

Coronavirus Job Retention Scheme

In an unprecedented move on Friday 20 March 2020, the Government announced plans to help pay the wages of employees not working, under the Coronavirus Job Retention Scheme.

The government is being forced to devise and implement momentous measures with exceptional rapidity. Some issues are unclear, others are not addressed. Further details will be published in the next few days. In common with the Government, employers must act quickly. However, they should also exercise caution.

What We Know So Far:

- All UK businesses, including charities and not for profit organisations, will be eligible to apply for grants.
- The scheme offers temporary contributions to the wages of workers whom employers cannot afford to pay due to the COVID-19 pandemic, to avoid redundancies. It will operate for at least 3 months but may be extended.
- You must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.
- To apply, employers must first designate *employees* they are unable to pay as 'furloughed *workers*'. These workers must be written to to confirm their change in status, but only after seeking their consent to do so (see risks and issues below). To be considered furloughed, the workers must **not** be working at all including doing aspects of their role or working for the employer in another capacity or on a voluntary basis but will remain 'on the books'.
- Information about the furloughed workers and their earnings can then be submitted to HMRC through a new online portal. HMRC will reimburse 80% of a furloughed worker's wages for all employment costs to employers directly, up to a cap of £2,500 per month – just above the national median salary. This amount can be topped up by employers, if they choose to do so.
- HMRC are working urgently to set up a system for reimbursement, as there is no existing method to facilitate payments to employers in this way; we hope more details will soon follow.
- The Chancellor aims for the first grants to be paid within weeks and no later than the end of April 2020. Grants can be backdated to 1 March 2020.
- The scheme is intended to be as broad as possible. However, the Government guidance creates confusion by referring interchangeably to "employees" and "workers" – which term covers those who contract to provide services personally, but who are not in business on their own account and that do not provide their work in an arrangement where the "employer" is actually a customer or client.
- More information on the Coronavirus Job Retention Scheme and other announcements are expected in the coming days, particularly in relation to small and medium-sized businesses.

Risks and Issues:

'Furloughed' status:

- Changing the status of an employee remains subject to existing employment law and the ability to do so will therefore be dependent upon the terms of the employment contract.
- Few contracts contain an express right to change status or lay off employees for whom the employer has no work.
- Unless such a right exists, employers will need to agree the change, or introduce it on notice.
- Merely imposing the change will expose the employer to the risk of employees resigning to claim wrongful dismissal and (for those with 2 years' qualifying service) unfair dismissal. Alternatively, employees could refuse to accept the change, continue in employment under protest and later claim damages or an unlawful deduction of wages for the balance of their contractual salaries.
- In practice, many employees may consider it more attractive to accept the change to become furloughed than face redundancy.

What can be claimed

- Employers can use a portal to claim for 80% of furloughed employees' (employees on a leave of absence) usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers can use this scheme anytime during this period (three months from 1 March 2020).

20% top-up:

- Government guidance states that employers can "choose" to fund the difference between normal salary and value of the grant, but do not have to do so.
- As the guidance states that the change to furloughed status remains subject to existing employment law and the contract of employment, it is unlikely that employers will be given a statutory exemption from paying sums contractually due under the contract.
- If that is correct, employers must reach and record agreement with furloughed employees to waive all or part of the excess over the value of the grant.

Non-furloughed workers:

- Employees cannot demand to be furloughed without their employer's agreement.
- Selection of furloughed, retained and redundant employees could cause resentment within the workplace, eg from employees who are retained while their colleagues are sent home and paid 80% or 100% of their wages for no work at

all.

- The guidance does not refer to any requirement to adopt fair criteria to make those decisions, to which normal discrimination laws would apply. Therefore a sound decision process on selected furloughed employees should be adopted.
- No grant is available for employees continuing to work normal or reduced hours, for example, due to agreed short time working. As workers designated as 'furloughed' under the scheme cannot undertake **any** work for their employer, the grants cannot be used to top-up the wages of such workers.
- Employers may dislike rewarding, for example, half their workforce for no work at all when they would prefer to have all their staff on half-time working. One possible solution would be to rotate workers on furlough, in order to treat all workers equally. However, it may be that such complexity proves administratively prohibitive for some employers.

Abuse:

- Concerns have already been raised over employers exploiting the scheme by claiming workers are furloughed when, in reality, they remain in work. The Government is yet to release details of how the scheme will be regulated but it is expected that employers will need to provide evidence. The Government has been clear that the scheme will apply broadly, in an attempt to protect as many jobs as possible. However, more information is awaited in relation to how the scheme will engage with workers on zero-hours contracts or those already on short-time working. The Chancellor has also promised a similar initiative for the self-employed – which could also extend to "workers".
- Aside from the rapidly evolving legal position, effective communication and transparency are key for all employers when implementing a period of furlough. Open discussion, pragmatic solutions and, preferably, agreement will be critical in using the scheme to save businesses and reduce the risk of claims.

Process

1. An employing organisation (PCC or Standing Committee) needs to decide which of their employees they are selecting for furloughed leave. You need to document a sound decision process on selecting these employees and document it.
2. It is important to remember that the way your employees respond to this will very much depend on how you approach and hold conversations with them. Therefore, it is important that these difficult conversations are held with care and compassion and recognition that this is a challenging time for all.
3. Furlough is likely to be appropriate where there is a reduction in work available and an employee would otherwise be at risk of being laid off or made redundant. Employees who are placed on furlough leave remain as an employee until work becomes available again and will continue to receive pay with the employer

reclaiming up to 80% of each furloughed employee's salary through HMRC (up to £2500 per month).

4. The employer may also choose to pay the remaining 20% of a furloughed member of staff's salary notwithstanding that this cannot be reclaimed from HMRC. Government guidance confirms that the employer will not be obliged to pay the additional 20%. Careful consideration will need to be given to treat all staff fairly and consistently.
5. In addition to the reimbursement of 80% of salary the employer can reclaim associated employer NICs and minimum auto-enrolment pension contributions on that salary.
6. The scheme is very specific that any employee on furlough leave MAY NOT work for the parish during this time including on a voluntary basis - although they can undertake any opportunities for learning or professional development.
7. It may be that an employee has more than one part time job so may be put on furlough leave from either or both jobs. In reality this is a scheme to protect employment.
8. An employee must be furloughed for a minimum of three weeks and that three weeks can start any time during the duration of the scheme. They can then come off furlough and return to work. (This means that employers cannot rotate staff weekly between furlough and non-furlough.)
9. If someone is absent from work as a result of medical advice and self-isolation guidance and they are receiving statutory or contractual sick pay, they should not be placed on furlough leave. However, staff could be furloughed later when they are ready to return to work.
10. Furlough should not be used as an alternative for sickness absence. The critical question is if there is work for them to do, or if they would otherwise have been at risk of redundancy due to lack of work. If they would otherwise have been in a category of staff who would have been furloughed it may still be appropriate to identify them as furloughed. If but for their illness or self-isolation they would be undertaking work, then it will not be appropriate to furlough them.
11. Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February 2020.
12. If staff are working remotely, and there is work to do, they should be retained and paid as normal.
13. The calculation of 80% of salary is based on the higher of;
 - (i) the same month's earning from the previous year (for example if someone is furloughed in March this will be based on earnings from March 2019 if they are furloughed in April it will be based on earnings from April 2019 etc); or
 - (ii) the average monthly earnings in the 2019-20 tax year

14. Ideally staff need to agree that they will be furloughed. As a starting point staff need to be written to, explaining who you have identified as furloughed, and ask them to confirm their agreement to this in writing. Should they not agree then it will be necessary to consult with them (over the telephone or video link) to understand their objections and if these can be overcome. Ultimately then consideration will need to be given as to whether to simply notify them of the change of status or alternatively make redundancies.
15. Where all employees or whole teams or categories of staff are identified as not needed to work during this period then selection will be straightforward. However, where a reduction in staffing is required with some staff continuing to work, selection will be more complicated. In these circumstances a fair and objective selection process should be designed in order to justify the designation of all staff as either furloughed or working. It might be appropriate to seek volunteers or alternatively have clear criteria. In all cases there should be a document that can be shared that sets things out clearly, the rationale for furloughing staff, and if a selection has to be made, the basis for this.
16. Any employee appointed on or after 1 March 2020 is excluded from the scheme.
17. If a post has already been made redundant, an organisation can re-employ people who have been made redundant since 1 March 2020, and then place them on furlough leave as an alternative to dismissal. It may be appropriate to consider redundancy for certain posts at a later date.
18. Furloughed absence is just a pause on day to day working whilst remaining on the pay roll, so the person is still part of the organisation and should be kept up to date with news and information.
19. Any furloughed member of staff, and any member of staff off sick continues to attract all their usual employment rights, including the accrual of annual leave so there may need to be a plan of how that leave is then taken when things 'get back to normal' to avoid people all then being off at the same time.
20. Throughout any period of sick leave or furloughed absence please do remember that there is still a duty of care and issues of wellbeing, support and pastoral care that should be in place so that people still feel part of things.
21. Details of the online portal for reclaiming the 80% of salary should be released soon.

To claim, you will need:

- your PAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- your bank account number and sort code
- your contact name
- your phone number

22. **What about self-employed people?** There are no steps to be taken by the PCC here, HMRC will be in touch directly with a self-employed person as there is a specific earnings protection scheme for the self-employed.

Further Advice and guidance

ACAS is the best resource and to check on HMRC website and the Gov.uk website for more information

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

Sample furlough leave letter

Before this letter is sent a conversation should take place so that there is time for any questions and clarifications to happen and reassurances given.

(This should ideally be sent by email with a hard copy letter following by post. The individual must consent to the change to their circumstances before furlough arrangements are implemented).

Church Letterhead

Date

Private and Confidential

Name

Address

Dear

Re: Furlough absence

Following our conversation (**say when**) I am writing to propose that as a result of the ongoing COVID-19 (Coronavirus) pandemic, your current role as (**say what it is**) with us (**say the name of the employing body eg St James PCC**) is “furloughed” from [date/immediately] until [date OR further notice].

To reassure you, furlough is a temporary period of leave to help us deal with the fact that there is **[no/less]** work available for employees at this time due to the current COVID-19 situation. You will remain employed by us during this period and your usual contractual terms and arrangements will all still apply such as continuing to accrue annual leave.

Your contract of employment will be unaffected, save in the following areas which shall be amended on a temporary basis for the period that your employment is furloughed as follows:

- 1) Your hours of work will be reduced to zero;

- 2) **State what is being paid:** eg your [pay/salary] will be reduced to 80% of your contractual pay/salary subject to a cap of £2,500];
- 3) **State what is being paid if you are choosing to top up:** eg you will be paid [20%] or other % to make up usual salary] % of your usual gross basic pay;]
- 4) You will not be required, or permitted, to work during this period and you should not attend your usual workplace (unless we request you to attend).

It is important to say that you must remain in touch and available for work throughout this time so that we can bring you back in immediately as the situation changes.

This step is being taken in order to help avoid making redundancies at a time when our income is under significant pressure. We will be regularly monitoring any further government announcements and will keep you abreast of any important changes that may affect this proposed new arrangement.

Due to the urgent nature of this proposal, please respond to this letter within [24 hours/3 days etc.] to confirm your acceptance or otherwise of this proposal.

If you are willing to accept this temporary change to your employment contract, please sign and complete the section at the bottom of this letter and return it to **NAME** by email to **xxxx**).

If you would like to discuss this further, or have any concerns. please do let me know.

We understand this will be difficult news for you; however, by making this decision we hope to be able to retain **(you/all of our employees)** during these extremely difficult and unprecedented times.

I look forward to hearing from you.

With best wishes etc etc