

## Coronavirus - What is Furlough Leave and How to Use It

As part of a new package of business support measures to help businesses cope with the impact of COVID-19 (Coronavirus), on 20 March 2020 the UK government announced the Coronavirus Job Retention Scheme (also known as 'furlough leave').

Furlough leave is a temporary leave of absence from the workplace for economic reasons. It is paid for by the government and has been introduced to help businesses avoid mass redundancies.

### Which employers can use the scheme?

Any UK organisation with employees can apply, provided they:

- had created and started a PAYE payroll scheme on or before 28 February 2020; and
- have a UK bank account.

### What does the furlough leave scheme pay?

Employers will receive a grant from HM Revenue & Customs (HMRC) to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated employer's national insurance contributions and minimum automatic enrolment employer pension contributions payable on that subsidised wage.

While on furlough leave, the employee's wage will be subject to usual income tax and other deductions. Fees, commission and bonuses cannot be recovered from HMRC and should not be included in calculating the employee's 80% pay. For salaried employees, their entitlement will be calculated using their salary as at 28 February 2020.

HMRC is expected to issue more guidance on how employers should calculate their claims for employer's national insurance contributions and minimum automatic enrolment employer pension contributions.

Payments can be backdated to 1 March 2020 (but reimbursement will not apply to periods of active work after that date).

### How does an employer make a claim to HMRC?

At the time of writing this Briefing Note, the online claims service is not yet available. However, we expect it to be available by the end of April 2020 and reimbursement payments should also be available at that time.

### Do employers have to top up the 80% pay to 100%?

Employers may, but are not obliged to, top up furloughed employees' pay to 100%. If an employer decides to do so, care should be taken in paying a top-up amount to furloughed employees, as it could leave employers exposed to potential claims of discrimination. Specific advice should be sought.

### How long will the temporary scheme last for?

This is probably dependent on how long the Coronavirus pandemic lasts. At present the scheme will initially run until 31 May 2020, but there is provision for it to be extended.

### Which employees can be furloughed?

To be eligible, the employee must have been on your PAYE payroll on or before 28 February 2020. Those employees who were taken on after that date are not eligible. The staff member can be on any type of contract, including:

- full-time employees;
- part-time employees;
- employees on agency contracts; and
- employees on flexible or zero-hour contracts.

To be eligible for the reimbursement employers should write to their employee confirming that they have been furloughed and keep a record of this communication. In other words, an employer can only claim a reimbursement for an employee once they have been placed on furlough leave.

### What about employees who were made redundant after 28 February 2020?

An employee made redundant after 28 February 2020, is eligible to be furloughed if they are re-hired by their employer. However, an employer is not obliged to re-hire an employee to do so.

In many cases, this will require an agreed change of contract and continuity of service can usually be preserved. Specific advice should be sought on the contractual documentation required to do this.

### How does an employer place an employee on furlough leave?

If an employer would like to place an employee on furlough leave, the result would be that the employee concerned would be receiving 80% of their normal pay whilst remaining at home unable to carry out work. In order to receive less than normal pay, an employee will need to agree to that deduction, meaning that an employer will need to expressly agree a temporary variation of the employee's contract of employment.

An employer will need to consider how best to document this temporary variation of contract (particularly as HMRC may require evidence) and to avoid unintended consequences. Such agreements are being referred to as 'furlough agreements'.

### How long can employees be furloughed for?

As stated above, the furlough leave scheme will initially run from 1 March to 31 May 2020 (but it may be extended). Therefore, employers may want to retain some flexibility to allow them to extend the period of furlough leave if necessary and/or to recall employees on furlough leave back to work to cover staff absences etc.

Three weeks is the minimum length of time that an employee can be furloughed in order for the employer to be eligible for HMRC reimbursement.

### What is the employee's status whilst on furlough leave?

Very simply, furlough leave is a temporary leave of absence from the workplace that is paid for by the government, rather than the employer, up to the 80% reimbursement cap. The employee will remain on the payroll and continue to accrue continuous service/annual leave. An employee would also appear to remain entitled to receive any other contractual benefits.

### How do employers notify HMRC that an employee has been furloughed and claim the reimbursement?

As mentioned above, employers will need to submit information to HMRC via a new online portal (still to be set up). Here, they will confirm which employees have been put on furlough leave and state their earnings.

### Can we force employees to accept a period of furlough leave?

The purpose of the scheme is to provide financial relief to employers by placing employees on a period of leave and enabling them to claim back 80% of their full pay from HMRC.

In short, an employer will almost certainly be in breach of the contract of employment if it tries to force an employee to be on furlough leave and receive less than their normal pay.

Placing an employee on furlough leave will involve a temporary change of contract and furlough leave should not be unilaterally imposed without consent. Employers should make sure any process followed is fair and involves consultation with employees if it wishes to minimise the risk of potential claims in the future.

### Will the furlough leave scheme pay the wages of my staff who are still working?

No, the HMRC guidance makes it clear that an employee must be furloughed to be eligible i.e. not working. However, a furloughed employee may:

- Take part in volunteer work, as long as they do not provide services to, or generate revenue for or on behalf of their employer; or
- Complete online training courses whilst they are furloughed, provided they are paid at least the national minimum wage/national living wage for the time spent completing such training.

### How do we choose which employees are placed on furlough leave and which are required to carry on working?

You do not need to place all of your employees on furlough leave. Many employers will be unable to place their entire workforce on furlough leave. There are many potential pitfalls for an employer to consider, for example, a difficult situation arises if you intend to pay staff on furlough leave their full pay, whilst other staff are being asked to work as normal for their pay.

In deciding which employees to select for furlough leave, business needs should be the starting point. Care must be taken to avoid direct or indirect discrimination in the selection process and, if you must select between staff doing identical business critical roles, you may wish to consider either asking for volunteers to work, having a selection matrix (akin to a redundancy selection exercise), or perhaps using a randomised selection method.

### Can an employee on furlough leave work elsewhere?

They will be able to undertake voluntary work (e.g. delivering food parcels to vulnerable people). An employee should not undertake work for their employer whilst on furlough leave, so it seems unlikely that the same employer would permit a furloughed employee to carry out work for another employer (a well drafted employment contract would expressly prohibit this in any event). In that sense, an employee on furlough leave is similar to an employee being placed on garden leave (except for how they are paid and the requirement to work).

### Can an employee on furlough leave be required to take their annual leave during furlough leave?

HMRC's guidance states that "*employees who have been furloughed have the same rights as they did previously*". This appears to include entitlement to accrue annual leave in accordance with their contract, and an employer's ability to specify when annual leave is taken would be preserved.

### Can an employee unable to take holiday due to Coronavirus carry-over their annual leave?

Anyone who is incapacitated due to Coronavirus, and therefore unable to take all of their annual leave before the current leave year ends, will be entitled to carry it over in the usual way.

### Can I make redundancies rather than put employees on furlough leave?

There is no obligation imposed on employers to use the scheme and place employees on furlough leave. If an employer was already in the process of, or is planning to make redundancies, they are free to do so. There may be the potential for claims from employees made redundant if the employer subsequently places any remaining employees who were not made redundant on furlough leave.

If you have any queries regarding furlough leave or any other employment matter, Rooks Rider Solicitors is open for business as usual and is on hand to assist. Please contact [Aaron Heslop](#) in our [Employment Team](#) for advice or assistance in preparing a furlough agreement.



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