

Furloughing : the most used F word of 2020?

An easy guide for the smaller employer

INTRODUCTION :

Our straightforward guide – and our time-limited offer of 30 minutes` free legal advice from our specialist employment and discrimination barristers.

These are, as many have said, unprecedented times. Times of immense challenges for the tiniest to the largest of businesses - unless perhaps you are Amazon!

A lifeline has been thrown, at least for now, to employers and staff alike, by means of the Coronavirus Job Retention Scheme. The aim is to enable businesses to survive the immediate impact of the virus by providing a wages “cushion”, along with various other measures designed to help businesses stay afloat.

But in straightforward terms, what does this mean for the smaller employer who may not have day to day access to specialist legal advice or HR support? When does the Furlough scheme apply, or not? How does it work? Who does it cover? What can you claim for, when and how? What are the potential pitfalls that lie in wait? Can actions you take now with the best of intentions come back to bite you, with claims for discrimination, health and safety detriment, unfair dismissal, and so on, relating to the way you implemented, or did not implement, the scheme? What can you do now to avoid these? The last thing you want is to find a way to survive the immediate crisis, only to find that your business is broken by claims brought by disgruntled employees or other staff, further down the line.

That`s not the end of it though. What happens when the Furlough scheme is gradually wound down, or comes to an end altogether? The Government has said that there won`t be a cliff-edge end to the scheme, so it won`t go from 80% to zero in one go. But as yet, there is no clarity on whether the percentage reduction paid by the government will reduce, whether staff will be permitted to work part-time and top up their wages with furlough payments, or whether the changes will come about sector by sector.

There is so much information out there. What is really needed is a straightforward guide, with everything in one place. This is what we have tried to provide below.

In addition, we appreciate that specialist advice may be needed in some cases. With this in mind, we are offering SMEs the option to access up to 30 minutes` advice from our team of specialist barristers free of charge. By doing this, we can help you to help your employees.

The summary of key points below is designed to help the smaller employer gain a broad understanding of the scheme, as it works in practice, without having to trawl through pages of internet search results. It is updated whenever the government guidance is updated, so you can rest assured that it represents the position as it currently stands.

KEY POINTS

Who does the scheme apply to and for what period?

1. The furlough scheme applies from 1 March – 31 October 2020. The information set out below will remain valid until 31 July 2020. For the final three months, there may be changes (which are yet to be announced).
2. It applies to all employers: businesses, charities, public authorities, individuals (eg those who themselves employ a nanny or a carer), public authorities or administrators.
3. The scheme covers a wide range of staff who are paid via PAYE: employees, workers, agency, fixed term, casual or zero hours staff, apprentices and office-holders / company directors are all covered. Where the term “employee” is used below, it covers all these categories.
4. Foreign nationals are eligible to be furloughed and you can furlough on all categories of visa.

What is needed for you to furlough your staff?

5. You can only furlough an employee if you and they agree to do so. You cannot force an employee onto the scheme if they do not want to be furloughed.
6. If the employee does not consent to be furloughed (not surprisingly, most do), you will have to rely on any contractual right to lay off. If you don` t have this, your options are to maintain the current contractual arrangements, to seek to agree changes to that contract (temporarily or permanently) or to go down the redundancy / termination of employment route, which requires a fair process to be followed.

7. Where the employee does agree to be furloughed, you must confirm this (including the start date and the pay the employee can expect to receive whilst furloughed) in writing and keep this for at least 5 years.
8. More recent government communications suggested that you need to get the agreement of the employee in writing (not just inform them of it). A short email confirming their agreement should suffice. You can find a template for a furlough letter on the ACAS website (www.acas.org.uk). In a subsequent communication, HMRC has suggested that it is not necessary for the agreement to furlough to be signed by the employee. However, where this can be done, it would be good practice (even if not an essential legal requirement) to do so, not least to avoid future disputes.

What are the qualifying dates and criteria?

9. Originally, businesses could only furlough employees who were already on their payroll on 28 February 2020 (or had left their employment shortly before then, but the business had agreed to re-employ them). This has now been extended to cover staff members who were on the payroll on or before 19 March 2020.
10. A business must be registered for PAYE online for this scheme to apply (ie. you must have made an RTI submission notifying HMRC of payment of the employee in question) by no later than 19 March 2020.
11. If any employee was on the payroll (ie. notified to HMRC on an RTI submission) on or before 28 February 2020 but made redundant or stopped working after that date, you can re-employ and furlough them under the scheme. The date on which you re-employ them may be later than 19 March. You should not do this for any former employees who have been furloughed by their new employer. It is also recommended that you take advice about the terms upon which you agree to re-employ such staff.
12. There is now guidance about whether staff who have been transferred under the TUPE Regulations may be furloughed. A new employer may be able to furlough TUPE'd staff who do not already qualify based on the dates set out above, provided certain conditions are satisfied.

13. Thus, if staff TUPE transferred to you after 19 March and therefore could not have been on your RTI payroll as of that date, you may still be able to put them (or continue them) on furlough and receive the government payments under the scheme.
14. We can help you to establish the position where there has been a TUPE transfer, so you can be clear about what your rights and obligations are.

For how long must furlough leave last?

15. The minimum period of time for which an employee can be furloughed is 3 weeks. This must be continuous - you cannot break up this period with days in work and days furloughed.
16. You can have more than one furlough leave for any employee, but each must be for no less than 3 continuous weeks. Thus, you can furlough for three or more weeks, have the employee back at work for a time, and then furlough again for three or more weeks.

What can / can't be done during furlough leave?

17. At least until 31 July, the employee is not allowed to do any work for your business whilst on furlough leave, or for any linked or associated business. This includes providing services or generating revenue. The scheme does not allow staff to work on reduced hours – they must not undertake any work at all. This may mean furloughing some and redistributing their work to others. Please note that it is possible that between August and October 2020, employees may be able to work part-time with the cost being shared between the Government and the employer. We are awaiting further information about this.
18. Furloughed employees can undertake training, however, but they must be paid at least the National Minimum Wage for any time spent training (employees on modest rates who are paid at 80% may otherwise dip below the NMW rate). This is permitted for the time spent furloughed (as they are not working) but the full NMW rate must be paid for any time spent training
19. Furloughed employees can do voluntary work for other organisations. If their contract of employment ordinarily permits it, they are also able to take up paid employment elsewhere, whilst on furlough leave.

Selection decisions

20. Businesses must be extremely careful when making decisions about who to furlough / not to furlough and about who should be brought back to work and when. It is very easy to unwittingly discriminate against protected groups even when the employer is acting with the best of intentions. The best way to avoid this is to make decisions based on business need and to apply objective, non-discriminatory criteria. If in doubt, please contact us for advice.

Furlough pay – what can be reclaimed?

21. You can reclaim 80% of the employee`s pay or £2500 per month (whichever is lower) from the Government. You can also reclaim employer national insurance contributions and the 3% minimum employer auto-enrolment pension contributions, but only on the furloughed amount (80% or £2500) not at 100% pay rates. Also, if you contribute to the pension at a higher rate than the minimum rate, you cannot claim the difference for any of it. Thus, if you pay 5% pension contributions and furlough your staff at 80%, your claim for pension payments will be for 80% at 3% only. The position may change for the period between August – October 2020 to enable part-time working with a top-up element being paid by the Government, but further details of this are awaited.
22. It is up to you whether you offer to furlough staff at the 80% rate or top it up to 100% (or any figure between 80% and 100%).
23. The 80% / £2500 monthly cap relates to gross (pre-tax) pay.
24. “Pay” for these purposes includes any regular payments the business is obliged to pay to the employee, including wages, past overtime and compulsory commission payments. It does not include discretionary bonuses (including tips), discretionary commission payments or the value of any non-cash payments, even if they are taxable benefits in kind. There are special rules applicable to salary sacrifice schemes.
25. Where employees have variable pay, the calculation will be based on the average pay. For employees of 12 months or more, you can use the higher of their earnings in the same month the previous year or their average monthly earnings over the 2019-20 year. For those who have been employed for less than a year, you will claim their monthly average since they started work (it is pro-rated for those who had been employed for less than a month).

26. Your staff will be paid and taxed in the usual way (furlough pay is subject to exactly the same deductions).
27. It seems that employees already on sick leave (whether short term or long term) may be furloughed for business reasons (although there is some inconsistency in Government communications about this). However, it is not intended to simply cover short-term sickness absence. Employees who become sick whilst furloughed may either be left on furlough leave or moved onto sickness absence and will be paid accordingly. Remember that the usual 3 week minimum furlough period will apply – if the employee is taken off furlough (eg because they are placed on sick leave) you can only recover the 80% / £2500 if there has been a continuous furlough period of 3 weeks or more.
28. The normal rules apply regarding staff on maternity, adoption, paternity or shared parental leave (but businesses can claim through the scheme in respect of any enhanced contractual pay applicable to such leave).
29. Employers are entitled to furlough employees who are shielding (or who need to stay at home with someone who is shielding) or off on long-term sick leave. The same applies to employees who are unable to work because they have caring responsibilities (eg young children or elderly relatives).

How to make a claim

30. The scheme requires employers to pay the employees itself and then reclaim the furlough payment by making a claim to HMRC. The only way to make a claim is via their HMRC online portal which went live on 20 April 2020. HMRC stated that claims would be paid within six working days and it currently appears that payments are being received within this type of timescale.
31. In order to make a claim, you need a Government Gateway ID and password, you must be enrolled for PAYE online and you must have available, for each employee you are claiming for:
 - Name
 - NI number
 - Claim period / amount
 - PAYE / Employee number (optional)

32. If you have fewer than 100 furloughed employees, you will need to input the information separately for each. If you have 100 or more, you will need to upload a file with information for each employee. The following file types are accepted: (.xls .xlsx .csv .ods).

33. To access the scheme, you must have a UK bank account.

Employees with more than one job

34. If an employee has more than one job, then can be furloughed from none, any or all of them.

Planning for the longer term

35. It should be noted that all other employment rights remain unaffected by the furlough scheme (the contract is simply suspended so far as the obligation to work is concerned but remains in place for all other purposes).

36. Businesses can go through redundancy processes and make redundancies during a period of furlough leave, but this will need to be carefully managed. Depending on the numbers involved, there may be obligations to consult collectively as well as individually. It has now been clarified that trade union representatives or employee representatives can undertake their collective consultation roles without breaking the “no work” rule for furloughed staff. Do seek advice if you believe you will need to make redundancies either now or in the next few weeks or months.

37. Businesses can seek to agree changes to other terms and conditions as well as, or instead of, putting employees on furlough leave. However, you should not do this unilaterally, it is usually necessary to get employee buy-in / agreement. If this affects 20 or more employees, advice should be taken as to collective consultation obligations.

38. For example, some smaller employees who do not have the cashflow to enable them to pay wages before receipt of the furlough payments are asking their staff to agree to defer payment of their wages, eg. for 14 days after the usual date. This can be done, if there is agreement to it.

39. If and when businesses are in a position to consider asking employees to return to work, some careful and informed decisions need about when and how this should be done. This is a very high-risk area for smaller employers, who should wherever possible seek specialist advice.

THE INEVITABLE COMPLICATIONS / GREY AREAS – LET US HELP YOU.

40. It is not possible to answer every single question in this document. The national guidance is incomplete and further, there will inevitably be grey areas and nuances that will require individual consideration. Some of these would include issues such as:

- To what extent do employees accrue annual leave whilst on furlough leave? If so, does that mean all annual leave is covered? What can be done to reduce the amount of leave that accrues during the furlough period?
- Can employees be required to take annual leave whilst furloughed, even if they don't want to? If so, how much, and at what rate should they be paid?
- How do the conditions for claiming for TUPE employees under the Scheme apply to your business?
- To what extent can you consult directly with your staff (rather than trade union or employee representatives) about redundancy or restructuring plans while they are on furlough leave? How can this be done without breaking the key furlough condition that employees are not allowed to do any work whilst furloughed?
- To what extent can you give notice to terminate employment to an employee on furlough leave and use furlough pay to cover any notice period? If notice is given, should they be paid at 80% or 100%?
- How should selection decisions be made regarding the starting and ending of furlough leave? To what extent is it appropriate to take the personal circumstances of the employees into account?
- What happens to your employees if your business has to be sold whilst `closed` or becomes insolvent?
- How do you get your employees back to work safely and in a non-discriminatory way?

If you haven't found the answer to your question above or if there is anything about which you are unsure, please do contact us and we will do our best to help you.

OUR OFFER OF HELP – AND THERE`S NO CATCH

To support SMEs (many of whom we know are struggling to cope with the current crisis and have immense cashflow concerns), specialist employment and discrimination barristers in our team have agreed that until 30 June 2020, they will offer any SME which has any employment issues connected to the current crisis, 30 minutes` free advice by telephone, email or video-link meeting, on a one-to-one basis.

To access this service, please [click here](#) and complete the form, or speak to Kate Hather on **0117 930 9000** or by email at kate.hather@guildhallchambers.co.uk

Kate will ensure one of our barristers is allocated to you without delay.

We recognise the urgency involved in questions relating to this crisis, and we will do our best to provide the advice to you on the same day or at latest, within 24 hours of receiving the details of your query from you.

You will need to be aware that there are some matters where the position is not yet entirely certain and where further guidance is needed, but we will do our utmost to help you by answering definitively any questions that can be answered in that way, and if not, to give you a steer based on what we believe is the likely position, taking into account our knowledge and experience of industrial relations in the workplace and the way in which employment tribunals are likely to approach matters in the future.

Note: this document provides general guidance only. Expert advice should always be sought in relation to particular circumstances.