



BRIEFING NOTE

FURLOUGH SCHEME

The Government is introducing a Coronavirus Job Retention Scheme, the Furlough Scheme. Furloughed employees are those being kept on but with no work to do.

Essentially employers will be able to recover 80% of their employees' wages through HMRC. At present this is with effect from 1 March 2020 for a three month period, but this may be extended. It is a temporary scheme.

The Furlough Scheme only applies to PAYE employees on the payroll on 28 February 2020.

Details of the legislation establishing the Furlough Scheme are awaited and this Briefing Note may need updating. The legislation is anticipated next week. Therefore at this point there are not answers to all potential questions and some advice is common sense, but of course subject to clarification once the exact details are provided.

The Furlough Scheme

The intention of the Furlough Scheme is to save jobs and protect employees' pay by paying part of their salary for those employees that would otherwise have been laid off.

What is it?

The Furlough Scheme only applies to employees on PAYE whereby the employer will be reimbursed by HMRC 80% of the employee's wages, subject to a cap of £2,500 per month. The employee's payment would be subject to the usual deductions for tax and NI. The employer can top up the difference but does not have to, (subject to employment law and renegotiating any contractual entitlements).

At present the systems at HMRC are not set up to facilitate payments to employers and this may take a number of weeks to implement which will cause a delay in employers receiving payments from HMRC. Government Guidance suggests that HMRC will be ready to facilitate payments by the end of April 2020 and claims can be backdated to 1 March 2020. Employers can only claim once every three weeks.

Government Guidance refers to "all employment costs" which does not include employer's NI and minimum auto-enrolment pension contributions on that wage. Fees, commissions and bonuses are not included.

The Furlough Scheme only applies where the employee stops working and does not apply if the

employee reduces the hours or days that they work. Even if the employee works for an hour they will not be eligible.

The Government Guidance states that the Furlough Scheme is available to all UK businesses, the Government does not expect public sector employers to use it as long as central government continues funding wage costs in the normal way.

Irregular Earnings

For employees whose pay varies the 80% will be based upon the higher of: the same month's earnings from the previous year; or average monthly earnings in the 2019-20 tax year. If the employee has been employed for less than one year the furlough pay will be 80% of their average monthly earnings since they started work.

National Minimum Wage ("NMW")

Employees are only entitled to the NMW for the hours they work. So, if they are furloughed and do not work and 80% of their normal earnings would take them below the NMW based on their normal working hours, they will still only receive 80% as they are not working. However, they will be entitled to be paid the NMW for any time spent training.

Agreeing to be furloughed

Unless there is a lay-off clause in the contract of employment, the employer will still be liable to pay 100% of the wages, which is fine if they agree to top up the difference.

However, the employee will need to agree to be furloughed, it is likely that they will as the alternative is lay-off or redundancy. Where there is no lay-off clause in the contract of employment and the employer does not want to top up the pay, the employer will need to negotiate with the employee. Some employers have already started preparing 'Agreements for Furlough Leave'. This is likely to include agreement of a reduction in pay to 80%.

HOWEVER, such an agreement is likely to affect an employee's right to claim the 20% shortfall in wages as an unlawful deduction from wages as they have agreed to the reduction.

Annual Leave

Annual leave will continue to accrue during furlough leave. However, employees should be careful as to what they agree to during the furlough leave to avoid a situation that they are paid their full pay during the annual leave and not the 80% rate.

Caution: Any agreement to take furlough leave by an employee with their employer should not include a variation to their pay when taking annual leave.

Employers can require employees to take annual leave during furlough leave, subject to the provision of the Working Time Regulations requiring twice as much notice to be given than the period of annual leave.

Sickness Absence

Employees on sick-pay or self-isolating cannot be furloughed, but can be furloughed afterwards. Employees who are shielding can be placed on furlough.

Maternity Leave

Employees on maternity leave (or similar) can continue to draw SMP (or similar payments). The

guidance does not prohibit women on maternity leave agreeing to return to work early and then being furloughed, or electing to change to shared parental leave and then being furloughed.

Employees on Unpaid Leave

Employees on unpaid leave cannot be furloughed unless they were placed on unpaid leave after 28 February 2020.

Employees with more than one job

If the employee has more than one employer they can be furloughed for each job. Each job is separate and the cap applies to each employer individually.

Redundancy – will it be unreasonable to dismiss for redundancy if furlough is available?

Such a decision is likely to revolve around the employer's cash flow. As there will be a delay to employers being re-imbursed by HMRC they will either need to pay up front and claim back from HMRC once they are set up to do so or agree with the employees a different arrangement of paying them some or all of the 80% of the wages when they are received.

Once HMRC are up and running with the re-imbursing it is considered likely to be unreasonable to dismiss for redundancy when furlough is available.

An employer can re-employ people, and put them on furlough leave, who were on the payroll on 28 February 2020 and have since been made redundant since.

How will an employer decide who to furlough?

The employer is likely to apply a very basic and simple selection process if not all employees are to be furloughed. This is likely to only be able to be challenged if the selection is unlawful, for example discriminatory.

It is thought that vulnerable employees and employees over 70 may be prioritised when an employer decides who is to be furloughed.

Can there be multiple periods of furlough?

Furlough Leave must be taken in minimum blocks of three weeks to be eligible for funding. There is nothing in the Guidance which prohibits rotating Furlough Leave amongst employees, provided each employee is off for a period of at least three weeks.

Can an employer raise wages to cover the shortfall?

There will be strong measures to prevent fraud and misuse of the Furlough Scheme. HMRC would be able to identify from PAYE records if an employer was misusing the Furlough Scheme. The 80% will be based upon: the same month's earnings from the previous year; or average monthly earnings in the 2019-20 tax year. If the employee has been employed for less than one year the furlough pay will be 80% of their average monthly earnings since they started work, which would prevent a pay rise to cover the shortfall having an effect.

Employees objecting to their colleagues getting 80% on furlough leave when they have to work

This is a difficult situation and there is no real solution to this issue.

Can employees on long-term sick return to work to take advantage of the Furlough Scheme?

Probably not, the employee would need to be ready willing and able to return to work.

Is the employer's refusal to top up the extra 20% a breach of trust and confidence?

Unlikely.

Would a furloughed employee be able to take a new job in their (now) spare time?

It is likely that the legislation will prohibit this and such action could amount to gross misconduct with the current employer. Although volunteering and training (provided it does not generate an income for their employer) is to be allowed.

Disciplinary and Grievance Procedures

Legislation is likely to allow activities associated with employment (for example grievance and disciplinary processes) to continue.

Can the employer give redundancy notice during the three month period of the Furlough Scheme so that in effect HMRC contribute to the cost of the notice period?

Likely to be allowed unless the legislation excludes it.

Can redundancy consultation be conducted during furlough leave?

Yes.

Agency Workers

The Furlough Scheme is only available for agency employees who are not working.

Term and Conditions of Employment including Continuity of Service

Continue during the furlough period.

Death in Service Benefit

This depends on the terms of the insurance policy, however, such payments are often based on the average salary of the preceding three years.

RMT LEGAL DEPARTMENT

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Further Briefing Notes and Updates will be provided when information is received and/or issues arise.