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EMPLOYMENT LAW BULLETIN

APRIL 2020

Welcome to the April edition of our Employment Law Bulletin.

April has been an extraordinary month for us all, employers, employees and employment lawyers alike. The Government's Coronavirus Job Retention Scheme has brought in state support for employment costs on a scale which has never been seen before. As we have limped slowly through a month of lockdown, HMRC has published a number of versions of its guidance and the legislative scheme which underpins it.

We bring together in this edition of our Employment Law Bulletin articles covering a number of tricky employment issues raised by the current crisis, the Job Retention Scheme and furlough leave.

In our first article, we answer frequently asked questions raised by our clients including: "Will we have a redundancy situation if we can now furlough workers?" and "Can employees volunteer while on the Job Retention Scheme and can they volunteer for their own employer?"

We take a look at the various updates to the guidance, including detail of whose employment costs can be claimed for under the scheme, whether employees can be rehired then put on furlough, the interaction between sick leave and furlough, whether employees can be furloughed after a TUPE transfer, the change to the payroll cut-off date for eligibility, and the calculation of pay for those returning from maternity or other statutory leave. We also focus on what had been a key area of uncertainty for employers: the interaction between holiday and furlough leave.

Our last two articles focus on questions specific to particular sectors. Here we consider the impact of salary sacrifice schemes on furlough claims, of particular relevance to independent schools, and the impact of the virus on employers working in a rural context.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

Forthcoming events:

- **Covid-19 - when the new normal ends. What happens next?**
  5 May 2020, Webinar
  For more information or to book

- **Employment Breakfast Briefing Webinar:** Redundancy: getting the process right
  12 May 2020, Webinar
  For more information or to book

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Contents

Wherever you see the BAILII logo simply click on it to view more detail about a case

FAQs - Covid-19, employment law and furlough leave

Many employers are facing extremely difficult decisions in the light of the Covid-19 restrictions and are working hard to find solutions.

Our team have answered some of the most common questions we have been asked during the Covid-19 pandemic in the news articles which can be found here.

Please also see the most recent Government and Acas guidance.

Our most frequently asked questions relating to Covid-19, employment law and furlough leave:

1. Will we have a redundancy situation if we can now furlough workers?

2. Should we consult with staff whom we are making redundant during the Covid-19 crisis?

3. If we made staff redundant or laid them off in March, should we rehire them / end lay-off and put them on furlough?

4. What can employers do if they still have work for staff but no funds coming in?

5. What should charities consider before putting staff on furlough?

6. How do I go about putting staff on furlough?

7. What will employers receive on the Job Retention Scheme?

8. How will pay be calculated for those on furlough with variable pay?

9. Do we have to pay the National Minimum Wage or National Living Wage (NMW) during furlough?

10. How long will the furlough scheme last and what do we do when it ends?

11. Will we recoup all of our employment costs if we furlough staff?

12. Can we put casual / zero hours contract workers on furlough?

13. Can an employer continue to keep staff working whilst they are furloughed?

14. Can our employees work for someone else while they are on furlough for us?

15. Can employees volunteer while on the Job Retention Scheme and can they volunteer for their own employer?

16. Can employers place someone who is self-isolating or off sick on the Job Retention Scheme?

17. If an employee was hired after 28 February 2020 can the employer put them on the Job Retention Scheme?

18. If we have already paid staff for March, can we backdate a furlough claim for those wages?

19. Can we insist that staff take holiday during furlough leave and how would this be paid?

20. Can all staff carry leave over to the next 2 holiday years, including those on furlough?

1. Will we have a redundancy situation if we can now furlough workers?

Employees may be furloughed under the government's Coronavirus Job Retention Scheme. However this new process is just one option open to employers when faced with a down turn in work and the law on unfair dismissal and redundancy remains unchanged. Employees with two years' service can bring unfair dismissal claims and can claim for statutory redundancy pay if this has not been paid. Employers should be aware that they must have a fair reason for dismissal (in this case redundancy) and the dismissal must be fair in all the circumstances.

Redundancy happens when an employer's business closes down altogether, when it closes one site and the work moves to another location, or when the kind of work done by some employees stops or reduces. A redundancy situation could therefore occur even though the Job Retention Scheme can help with paying employees for a limited period.

The starting point for employers when considering redundancy will be assessing whether there is a business case for making employees redundant. Employers should consider whether the financial and operational position of the business is such that it would be fair in all the circumstances to make employees redundant now rather than assessing the situation again when the Job Retention Scheme ends. If there are pressing reasons why the organisation cannot wait until then to make staff cuts, these should be recorded in writing and explained to staff as part of the consultation exercise.

To make a redundancy dismissal fair, employers also have a duty to consider alternatives to redundancy. The Job Retention Scheme will be such an alternative. Again, if it is not feasible to keep staff on and apply for a grant under the Scheme (for example because waiting until the end of April for the funds to come through is not possible), the reasons for this should be noted and communicated clearly to the affected staff.

2. Should we consult with staff whom we are making redundant during the Covid-19 crisis?

If employers decide to pursue redundancy dismissals, they should do all they reasonably can to consult individually with employees before the decision to dismiss is made. As face to face meetings are likely to be difficult in view of social distancing and self-isolation, this is likely to include letters, emails, telephone calls and video meetings. The consultation process should, even though it is done remotely, still allow employees to feedback suggestions on avoiding redundancy, to raise concerns and to ask questions.

Where 20 or more employees are affected by redundancy proposals, collective redundancy consultation obligations will apply. Employers must then consult with staff representatives at least 30 days before the first dismissal where there are between 20 and 99 affected employees, and at least 45 days before the first dismissal where there are 100 or more affected employees. Employers should consider the logistics of consulting with trade unions or other staff representatives and whether those representatives can meaningfully consult with staff in the current restrictions.

In "special circumstances" where it is not reasonably practicable to comply with these collective redundancy consultation rules in full, employers should still take reasonable steps to consult collectively with staff representatives. Employers should be aware that the existence

of the Job Retention Scheme may lead employment tribunals to conclude in some cases that it was reasonably practicable for employers to comply with these consultation requirements while employees were on furlough.

Insolvency is not in itself a special circumstance but a 'sudden disaster' (either physical or financial) can be. This exception to the consultation rules is more likely to apply where the impact of an event on the business is immediate. A gradual run-down of a business over a longer time period is unlikely to fall into the exception. Employers facing insolvency, should still make reasonable efforts to consult employees and their representatives.

A failure to comply with collective redundancy consultation obligations can be expensive. It can lead to a protective award of up to 90 days' actual gross pay for each affected employee.

Where businesses go into administration, the administrator will also be able to apply for a grant to cover 80% of wages under the Job Retention Scheme. However recent guidance confirmed the government would expect an administrator to only access the scheme if there is a reasonable likelihood of rehiring the workers i.e. there is a future for the business.

3. If we made staff redundant or laid them off in March, should we rehire them / end lay-off and put them on furlough?

The Job Retention Scheme guidance states that staff can be rehired and placed on furlough as long as they were on your PAYE payroll on 28 February 2020. Employers who have laid-off staff can also bring the lay-off period to an end and move workers onto furlough.

One of the clear intentions of the Scheme is to provide employers with an alternative to lay-off and redundancy while Government restrictions are in place. Employers do however have a choice as to whether to rehire staff. If employers who dismissed before the Scheme was announced decide not to rehire and employees bring unfair dismissal claims, the tribunal would consider the circumstances facing the employer at the time of the dismissal rather than taking into account the support offered under the Scheme. The question for the tribunal will be whether the decision to dismiss, at the time it was taken, fell within the band of reasonable responses of a reasonable employer. The exception to this may be where dismissal appeals are still being considered by the employer. The option of furlough should be properly considered as part of any appeal process.

If staff are rehired, it is possible that an employment tribunal will consider that there has been a temporary cessation of work and that they have continuity of service. In that case employees could still bring claims relating to any later dismissal and would be entitled to statutory and contractual benefits on the basis of their full length of service. It is not yet clear whether specific provision will be made in the Scheme for such employees to be re-engaged with no loss of continuity of service. If this is the case, these employees will be entitled to pay and benefits for that period at the agreed rate.

Employers can bring periods of lay-off to an end at any time (subject to any contractual agreement). It may be that employers will wish to do so before employees are able to opt for redundancy and a statutory redundancy payment (for example after four consecutive weeks of lay-off). Pay during lay-off is limited to statutory guarantee payments with a current maximum of £29 per day for five days in any three month period. Employees will therefore be better off financially on furlough and are likely to ask the employer to move them from lay-off to furlough and to backdate pay accordingly. Claims for a grant under the Scheme can be backdated to cover any time during which the employee was doing no work (with a backstop date of 1 March 2020). Any pay already received by the employee should be taken into account when paying back pay.

4. What can employers do if they still have work for staff but no funds coming in?

Employers who have cash flow issues should consider whether there are alternative sources of funding in the crisis. Government guidance on possible means of support is available at: https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses. Please see our FAQs on sources of funding for charities and social enterprises here.

Employers may have a redundancy situation if they are forced to close down all or part of the organisation because of the funding situation. Employers in this situation should consider whether redundancy dismissals will be fair in all the circumstances, including whether furloughing staff under the Job Retention Scheme is a viable way to avoid redundancies. For more information on this, see Will we have a redundancy situation if we can now furlough workers?

It is important to note that the Job Retention Scheme cannot be used to pay the wages of staff who are still working for the organisation. It may be possible to come to a mutual agreement with staff to reduce wages (engaging with trade unions where recognised). Such a change will be a fundamental change of contract and so should not be imposed unilaterally by the employer. Employees could decide to bring claims for breach of contract / unlawful deduction from wages at a later stage if the reduction is not agreed.

Employers should consider whether work can be restructured so that some employees continue to work and others are furloughed. Furlough leave could also be rotated between staff, remembering that each period of furlough must last for a minimum of 3 consecutive weeks.

5. What should charities consider before putting staff on furlough?

Charities and third sector organisations can make claims under the Job Retention Scheme along with all other employers.

When deciding whether to access the Scheme, charity trustees should consider their usual trustee duties, including the duty to manage the charity's resources responsibly. They should continue to follow decision-making guidance issued by the Charity Commission. We also recommend the Charity Commission's recent Coronavirus (COVID-19) guidance for the charity sector.

The guidance to date on the Job Retention Scheme suggests that organisations which continue to receive public funds during the crisis will not be expected to access grants under the Scheme. There may, however, be some roles within the charity which are no longer required and / or funded because of the crisis where it may be appropriate to make use of the Scheme rather than laying off staff.

Charity employers should consider the financial position of the charity in the round, taking into account the best interests of current and future beneficiaries. Where grant funding or financial reserves are available, trustees should consider whether these should be applied before the Job Retention Scheme is resorted to.

Charities should also be alive to reputational risks in the current crisis. For example, charities which make the decision to make redundancies instead of using the Job Retention Scheme could face public criticism. Equally, charities with significant resources may receive negative press for relying instead on the Job Retention Scheme.

6. How do I go about putting staff on furlough?

At this moment the 'how' does not exist. However, HMRC are working to create an online portal

where employers will be able to register for the Scheme. The current intention is for this to be ready by the end of April.

To claim, employers will need:

- ePAYE reference number
- the number of employees being furloughed
- the claim period (i.e. start date and end date)
- the amount being claimed
- the employer's bank account number and sort code
- the employer's contact name and telephone number

HMRC will retain the right to retrospectively audit all aspects of the claim, so employers are best advised to review the information being provided before submitting it to the Scheme.

7. What will employers receive on the Job Retention Scheme?

Employers who place staff on furlough 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". Employees' pay will continue to be subject to deductions for PAYE and employee National Insurance contributions.

For salaried staff, pay will be calculated as at 28 February 2020. For more details of how the pay of staff with variable hours will be calculated, please see our FAQ 'How will pay be calculated for those on furlough with variable pay?' below. The guidance states that employers can also make claim against the wage costs of enhanced contractual maternity, adoption, paternity or shared parental pay through the Scheme.

8. How will pay be calculated for those on furlough with variable pay?

There are a number of ways of calculating the pay of staff on variable hours. It is for the employer to choose the most appropriate calculation method.

- If the employee has been employed for twelve months prior to the claim, employers can claim for the higher of:
    - the same month's earnings from the previous year; or
    - average monthly earnings from the 2019-20 tax year.
- If the employee has been employed for less than a year, employers can claim for an average of the employee's monthly earnings since they started work.
- Where the employee began work during February, employers should work out a pro-rata monthly average based on their earnings to date.

9. Do we have to pay the National Minimum Wage or National Living Wage (NMW) during furlough?

The NMW will not apply to furloughed workers because they will be carrying out no work during the furlough period. However, employees can be required to undertake training during furlough and, if so, the guidance states that they should be paid at least NMW for that time. In most cases it is expected the grant will cover NMW unless the employee is spending significant periods of time on training.

10. How long will the furlough scheme last and what do we do when it ends?

The Job Retention Scheme is initially being opened for three months from 1 March to 31 May 2020. This is subject to revision by the government, and the Scheme may be extended further.

There is no clear end date to the Scheme, but the Government's mantra has been 'whatever it takes' when supporting employers through the current situation.

To qualify for the Scheme, employees must be furloughed for at least three weeks, but employers can bring the furlough period to an end at any time provided notice is given to the affected employees.

When communicating with employees about the Scheme, employers should make clear that the furlough arrangement is a temporary change to the employment contract, and that when furlough ends, the terms of the contract will be as before. Employers should ask employees to agree to this temporary change. It is to be hoped that this will mean employees will eventually return to work on full pay. However, employers may be faced with a redundancy situation when the Scheme ends and will need to comply with consultation requirements and a fair redundancy process.

To be eligible for the grant under the Scheme employers must confirm in writing to their employee that they have been furloughed. A record of this communication must be kept for five years.

11. Will we recoup all of our employment costs if we furlough staff?

By making a claim to HMRC an employer will receive a grant to cover:

1. 80% of an employee's normal pay or £2,500 per month, whichever is the lower; and

2. the employer's NICs and minimum automatic enrolment pension contributions (at 3%) based on 80% of pay.

However, the actual employment costs for the employer will depend on a few factors. In most cases, employers will not have a contractual right to lay off staff or to reduce pay without the agreement of the employee. They will therefore need to ask employees to agree to being put on furlough. That said, when forced to choose between furlough and the alternatives, e.g. redundancy, it is likely that employees will agree to being put on furlough at 80% of wages. In such cases, the Scheme may cover all the associated employment costs of the furloughed workers.

Guidance published on 4 April 2020 confirmed employers can claim for any regular payments they are obliged to pay to employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments such as benefits in kind should be excluded.

Employers should be aware that contractual benefits may continue to be due at the rate of 100% of pay. This will depend on the way these benefits are worded in the contract. Employers should consider making clear in their communication with staff that any contractual benefits will be pro-rated during the furlough period. If staff take holiday during the furlough period, this will need to be paid at the worker's normal rate of pay and so the employer will need to fund the top up.

Some employers may agree to top up pay to 100% of wages throughout the furlough period. In such circumstances the employer will be left to cover the difference between the Scheme grant payments and the full wages to the worker, plus the difference on the employer NICs and pension contributions not covered by the Scheme grant.

12. Can we put casual / zero hours contract workers on furlough?

Yes. The Scheme can be used for anyone who is paid through payroll no matter what kind of contract they are on.

The Scheme guidance for employers states that: "Furloughed employees must have been on your PAYE payroll on 28 February 2020, and can be on any type of contract" and that this includes "employees on flexible or zero hours contracts". In most cases those on zero hours contracts will be workers rather than employees (for employment law purposes) but will be employees for tax purposes and so the Scheme applies equally to them.

The government guidance for individuals (https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme) states: "Any UK employer with a UK bank account will be able to claim, but you must have been on your employer's PAYE payroll on 28 February 2020. You can be on any type of contract, including a zero-hour contract or a temporary contract." If it was the case that only employees were eligible, that would exclude many people from the Scheme, which we understand is not the Government's intention.

13. Can an employer continue to keep staff working whilst they are furloughed?

No. To be eligible for the Scheme an employee cannot undertake work for or on behalf of their employer. This includes 'providing services' or 'generating revenue' for the employer. If an employee continues to work for an employer on reduced hours, the employer must continue paying the employee, subject to the terms agreed between the employer and employee.

Employees may undertake training whilst furloughed, providing that the employer ensures that the employee receives the national minimum wage (or national living wage) for the time spent training. This means employers need to check if they will have to pay to top up the pay of those employees on the Scheme for time spent training.

14. Can our employees work for someone else while they are on furlough for us?

This will depend on the working arrangements as of 28 February 2020. If the employee had more than one employer for whom they were enrolled on a PAYE scheme on 28 February 2020, then the employee can be furloughed for any one or all of those employers. Each job is treated separately under the Scheme and the Scheme's cap of 80% of earnings will apply to each employer individually.

Recent guidance has confirmed that if contractually allowed, employees are permitted to take up new work for another employer whilst on furlough.

For any employer that takes on a new employee, the new employer should ensure they complete the starter checklist form correctly. If the employee is furloughed from another employment, they should complete Statement C which confirms they have another job. If the existing contract of employment does not allow an employee to work elsewhere while in your employment and the employee seeks out another job after being furloughed employees risk disciplinary action unless they seek agreement in advance. Employers should make their expectations clear at the time of placing an employee on furlough.

15. Can employees volunteer while on the Job Retention Scheme and can they volunteer for their own employer?

Employees 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". The meaning of this is not altogether clear, but we consider that there is a risk that staff volunteering for their own employer during furlough could be against the rules. This would not stop the employer

informing their staff about volunteering opportunities in the community and even other work where these are run by other organisations and the opportunities are in line with public health guidance.

16. Can employers place someone who is self-isolating or off sick on the Job Retention Scheme?

Employers can only place someone on the Scheme after a period of sick leave or self-isolation ends. However, employees who are shielding themselves from exposure to Covid-19 in line with public health guidance, i.e. those who are considered extremely vulnerable, and those staying at home with employees who are shielding can be placed on the Scheme.

17. If an employee was hired after 28 February 2020 can the employer put them on the Job Retention Scheme?

No. The Scheme is only open to employers that had created and started a PAYE payroll Scheme no later than 28 February 2020 and can only be used to claim for employees on their PAYE payroll scheme as of that date. This means that employees taken on after 28 February 2020 will have to be managed in the usual ways where work decreases, e.g. reduced hours, lay-off (where the contract allows) or redundancy.

18. If we have already paid staff for March, can we backdate a furlough claim for those wages?

Yes. Claims under the Job Retention Scheme can be backdated to 1 March but only for a period during which the employee in question did no work at all for the employer. If employees performed some work in that period, you will only be able to backdate the claim to the date from which they ceased work.

19. Can we insist that staff take holiday during furlough leave and how would this be paid?

There is some doubt at present about how annual leave will interact with furlough. It is possible that the Government will clarify this point when further detail of the Job Retention Scheme is published.

As employment law stands, it is likely that statutory leave under the Working Time Regulations (5.6 weeks) will accrue during furlough.

We cannot be sure at the moment whether it is intended that employers can require workers to take holiday during furlough. There is also some doubt about how annual leave taken during furlough should be paid. We will provide an update on this question if further detail is provided by the Government.

There is a statutory rule which allows employers to give workers notice that they must take their statutory annual leave (up to 5.6 weeks) on particular dates. Unless this rule is varied by a clause in the contract, employers must give at least twice as much notice as the length of the leave. For example, to require a worker to take 2 weeks' leave, employers would have to give them 4 weeks' notice.

Subject to any further guidance from the Government, employers asking staff to take holiday during furlough should consider the needs of the organisation alongside the health and safety and wellbeing of workers. Organisations are likely to find it difficult to manage a glut of annual leave taken later in the year. However, consideration should be given to the limitations on the quality of workers' leave under the present restrictions as well as the implications for worker

morale. It is likely that a balance will need to be struck between these competing needs.

Where holiday is taken, a week's pay is payable for a week's leave. Where the worker has normal hours (rather than variable hours), a week's pay should be based on pay for those normal hours. Because the change to furlough will be a temporary change to the contract, it is likely that holiday will need to be paid at the normal full pay rate.

20. Can all staff carry leave over to the next 2 holiday years, including those on furlough?

There have been recent changes announced to the WTR to allow workers who cannot take annual leave because of the impact of the virus on the worker, on the employer or on wider society, to carry over 4 weeks' leave to the next 2 holiday years. The new Acas guidance states that this will apply to workers placed on furlough. However, we consider that this new rule may not apply to those on furlough leave, if they are able to take annual leave (even though they may not be able to leave home under current restrictions). It is our understanding that this change is intended to provide flexibility where there is a high demand for work because of the virus (for example for NHS workers) or while businesses are working to get back on their feet when restrictions are over.

21. Can we furlough staff who TUPE transferred to us after 28 February?

Possibly not. We are hoping that future guidance will bring clarity on this point. As an employer's access to the Job Retention Scheme relies on the employee in question being on their PAYE payroll on 28 February, it is possible that a transferee employer will not be able to claim under the Scheme for employees who transferred after 28 February 2020. The grant is a matter between the employer and HMRC rather than being a contractual right which transfers with the employee under the TUPE Regulations.

Where TUPE transfers are planned in the next weeks and months, it is possible that transferee employers will take on a contractual obligation to pay wages for employees who have already been furloughed (which could be at 80% of normal pay or more depending on the agreement which has been made between outgoing employers and their staff) but will not receive any Government grant to support this payment. Well drafted furlough agreements should make clear that furlough leave will come to an end when the employer or employee is no longer eligible under the Job Retention Scheme. In that case, it is likely that the transferee employer will be liable for 100% of salary and benefits.

22. Can we pay some staff 80% of average pay but top up others pay to 100% while on furlough?

If you distinguish between groups of workers on the basis of a protected characteristic, there is a risk of a discrimination claim. Indirect discrimination could occur if you apply to everyone a policy which disadvantages people sharing a protected characteristic. For example, a policy or practice of paying part time staff 80% of pay while paying full time staff 100% of pay risks an indirect sex discrimination claim as the policy is likely to disadvantage women because statistically they are more likely to have caring responsibilities and take part time work.

Such a policy would also risk a claim under the Part Time Workers Regulations that a worker had been less favourably treated because of their part time status. In order to bring such a claim, the part time worker would have to be able to compare themselves with an actual full time worker paid 100% of pay while on furlough and who was working for the same employer, on the same type of contract (e.g. a worker contract) and carrying out the same or broadly similar work.

23. Can we furlough employees who are unable to work due to childcare commitments?

Yes. Employees who are unable to work because they have caring responsibilities resulting from coronavirus can be furloughed including employees that need to look after children.

Furlough scheme guidance updated

The Government has clarified some details of the Job Retention Scheme.

On 4 April, HMRC updated its guidance on the Coronavirus Job Retention Scheme (the Scheme). We outline below some of the key clarifications.

Can we only furlough staff who are at risk of redundancy?

The guidance makes clear that the Scheme is designed to help employers whose operations have been severely affected by coronavirus to retain their employees and protect the UK economy but states: "However, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus". This suggests that employers can claim under the Scheme even if redundancy is not the only other alternative for furloughed employees.

Can we furlough individuals who are not employees?

Claims can be made in relation to anyone who was on the employer's PAYE payroll on 28 February 2020 (the payroll rule). The updated guidance makes clear that this includes:

Workers

Individuals who work for you under a contract where they have to provide a personal service and where the employer organisation is not a client or customer of the individual can be furloughed. Casual workers and those on zero hour contracts are therefore included subject to the payroll rule.

Office holders and company directors

If office holders, including company directors, are paid through PAYE payroll, they can be put on furlough.

The guidance states that company directors can fulfil their statutory duties while on furlough but they should not carry out any other work for the company.

LLPs and companies should ensure that they follow proper decision-making protocols and that the decision to furlough is formally adopted and minuted.

Agency workers

Agency workers who are paid through payroll, whether that is the agency's payroll, or the payroll of an umbrella company, can be furloughed. These agency workers would not be able to carry out work for the agency or umbrella company during furlough.

Apprentices

There is clarification that apprentices can be put on furlough. As with other employees, apprentices can undertake training during furlough and should be paid at least the relevant

national minimum wage for time when they are training.

Fixed term employees

Those on fixed term contracts can be furloughed. Employers can take the decision to renew or extend the contract during the furlough period.

Can individual employers claim under the Job Retention Scheme?

Yes. People who are engaged by individual employers and paid through PAYE payroll can be furloughed. This might include carers, support workers, personal assistants, nannies, cleaners etc. However, if these workers are paid in cash and the employer is not registered with HMRC for PAYE, a claim will not be able to be made through the Scheme.

Can we re-employ staff who resigned or were dismissed after 28 February?

Yes. Employers can choose to re-employ staff and make a claim for them under the Scheme, whether they were dismissed for redundancy or any other reason, or if they resigned. Employers should be aware that continuity of service is likely to continue to accrue if someone is re-employed. They should also be aware that HMRC can retrospectively audit the claim and could query payments which have been made outside the intentions of the Scheme.

Can we furlough staff who are caring for others and so cannot work?

Yes. The guidance states that those who have to look after their children because of coronavirus may be furloughed. It also makes clear that employers can furlough people who need to stay at home with someone who is shielding because they are extremely vulnerable to the virus (where they would otherwise be made redundant).

Working for others during furlough

The updated guidance states: "If contractually allowed, your employees are permitted to work for another employer whilst you have placed them on furlough." This is an interesting clarification as it suggests that an employee can in some circumstances increase their take home pay by taking on alternative work during furlough. Commentators have suggested that this is to provide flexibility for employees with no work to assist in areas of the economy urgently requiring labour.

The employment contract may provide that an employee is not allowed to work for others during contracted hours. However, employers and employees could agree to vary such a contractual term on a temporary basis during the furlough period.

Employers taking on new starters should ensure that the starter checklist for PAYE is completed. New starters who are furloughed from another job should tick Statement C on the checklist form.

Employees must be notified of furlough in writing

The changes to the guidance clarify that employees must be notified in writing if you are furloughing them. A record of this written notification must be kept for five years and will be required if HMRC retrospectively audit the claim.

As we have previously highlighted, employers should seek the agreement of employees to being furloughed and this agreement should ideally be in writing and a record kept on file.

Making a claim

Enrol for PAYE online

The updated guidance makes clear that employers will only be able to make a claim if they have enrolled for PAYE online. Employers who intend to furlough staff and have not yet enrolled for PAYE online should do so now. This process can take up to ten days.

More detail of what can be claimed

Employers can claim for any regular payments they are obliged to pay employees. This includes wages, past overtime, fees and compulsory commission payments.

Discretionary payments such as bonuses, tips, commission payments and non-cash payments cannot be included.

The value of any salary sacrifice amount or benefit in kind cannot be claimed for. Benefits in kind, such as accommodation, private health insurance or company car should not be included in the calculation.

Unanswered questions

There continue to be uncertainties on how the Scheme will work. For example, we have seen opposing views from commentators on whether employees will be able to take annual leave during furlough without breaking the minimum three week furlough period. It is also unclear whether annual leave during furlough will need to be paid at the full rate of pay. We consider it likely that at least the first four weeks of annual leave ("Euro-leave" under Regulation 13 of the Working Time Regulations) will need to be paid at the rate of normal (pre-furlough) remuneration if it is taken during furlough.

There continues to be no clarity on the question of whether employers can claim under the Scheme for staff who have TUPE transferred to them after 28 February 2020. Such employees will not have been on the payroll of the transferee employer at the key date and so there are likely to be (at least) technical issues with such a claim.

FAQs - Third update to furlough scheme guidance

The Government has further clarified some details of the Job Retention Scheme.

On 9 April, HMRC published the third update of its guidance on the Coronavirus Job Retention Scheme (the Scheme). We outline below some of the key clarifications. Questions and answers arising in light of previous guidance may be found here.

How long will the scheme be in place and can we access it at any time?

The government plans to have the scheme in place from 1 March to 31 May 2020 and it may be extended beyond that date. The government recognises businesses will be affected by Coronavirus in different ways and they may access the Scheme at any point during the three months duration. The stated purpose of the scheme is to assist employers to retain their employees and protect the UK economy; again the updated guidance confirms the employer does not have to demonstrate a redundancy situation to access the scheme.

Can we furlough foreign nationals?

Yes. You can furlough employees on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts, together with other classes of workers not normally referred to as employees, providing they are paid through PAYE. Likewise foreign nationals employed through PAYE are eligible to be furloughed. Grants under the Scheme are not counted as 'access to public funds' and you can furlough employees on all categories of visa.

What can employers apply for in addition to employee's pay under the Scheme?

Employers can apply for a grant that covers 80% of their usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution i.e. 3%) on that subsidised furlough pay not on normal salary. See also "Can we use any of the grant claimed through the scheme to pay for benefits in kind?" below.

We receive a combination of public funds and income from a trading subsidiary. Can we furlough our employees?

The guidance makes it clear organisations in receipt of public funding are not expected to furlough employees on the assumption that either the organisation is providing essential public services or it is contributing to the response to Coronavirus. Even if this is not the case, for example in some schools which are completely closed, where funding is continuing employers are expected to use that money to pay staff in the usual way and not furlough.

The government does recognise there may be some organisations that are not primarily funded by the public purse and whose staff cannot be redeployed to assist with the fight against Coronavirus, such as where part of an organisation may be funded by commercial income, and in such cases the Scheme may be appropriate in respect of some employees.

Can administrators use the Scheme when they are called in to deal with an insolvency?

Furloughing employees may be an option for administrators dealing with an insolvent business. However in reality, and as recognised by the updated guidance, this is only likely to be an approach taken by administrators if there is a reasonable likelihood of rehiring the workers; for example if the business could be sold. Unfortunately this is not the case in a large proportion of administrations.

We know furloughed employees can not work for their employer but what about other companies in our Group?

The updated guidance confirms furloughed employees must not undertake work for, or on behalf of, their employer which includes providing services or generating revenue. This may extend so far as providing voluntary services to the employer. It also confirms a practical point that, subject to agreement or contractual right to vary duties, the tasks of furloughed employees may be reallocated to employees who are not furloughed.

The new guidance goes further to confirm furloughed employees may not work for any organisation linked to or associated with the employer. There is no definition of linked or associated organisations; the obvious targets are group structures, holding companies and subsidiaries. However, if a layman's approach is taken the definition could be very wide and apply to joint ventures, consortia and other less formal arrangements.

Likewise the guidance around volunteering has been extended and the updated guidance confirms 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 or a linked or associated organisation.

Can we furlough employees when they are on sick leave?

Yes. However the Scheme is not intended to replace SSP for short term absences from work due to illness and furlough leave must be for a minimum of three weeks. Beyond that if you need to furlough employees due to a business need and any of the affected employees are on sick leave they may be furloughed and placed in receipt of furlough pay rather than sick pay. Unsurprisingly employers can not claim under the Scheme and the SSP rebate scheme for the same employee at the same time although they can claim for the same employee at different times under both schemes.

Employees who are shielding under government guidance or on long term sick leave may also be furloughed. However some employees who are shielding may be able to work effectively from home and employers should not automatically furlough them on the grounds they are shielding.

If furloughed employees fall sick can we place them on sick leave?

Again, yes. Employers may keep employees who become sick while furloughed on furlough leave so long as their pay is at least equivalent to what they would receive if paid SSP.

We want to furlough an employee on a fixed term contract but it will expire two weeks into the Scheme. What do we do?

Furlough leave must be for a minimum of three weeks and therefore an employer would not be able to access the Scheme in relation to an employee who leaves after two weeks. However the guidance confirms fixed term contracts can be renewed or extended during the furlough period without breaking the terms of the Scheme. Employees on fixed term contracts that have expired since 28 February may also be rehired and placed on furlough leave. Employers should give careful thought to the duration and terms of any extended fixed term (and ensure this is recorded in a written agreement) taking into consideration the likely needs of their business going forward.

The usual rules on dismissal at the end of a fixed term contract still apply and will apply once the furlough ends if the employee is not to be further retained.

We are taking on a new contract this month and we are concerned we will not be able to furlough the new employees who have not been on our payroll since 28 February?

The most recent government guidance has clarified the position where there is a transfer of a business or a service provision change under TUPE Regulations or other form of business succession after 28 February. A business succession is when the ownership of a business changes from one legal entity to another and the new owner takes responsibility for the pay records. In such circumstances the new employer (the transferee) will be eligible to furlough transferring employees. Likewise where there is a payroll consolidation in a group of companies the organisation running the new PAYE scheme will be eligible to furlough affected employees and claim the grants available under the Scheme.

Can we use any of the grant claimed through the scheme to pay for benefits in kind?

No. The updated guidance confirms no part of the grant can be siphoned off to fund benefits. The entire 80% (up to cap of £2500) claimed must be paid to the employee and not used to pay administration charge, fees or other costs in connection with the employment.

Employers can claim employer pension contributions on the subsidised furlough pay set in line with the minimum automatic enrolment employer contribution of 3% of qualifying earnings provided they pay the whole amount claimed to a pension scheme for the employee as an

employer contribution. Employers can additionally claim employers NICs on the subsidised furlough pay not on normal salary or topped up pay.

If we furlough employees will it affect existing salary sacrifice schemes?

For advice on the impact on salary sacrifices schemes specifically in independent schools read here.

If your employees are furloughed and in receipt of furlough pay this does not mean you automatically have to terminate a salary sacrifice scheme. However HMRC agrees that Coronavirus counts as a life event that could warrant changes to salary sacrifice arrangements providing the contract allows and/or agreement is made with the employee.

If, when placed on furlough leave, the employee who has sacrificed salary falls below NMW this will not matter unless the employee undertakes training while on furlough leave in which case the employer must top up salary to the relevant NMW level for the time when training is undertaken.

When calculating 80% of salary to claim a grant under the Scheme employers should use the sacrificed salary as the benchmark and not include the value of the sum sacrificed. None of the grant paid to the employer may be used to pay for benefits provided through a salary sacrifice scheme.

Unanswered questions

Although our questions are being answered over time there continue to be uncertainties on how the Scheme will work. For example, we continue to see opposing views from commentators on whether employees will be able to take annual leave during furlough without breaking the minimum three week furlough period. It is also unclear whether annual leave during furlough will need to be paid at the full rate of pay.

Update to Coronavirus Job Retention Scheme and legislative scheme

HMRC has published an updated version of its guidance on the furlough scheme and the Government's Direction setting out the underlying legislative scheme has also been published.

Please see our answers to Frequently Asked Questions and articles on this subject here.

Key changes and clarifications in the guidance and direction are as follows.

Change to qualifying date

Employers who started a PAYE payroll scheme on or before 19 March 2020 and enrolled for PAYE online can now claim for furloughed employees who were on their PAYE payroll on or before 19 March 2020 but only where an RTI submission to HMRC relating to the employee was made on or before 19 March 2020.

While this will include some new starters who were previously excluded from the scheme, its impact could be limited as many employees starting in March will not have been notified to HMRC through RTI until later in the month.

Rehiring employees following furlough

The guidance makes clear that employers can if they wish rehire employees whose employment terminated on or after 28 February 2020, put them on furlough and claim for their wages through the scheme. This applies only if the employee was on the PAYE payroll on 28 February and had been notified to HMRC on an RTI submission on or before 28 February 2020. For clarity, the guidance states that this applies to employees whose employment was terminated after 28 February even where employers do not rehire them until after 19 March.

Rehiring where there has been a series of different employers

Where an employee has had a series of different employers, working for one employer at a time in the past year, former employers should check whether the employee is being furloughed by a current employer before agreeing to re-employ them and make a furlough claim. If the employee is being furloughed by a current employer, the former employer should not agree to rehire and furlough them.

If an employee has more than one employer at once, they can however be furloughed by each employer.

Choice of dates for calculation of salary

Because of the latest change in the guidance, employers can choose to use the reference salary for furloughed employees as at 28 February or in the last pay period before 19 March. This means that, where employers have already agreed with employees to furlough them based on salary at the end of February, this arrangement can remain in place. This latest change may be more relevant where employees are paid weekly or fortnightly.

Returning from statutory leave

The update clarifies that furlough claims for employees who return from maternity leave, paternity leave, shared parental leave, adoption leave, sick leave and parental bereavement leave should be based on their normal salary or earnings rather than on amounts paid during statutory leave.

Agreeing to furlough

The Direction states that an employee will be furloughed if they have "been instructed by the employer to cease all work in relation to their employment" for 21 days or more "by reason of circumstances arising as a result of coronavirus or coronavirus disease". (There is no stipulation that the employee would otherwise have been made redundant.) However, this does not mean that an employer can unilaterally impose furlough as the Direction also states that the employer and employee must have "agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment". This goes further than the guidance which states that employers must "confirm in writing to their employee" that they have been furloughed.

As we have set out in a previous article, employers should carefully document the agreement to furlough staff and ensure that employees indicate their agreement in writing. Where employers do not yet have written evidence of the furlough agreement, this can be put in place now and a retrospective furlough claim made subject to eligibility. Evidence of this agreement should be kept for five years as it may be subject to HMRC audit.

The agreement to furlough will be a temporary change to the employment contract and thought should be given to what will happen when the employer's circumstances change and/or the scheme comes to an end. As it is so fundamental to the eligibility criteria we recommend

that employers seek legal advice on the drafting of the furlough agreement.

Training activities during furlough

The Direction states that training activities which are "directly relevant to an employee's employment" and which are agreed between the employer and the employee before being undertaken will not be counted as work for the employer. Such training can therefore take place without breaking the furlough period.

Employers should note that training should only be undertaken where it is directly relevant to the work the employee carries out under the contract and should be agreed in advance with the employee. Employers should document such an agreement via an email exchange or similar. It is possible that evidence of such an agreement will be requested by HMRC in a future audit of claims.

Sick leave and furlough leave

The guidance suggests that employees who are off sick can be moved off sick leave and onto furlough leave. It does not provide detail on how or when this should be done but makes clear that employers will not be able to claim for the Statutory Sick Pay (SSP) rebate and make a furlough claim for the same period of time.

This might have led employers to consider retrospectively designating a period of sick leave as a period of furlough leave. The Direction appears not to allow this however. It states that where an employee is off sick, that is where "SSP is payable or liable to be payable in respect of an employee, whether or not a claim to SSP is made", the furlough period will not begin until the sick leave period has ended.

Unanswered questions: Taking holiday while on furlough

Unfortunately, the guidance does not provide any clarity on how holiday will interact with furlough. Nor is this referred to in the Direction.

We still do not have official confirmation that annual leave will not break the period of furlough, although we have seen HMRC Customer Support tweets which suggest that it will not. The same twitter feed suggests that pay for any period of annual leave during furlough should be topped up to 100%.

It is possible that we will not now have HMRC guidance on this point and that these questions might eventually fall to be considered by the employment tribunal or courts. The safest position for employers is to assume that leave will accrue during furlough and to ensure that pay is topped up to 100% for any annual leave during furlough.

Employers should also be aware of the risk that an employee may be entitled to take all accrued leave (including that accrued during furlough) on their return to work and that any annual leave purportedly taken during furlough will not count as taken. Following the recent change in the rules on carrying over holiday, some employees will be entitled to take accrued leave which they could not take because of coronavirus during the next two holiday years. Environment Secretary George Eustice said "the change is aimed at allowing businesses under particular pressure from the impacts of COVID-19 the flexibility to better manage their workforce, while protecting workers' right to paid holiday". This does not suggest the new carry over rule relates specifically to employees who are furloughed; although they may qualify if it is decided at a later date that leave taken on furlough does not count towards the statutory annual leave allowance and it is re-instated.

New HMRC guidance clarifies interaction between holiday and furlough

As the Coronavirus Job Retention Scheme goes live, HMRC provides helpful guidance on calculating claims.

The new guidance, published on 17 April sets out worked examples of claims in different scenarios and links to an online calculator which can be used to generate the key information employers will need to make a claim. The calculator is still under development at the time of writing can only be used to calculate figures for employees who are paid the same amount in each pay period. Detail is also provided on calculating the employer National Insurance contributions and pension contributions which can be claimed for furloughed employees. A step by step guide for employers has also been published to assist with making claims under the Job Retention Scheme.

As of yesterday, the online portal to make a claim under the scheme is available for employers to use.

Wrigleys is presenting a webinar on the Coronavirus Job Retention Scheme on 23 April 2020. Please see https://www.wrigleys.co.uk/events/ for details of how to register.

Scheme extension to 30 June and collective redundancy consultation

The scheme has been extended until the end of June 2020. This is a helpful change for employers who may be contemplating a significant number of redundancies once the scheme ends. This is because under collective redundancy consultation rules, employers must begin consultation with employee representatives at least 45 days before the first dismissal (where there are 100 or more potential dismissals within a 90 day period) and at least 30 days before (where there are 20 or more potential dismissals within a 90 day period). Employers contemplating more than 100 redundancies at the beginning of June would have had to start collective consultation at the end of last week.

However, employers should be aware of their obligations to consult collectively (and individually) on proposed redundancies and plan ahead to try to ensure the relevant processes can be followed as far as is reasonably practicable in the circumstances.

Holiday and furlough

Some long-awaited detail is provided on the interaction between holiday and furlough. However, the guidance states: “during this unprecedented time, we are keeping the policy on holiday pay during furlough under review”. Employers should therefore be alert to further updates and seek legal advice before making assurances to staff concerning holiday and holiday pay.

Holiday leave will accrue during furlough

After a period of uncertainty and speculation, the guidance clarifies that annual leave will continue to accrue in accordance with the employment contract. It states that employers and employees can agree to change contractual holiday entitlement as part of the furlough agreement but that such entitlement cannot be less than the statutory minimum of 5.6 weeks’ holiday per year.

Workers can take holiday while on furlough

The guidance makes clear that holiday can be taken during furlough. We understand this to mean that a day's holiday will not break the furlough period. Where workers have taken holiday (for example Easter bank holidays) in the last few weeks, this should not therefore impact on eligibility for the claim.

Time taken as holiday during furlough will need to be paid at the normal rate (i.e. the pre-furlough rate). Where staff are salaried, this will be the normal salary rate. Where staff have variable hours, employers should use the new 52-week reference period (in force since 6 April 2020) to work out average remuneration. (See separate guidance on calculating holiday pay for workers on variable hours for further help with this.)

This means that employers will have to pay the additional 20% of normal pay to staff for any time taken as annual leave. This will apply to the statutory minimum of 5.6 weeks' leave. Any additional contractual holiday leave taken during furlough should be remunerated in accordance with the employment contract.

Employers can restrict when holiday is taken during furlough

The guidance states that employers can, where there is a business need, limit the taking of holiday. For example, this might be because they are not able to fund the top up in pay which would be required where holiday is taken.

The guidance is silent on whether employers can insist that some holiday is taken during furlough. There is some debate amongst employment lawyers on this point. It is our view that the normal statutory rules are likely to continue to apply: employers can require workers to take holiday at particular times as long as they give twice as much notice as the length of the holiday. For example, an employer could require a worker to take 5 days' holiday but must give at least 10 days' notice of that requirement. There are advantages to insisting employees take annual leave while furloughed rather than later in the year because, during the furlough period, annual leave will be subsidised by the government grant. In addition if employers plan redundancies once the CJRS has ended they would not be faced with the cost of paying out for accrued but untaken leave.

However, if the courts decide aspects of the working time regulations do not apply to furlough leave, employees who were required to take holiday by their employer may be able to claim their days back or, if they have left the organisation, claim the financial loss suffered because they were not paid for accrued untaken leave.

Must an employer top up pay for bank holidays?

As set out above, the basic principle is that workers should receive normal pay (rather than 80% of pay) for time taken as holiday during furlough. However, the guidance states that employers have the option of giving the employee a day's holiday in lieu of a bank holiday which would normally be taken as leave. In that way, the employee will be able to take a day (at full pay) later in the year and the employer will not have to top up pay for the bank holiday at this stage.

Further questions

HMRC has stated that it intends to make payments to employers by 30 April if claims are made on or before 22 April. There is no doubt that further questions will arise as employers apply through the portal and come across novel problems and issues as they do so.

In particular, we recommend that employers take legal advice on documenting the furlough agreement as there are specific requirements set out for this in the legislative scheme

underpinning the Job Retention Scheme which are not included in the guidance.

FAQs - Covid-19 salary sacrifice schemes and furlough leave in Independent schools

Many independent schools are facing extremely difficult decisions in the light of the Covid-19 restrictions.

The proposal to reduce school fees next term and plans to furlough staff have raised a number of questions in circumstances where staff participate in a salary sacrifice schemes relating to school fees and pensions.

For frequently asked questions relating to furlough leave in general please see https://www.wrigleys.co.uk/news/charity-social-economy/faqs---covid-19-employment-law-and-furlough-leave/ For queries relating specifically to furlough leave and salary sacrifice schemes please see below where we have set out answers to the most common questions we've been asked. For more specific advice please contact Sue King on sue.king@wrigleys.co.uk

If we reduce school fees for Summer Term 2020 can we reduce the sum sacrificed through the Salary Sacrifice Agreement by the member of staff?

Yes - providing you entered into the agreement pre 6 April 2017 and the continuing arrangements relate to employment with the same employer at the same school in respect of school fees for the same child they may continue and the variation will not take the Salary Sacrifice Agreement out of the transitional arrangements.

If the member of staff is also on Furlough Leave you can still vary the Salary Sacrifice Agreement but you may have additional considerations – please see the questions relating to furlough leave below.

If staff currently pay 15% or more of the school fees out of taxed income can their level of salary sacrifice remain the same when fees go down?

Yes, but if as a result of leaving the salary sacrifice at the same level as last term the sum sacrificed covers more than 85% of the school fees staff will pay tax on the marginal cost normally set at 15% of the school fees through their P11D.

How do we document this variation?

We suggest you provide staff with a new schedule showing the revised value of the Benefit and Salary Sacrifice and ask them to agree the revisions by signing a new schedule in the same way as you do for fee increases each year. You may need to repeat this process at the end of the summer term in preparation for September.

If we place a member of staff on Furlough Leave will it be a Lifestyle change for the purposes of the salary sacrifice agreement?

Just to recap – a Lifestyle change is defined by HMRC as an unforeseen life event. This normally means events such as redundancy of partner, pregnancy of employee or partner or death of partner or child. Government guidance published on 4 April 2020 confirmed HMRC agrees that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly. This highlights the importance of obtaining written agreement from members of staff to changes to contractual arrangements including placing them on Furlough leave and varying the salary sacrifice agreement.

Whatever the impact of Covid-19 on individual members of staff fees still have to be paid so it is unlikely staff will seek to leave the salary sacrifice scheme, but accepting the situation as a Lifestyle change does give options. Staff may apply to a hardship fund or apply for a bursary (if available) in which case, if successful in their application, they will seek to reduce the sum they sacrifice or leave the scheme completely. If they leave the scheme they can not re-join in September.

What do we do if the salary sacrifice takes staff under the national minimum wage while they are on Furlough Leave?

The original salary sacrifice policy introduced at the time when you first entered into a salary sacrifice agreement with your employee states "*the salary sacrifice agreement will have to terminate if the reduction in pay means that the salary sacrifice takes the employee below the minimum level for the National Minimum Wage*".

However the government guidance at https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme#work-out-what-you-can-claim states 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.

In circumstances where members of staff are on furlough leave and participating in a salary sacrifice scheme the school will receive a grant for 80% of the employees' reduced (post sacrifice) salary. Therefore the school will pay this sum irrespective of whether it is below NMW and the existing rule regarding NMW will not apply because the member of staff is not working (unless they are undertaking training agreed with the school).

Can we continue to operate our salary sacrifice scheme for enhanced employer pension contributions while an employee is furloughed?

Yes – any tax, NIC and pension contribution will be collected from staff pay as normal. However employers must bear in mind they can only claim back the minimum automatic enrolment employer pension contributions. This means the maximum you can claim back from the government for employer pension contributions is 3% calculated on 80% of the normal salary of furloughed staff. For example if your enhanced employer pension contributions are 10% you will not be eligible to claim the additional 7% and schools will either have to terminate the scheme in accordance with its rules or absorb the additional cost.

For frequently asked questions relating to furlough leave in general please see https://www.wrigleys.co.uk/news/charity-social-economy/faqs---covid-19-employment-law-and-furlough-leave/

FAQs - The Government's Furlough Scheme and rural employers

We consider the application of the Coronavirus Job Retention Scheme to rural businesses and other Covid-19 related concerns affecting the sector.

As the latest details about the Government's Coronavirus Job Retention Scheme (the 'scheme') are studied and applied to various industries across the country, we consider what these mean for rural businesses.

Below, we have highlighted some common questions and issues. Separately, we have considered the impact of the scheme on employers more generally.

What is the scheme?

It is useful to think of the scheme as two agreements. The first is between the employer and the government where employers will apply to HMRC for a reimbursement of 80% of wages or £2,500 a month (whichever is the lower) for each worker who is eligible under the scheme.

Employers who successfully register their workers may also claim employer's National Insurance Contributions and employer's auto-enrolment pension contributions up to 3% on the wages covered by the scheme. If employers agree to top-up wages above those covered by the scheme (see below), they cannot recover the costs of the additional NICs and pensions contributions on that top-up. Tax must also be paid in the normal way via PAYE on the amounts paid to the worker. Employers can only claim for workers who were notified to HMRC as being on the payroll on 19 March 2020 or before.

The second agreement is between the employer and the worker in which the employer temporarily alters the worker's contract so they will do no work (not even emergency support or answering emails) for a minimum period of three weeks and will receive at least 80% of their wages (up to a maximum of £2,500 gross per month) during that time. It is up to the employer whether they agree to top the wages up to 100%. This means that if the worker agrees to be furloughed, for the period of time the employer accesses the scheme it will recover a percentage of employment costs associated with that worker. HMRC will be running the scheme.

The online registration portal went live in the early hours of 20 April 2020, with the first payments expected to be made on 30 April. Employers will need their Government Gateway ID and password to use the portal. Businesses struggling with cash flow now may be able to access funds via the Coronavirus Business Interruption Loan Scheme. However some businesses have struggled with eligibility and the length of time it takes to arrange the loan so those with little reserves may have to lay off workers or dismiss them on grounds of redundancy in the meantime. Employers can claim payments under the scheme from the date on which the worker had no work or were laid off as far back as 1 March 2020. If employers made workers redundant, or they stopped working for an employer on or before 19 March 2020, they can be re-employed and put on furlough and employers can claim for the lower of 80% of their wages or £2500 through the scheme.

Furlough or redundancy?

The scheme has been introduced in the hope that this will help avoid mass redundancies and lay-offs and allow employers to survive the lockdown period in the short to medium term and resume operations when the current crisis has passed. However, all employers are dealing with a level of uncertainty as to how long the lockdown will last and how long the scheme will continue to operate. Even when the current crisis passes, uncertainty over the health of the economy will continue.

Ultimately, how long a business can continue to operate will depend on individual circumstances such as the nature of the business, its financial reserves and so on. Some rural employers are particularly at risk due to the seasonal nature of their work and the fact that the lockdown has struck during Spring/ Summer, for example some shoots have already postponed days this season. At present, the scheme has been extended until the end of June, meaning employers can expect to recover the costs of employing staff until this time. It remains to be seen whether the scheme will continue into the Autumn, but this appears unlikely at this time.

Employers will therefore need to keep their operations under revision and consider government announcements on their plans for the scheme as they develop.

Accommodation and service occupancy - Continuation of the employment relationship whilst furloughed

As part of their role, many rural workers live in accommodation connected with the performance of their jobs. For rural workers this usually means there is a service occupancy or tenancy agreement in place. If there is a service occupancy, the right to occupy the property is treated as a licence to occupy that only continues for as long as the worker is in the job linked with the property. If there is a tenancy then the occupier's right to continue living in the property exists separately to the performance of the job. Furloughing a worker operates to temporarily vary the employment contract and, whilst furloughed, a worker cannot work for their employer but the employment contract and its associated rights continue. Employers will need to agree furlough with their workers. They must provide written notice of furlough leave, and should seek evidence of the worker's agreement, in writing and keep this information for five years, in case HMRC requests this evidence. Some terms of the contract can be varied for the period of furlough and most variations will focus on a reduction in pay and the change to the worker's obligation to undertake work. Where contracts allow the employer to impose lay-off or short time working, consent should still be sought to place a worker on furlough leave although it is more likely that workers will agree to the option of furlough. Because the employment relationship continues, furloughed workers who live in a property under a service occupancy agreement will retain their associated licence to reside there. If an employer seeks to alter any of the accommodation rights linked to the contract these changes must be agreed between the parties; there is no automatic right for an employer to vary these terms by themselves. Employers may also consider permitting rent payment holidays for accommodation. Separately, employers who have workers occupying properties under an assured shorthold tenancy (AST) will need to bear in mind the effects of the Coronavirus Act 2020. Under the Act, landlords must give at least three months' notice to AST tenants before they are able to start possession proceedings. The government has provided some technical guidance on this point.

Accommodation and service occupancy - What about redundancy?

Owing to the current circumstances, rural employers may be considering redundancies. Ending the employment relationship will also terminate the service occupancy, meaning an employer can recover the property. However, for workers with a tenancy agreement, the loss of a job will not automatically bring the tenancy to an end. Given the current circumstances employers considering terminating a worker's right to accommodation would be well advised to consider the knock-on effects including the impact on the employee and their family and the potential reputational damage this could cause. For example, if workers are made redundant can they find somewhere else to live? This will need to be balanced against an employer's ability to continue to run the accommodation provided to workers and the reduced opportunity to re-let in the short term, given the current restrictions on movement. As mentioned above, as part of the package of measures brought in to deal with the coronavirus crisis, the government has amended the law in relation to possession procedures so that landlords must give at least three months' notice if they want to get a property back. This applies to ASTs under which many rural workers occupy premises owned by their employers but does not apply to service occupants. Government guidance on these issues is available online. Employers also need to consider the practical point that ending a service occupancy or tenancy is one thing, gaining repossession of a property is another. Whilst service occupancies are not protected from the new three months' notice rule, if a service occupant refuses to leave the property, or is unable to leave, employers are likely to struggle to obtain a possession order from the courts until at least June. This is due to current capacity issues and the logistics of moving when it is difficult to engage removal companies and there is a restriction on non-essential travel. If workers on service occupancies are made redundant but allowed to stay in their accommodation, employers will need to make very clear the basis on which they are being provided with somewhere to live so as not to create additional rights of occupancy. We advise any rural employers to take specialist property law

advice if they are considering terminating their workers' right to reside in a property.

Social distancing, isolating and the impact on jobs

The government has provided sector-specific guidance on ways employers can amend their working practices to better protect their workforces at this time. However, some rural employers may find that they have staff who can no longer properly perform their role while observing social distancing. For instance, consider estate handymen whose jobs primarily consist of visiting inhabited estate properties to make repairs.

Unless the work is urgently required on a property, these workers should not be entering homes in accordance with the guidance (see above, and property guidance). This might mean that much of the work of handymen will stop and/or they won't be able to work safely with other workers, particularly if they cannot safely carry out their jobs whilst staying two metres apart from colleagues.

Employers have a few options to deal with this. The first is to see if working practices can be adapted to comply with the social distancing rules. The second is to see if these workers can be redirected to other parts of the business or estate where social distancing is not an issue (but with care as to the safety of lone workers who may be tempted to do jobs normally requiring 2 people). The third will be to see if it is possible to furlough these workers and recover a percentage of the employment costs via the scheme.

It might be sensible to keep someone in reserve to handle emergencies. However, doing so will mean that the worker(s) kept in reserve cannot be furloughed; they will either be kept on full pay or the employer will have to negotiate a reduction in pay and working hours of those kept on reserve. Alternatively employers will have to use outside contractors for emergencies.

Whilst many agricultural workers will be involved in food production and thus key workers, there will be grey areas around what elements of this work are essential to the performance of the business and thus what travel is 'essential'. Employers need to consider whether all work-related travel and activity is necessary for the continuation of the business.

For those agricultural employers involved in managing livestock, gamekeeping and vermin control, thought will need to be given to what work must be carried out as opposed to what work would be preferable to carry out, to ensure that workers are only undertaking essential travel. To this extent, employers should bear in mind any specific requirements to keep, maintain and manage land.

Continuing obligations for health and wellbeing - General points to consider

Employers owe a general duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees. Many employers are taking steps to keep in touch with staff who are isolated or who have otherwise been put on furlough and therefore have much reduced social interaction with others. Employers need to review and possibly amend lone worker policies and risk-assess new ways of working which comply with government guidance on self isolation.

The potential mental health impacts of the current situation on the workforce have been well documented and there are heightened concerns that these circumstances will put people at greater risk of depression.

Perhaps more so than the general working population, rural workers and business owners have been shown to experience high levels of stress and depression and it is possible that the added uncertainty of the coronavirus crisis, coupled with the already relatively isolated nature of rural work, could compound these issues for the rural workforce.

It is therefore worthwhile for rural employers to consider what can be done to try and reduce the effects of isolation. This might include encouraging remote communication and activity to help people through the current situation.

ACAS guidance on supporting mental health in the workplace (link here) may help employers think of simple ways to help with this. Mind, the mental health wellbeing charity, has also produced some useful guides that are designed to help employees and employers handle the additional stresses and strains of the situation.

Continuing obligations for health and wellbeing - Health and safety issues concerning the care of children

Rural employers will need to be alive to the additional potential risks caused by the closure of schools and nurseries. Food production workers have been designated as key workers, meaning that if they have children they should still be able to send them to school. However, there will be many rural workers who do not meet the definition of 'key worker' or for various reasons choose not to continue to send their children to school and so they are likely to need to keep children with them at home.

For rural workers working in or near farms or estates, this may represent an increased health and safety risk. For this reason, employers need to be clear with workers and their families which areas are strictly out of bounds and all rural estate workers should be made aware of the increased risk of children being in or around farms and estates. The rules on children accompanying parents during their work or on the employer's property should be updated and clearly communicated. Updated risk assessments may also be required.

What if I need more workers?

Employers engaged in the production of food and other essential supplies are faced with a difficult scenario. Just as crops and livestock are approaching yield, employers are faced with a country in lockdown. The National Farmers' Union has said that an 'army of people' will be needed to make up for the shortfall in foreign workers crop picking on farms. With many countries initiating a lockdown on similar terms to the UK, it remains to be seen who, if anyone, will be permitted to leave their country to come and work in the UK to help with food production.

On the positive side, government guidance has now clarified that workers can take up employment with another employer during furlough leave. As noted above, food production workers have been designated as key workers whilst the country is in lockdown. This means, in addition to the self employed and unemployed workers, there is a potential workforce among furloughed workers that can be freed up to harvest seasonal crops; with this in mind recruitment drives under the rallying banner of "Feed our Nation" are already underway.

Moving forward

The current circumstances present particular challenges for rural employers. In many rural workplaces the employer will comprise a relatively small group of people who have to perform many functions and roles within the business, including HR. These businesses may have relatively little in the way of specialist support and infrastructure to navigate the issues created by coronavirus.

Moving forward we would urge rural employers to listen to and watch out for guidance and information from their sector's leaders and read the government guidance and consider its practical effects on their own organisation and its staff. The situation is fluid and new or revised guidance should be expected, meaning rural employers need to be alert to the latest developments.

Where issues appear particularly complex or uncertain, or where there are difficulties in interpreting government guidance we recommend that employers seek specialist advice.

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