moved back home, it is hard to see how they could be said to be available for work.

If they are furloughed, there would appear to be no restriction on their location during such a period.

What happens to staff that started after the 28th Feb or started in February but added on payroll in March, will they still be entitled to the 80%?

The scheme is backdated until 1 March 2020 and appears to be available for employees, with no restriction on start date. We await further guidance, however.

When they were technically added to payroll will probably be a non-issue