



FURLOUGH LEAVE – ANSWERS TO (SOME OF) THE DIFFICULT QUESTIONS

This publication has been updated following the new Direction from the Treasury of 20 May 2020 and updated HMRC Guidance (29 May 2020). It should be noted that the new iteration of the Direction has been introduced to address the contradictions between the Direction and the HMRC guidance on the Coronavirus Job Retention Scheme (CJRS).

The main points to be aware of are:

- a qualifying employee now needs to have been on the payroll (and paid) on or before 19 March 2020 (the day before the furlough Scheme was announced), as opposed to the previous deadline of 28 February 2020;
- it has been confirmed that the scheme will no longer continue after October 2020;
- only wage costs for employees on the real time information (RTI) system by 19 March 2020 can be claimed. This is a controversial new requirement which we believe will be subject to further guidance because if not, it will remove the ability to claim in respect of people who were previously in scope;
- furlough pay for employees re-engaged by an employer can still be claimed but this area is now even more complex and employers should think carefully before doing so;
- no previously agreed period of unpaid leave or sabbatical will be covered - it must first expire;
- TUPE'd employees are covered but only employees that transferred under TUPE after 19 March can be furloughed;
- to claim the furlough grant for an employee, they now must have been instructed not to carry out any work for the employer or its group. This instruction must be made in writing or confirmed in writing by the employer (such agreement or confirmation may be via email) not to carry out such work;
- the above agreement to cease work may be made by means of a collective agreement between the



employer and a trade union;

- an employer can no longer move a sick employee between statutory sick pay (SSP) and furlough leave. Instead they must wait until the period of SSP has ended. SSP is specifically not available to be paid to anyone on furlough leave.;
- the scheme will be closed to new entrants from 30 June 2020. Therefore, in order to satisfy the requirement that employees must have been furloughed for a full 3 week period, the effective deadline to furlough employees who have not been furloughed before is 10 June 2020;
- from 30 June 2020 employers will only be able to furlough employees that they have already furloughed for a full 3 week period prior to 30 June;
- from 1 July 2020, employers can bring back to work employees that have previously been furloughed for any amount of time and any shift pattern, while still being able to claim the grant for their normal hours not worked. When claiming the grant for furloughed hours, employers will need to report and claim for a minimum period of a week; and
- from September employers will be required to pay 10% of furlough payments and in October employers will need to pay 20%. However, for furlough pay from August, employers will not be able to claim their employer NI contributions and employer pension contributions as they had been able to do before. Nothing will change in respect of the government's contribution to furlough pay over June and July.

On 12 May 2020, the Chancellor extended the Coronavirus Job Retention Scheme (CJRS) to the end of October (previously it was to expire on 30 June 2020).

This document has been written in general terms and may not include all relevant information. In particular, there are a number of areas where we expect further clarification in the coming days and weeks and therefore information is subject to change. This information is not a substitute for taking legal advice on your particular circumstances.

The basics

What is furlough leave and the Coronavirus Job Retention Scheme?

On 20 March 2020, the UK Government announced details of a temporary CJRS for workers placed on "furlough leave". Further guidance was issued by HMRC on 26 March 2020, 4 April 2020, 9 April 2020, 15 April 2020, 17 April 2020, 20 April 2020, 23 April 2020, 30 April 2020, 1 May 2020, 14 May 2020 and 29 May 2020. On 15 April 2020 and 20 May 2020, the Treasury, in exercising the powers conferred by the Coronavirus Act 2020, gave a Direction to HMRC on the application of CJRS.

Furlough leave currently has no technical meaning in UK law - it has been created as part of the CJRS in order to allow all UK employers to access financial support for those employees who would otherwise have been made redundant as a result of Covid-19. The Government recognises different businesses will face different impacts from the pandemic.

All UK employers are eligible for this scheme, including businesses, charities, individuals and recruitment agencies (where agency workers are paid through PAYE). The Treasury Direction provides that the employer must have created and started a PAYE payroll scheme on or before 19 March 2020, enrolled for



PAYE online, that the PAYE scheme must have been registered on HMRC's real time information system for PAYE ("a qualifying PAYE scheme") on or before 19 March 2020 and the employer must have a UK bank account. This is a major change from the previous guidance which required employees to be on the payroll no later than 28 February 2020. The new guidance makes it clear that where there is public funding for staff costs, the expectation is that the scheme should not be used.

How much does the Government pay?

Employers can claim a grant of 80% of the wages of employees placed on furlough leave, up to £2,500 per month gross (when paid to the employee this will be subject to deduction of tax and employee national insurance contributions). HMRC has published guidance on 17 April 2020 (which was updated as illustrated above) giving examples and detailed guidance on working out 80% of employees' wages. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or stopped saving into their pension. The grant to the employer will also include the associated Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions that are paid on the subsidised furlough pay. The scheme will cover the cost of wages from 1 March 2020. It will be open until the end of October 2020, however please see below for the cut-off date for new entrants to the scheme. . The employer will need to pay the agreed amount of pay during furlough leave and apply to the CJRS to recover the grant.

Who is entitled to furlough leave?

A furloughed employee must have been on the employer's payroll and been paid on or before 19 March 2020 and have been notified to HMRC on a real time information (RTI) submission on or before 19 March 2020. Eligible employees include full-time and part-time employees, employees on agency contracts, employees on flexible or zero-hours contracts and apprentices. Employees hired after 19 March 2020 are not eligible for this scheme.

The grant can be claimed for individuals who are not strictly "employees" such as office holders (including company directors), salaried members of limited liability partnerships, and workers, provided the individual is paid via PAYE on or before 19 March 2020 and was notified to HMRC on a RTI submission on or before 19 March 2020. Therefore, provided the eligible employee or individual is on the payroll, the rules do not distinguish between workers and employees.

What is a 'furloughed employee'?

According to the Treasury's Direction, an employee is furloughed if:

- the employee has been instructed by the employer to cease all work (but see below the revised arrangements regarding part-time work from 1 July 2020) in relation to their employment;
- the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more; and
- the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.



Does this pull back from the 3 April 2020 Rishi Sunak Twitter interview in which he said that employees who have left an employer “for whatever reason” can be re-engaged and furloughed?

Very possibly. The decision to furlough could still arise because of the coronavirus pandemic, but consider each case and also be careful with the new date requirements when re-engaging someone (see below).

What will qualify as an instruction?

There must be an agreement, in writing or confirmed in writing, between the employee and employer in which the employee agrees to cease all work for the employer or its group. The instruction/agreement may be in electronic form, e.g. an email. The instruction may be made by means of a collective agreement between the employer and a trade union.

Additionally, pursuant to the 20 May 2020 Treasury Direction, the employer is required to retain the agreement or confirmation until at least 30 June 2025.

This is major new requirement but we cannot see how it can disqualify a period of pre-existing furlough from the grant. As long as the agreement is in place before the employer claims for the employee this should be sufficient. In particular it would be a breach of natural justice for an employer who had relied on previous HMRC guidance to be unable to claim for a period of furlough leave. Without doubt, however, any claim will be far better, and far more likely to succeed, with clear agreement to furlough from the employee.

Are there circumstances where an employee can carry out any duties in contravention of the instruction to cease working from their employer?

Yes, where the employee is a director and they carry out work undertaken by directors of a company to fulfil a duty or other statutory obligation relating to filing company accounts or providing other information which relates to the administration of the director's company. Therefore such employees can carry out this work, whilst on furlough leave and still qualify under CJRS, provided the other conditions have been satisfied (see above).

Additionally, training activities directly relevant to an employee's employment, which have been agreed between the employer and employee, can be carried out while the employee is on furlough leave as long as this does not provide services to, or generate revenue for, the employer.

Will employers be permitted to ask furloughed employees to work during furlough leave?

From 1 July 'flexible furloughing' is to be introduced and employers will be able to agree with previously furloughed employees that they return to work part-time when on furlough leave. For example, a furloughed employee who normally works 5 days in a working week may be requested to work 2 days but not the remaining 3 days. In such a case the employee would be paid full pay by the employer for the 2 days worked and at the furlough rate for the 3 days not worked. HMRC has confirmed that any working arrangement agreed with an employee must cover at least one week and be confirmed to the employee in writing.

Making a claim

How will claims be made?

There is new [HMRC guidance](#) for employers to follow, which provides a step-by-step guide. The [online portal](#) opened on 20 April 2020.



Until the grant comes through, employers will need to fund the furlough payments to their staff, perhaps using other Government financial support. Employers will be able to submit only one claim every three weeks, which is the minimum period of time for which an employee can be furloughed. Claims will be able to be backdated to 1 March where applicable.

How can companies without cash flow pay their workers' wages?

The Government expects companies to borrow in the short term to fund the furlough pay until the CJRS is running and claims can be made. The main source of funds for this will be the deferral of VAT payments for the quarter ending June 2020, which do not have to be paid until March 2021. If a business needs short term cash flow support, it may be eligible for a Coronavirus Business Interruption Loan, which supports SMEs with access to loans, overdrafts, invoice finance and asset finance of up to £5 million and for up to six years.

How do we work out what to claim?

HMRC have published [guidance on the calculation](#).

The basic rule is that it is 80% of the worker's wages, before tax, up to a cap of £2,500 a month. £2,500 is 80% per cent of £3,125, equivalent to a gross salary of £37,500.

What about employees who are apprentices?

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed. For employees who are apprentices, their wages are (as appropriate):

- the Apprenticeship Minimum Wage (AMW); or
- the National Living Wage (NLW); or
- the National Minimum Wage (NMW)

for all their time spent training, whilst on furlough leave. Employers are required to cover the shortfall between the amount claimed for the apprentices' wages under the scheme and their appropriate minimum wage.

Will CJRS cover zero hours and casual workers?

Yes, see above link for how to calculate the amount to claim.

Will CJRS cover individual employers, such as those employing nannies?

Yes, provided the individual employer pays them through PAYE, they were on the payroll on or before 19 March 2020 and the individual employer sent HMRC a RTI submission notifying a payment in respect of the employee on or before 19 March 2020.

What about employees who are made redundant or stop working on or after 28 February 2020, are they covered by CJRS?

Yes, provided that all of the following conditions are satisfied:



- the employee was employed as at 28 February 2020;
- the employee was on the employer's payroll as at 28 February 2020;
- their employer notified to HMRC on an RTI submission on or before 28 February 2020;
- the employee was made redundant or stopped working for their employer after 28 February 2020 (this may need to have been for a coronavirus-related reason however); and
- their employer re-employs them and puts them on furlough.

What about employees who are made redundant or stop working on or after 19 March 2020, are they covered by CJRS?

Yes, provided that all of the following conditions are satisfied:

- the employee was employed as at 19 March 2020;
- the employee was on the employer's payroll as at 19 March 2020;
- their employer notified to HMRC on an RTI submission on or before 19 March 2020;
- the employee was made redundant or stopped working for their employer after 19 March 2020 (this may need to have been for a coronavirus-related reason however); and
- their employer re-employs them and puts them on furlough.

What about employees where their fixed term contracts have expired on or after 28 February 2020, or on or after 19 March 2020, are they covered by CJRS?

Yes, provided that all of the following conditions are satisfied:

- their employer notified to HMRC on an RTI submission on or before 28 February 2020 (in relation to expires on or after 28 February 2020);
- their employer notified to HMRC on an RTI submission on or before 19 March 2020 (in relation to expires on or after 19 March 2020); and
- their employer re-employs them and puts them on furlough.

However, if the employee started and ended the same contract between 28 February 2020 and 19 March 2020 they will not qualify for this scheme.

What about employers with more than one 'qualifying PAYE scheme'?

The Treasury's binding Direction states that an employer must make a separate claim in relation to each scheme and the amount of any payment under CJRS will be calculated separately in relation to each scheme.

Does the employer need to top up to 100%?

No, however they will need to reach agreement only to pay at the 80% rate. The employer should pay the employee all of the grant they receive for the employee's gross pay, which is 80% of the worker's wages up to a cap of £2,500 a month once they have been furloughed, deducting tax and employee's NICs (and



employee pension contributions if collected this way) under the pay as you earn (PAYE) system. If the employer wants to top up pay levels, they can, but they will not be able to claim for more than 80% of £3,125, equivalent to a gross salary of £2,500. It should go without saying but employers are not permitted to deduct any fee from the furlough payments as employers must pay their employees the entire grant received for their employees' gross pay in the form of money (see above for claiming fees). See also the section below on holiday pay.

Reaching agreement

Do we have to get agreement to the reduction in pay?

Yes. Employees will need to be placed on furlough by agreement. If the employer wishes to pay at a reduced rate, there will be a contractual change, and the employee will need to agree to this. The furloughed employee should be asked to sign a furlough agreement, in order to avoid a claim of unlawful deduction from wages later on.

As above, it is now important that this agreement records the employee's agreement to cease all work for the employer and its group of companies.

How long can furlough leave last?

If an employee is asked to go on furlough leave, their period of leave should be specified by the employer but must be for a minimum period of three weeks. The scheme will run until the end of October 2020 and many employers may wish to designate the whole of this period as furlough leave. The period should be set out in the furlough agreement or letter. If there is a requirement to extend any period of furlough leave, or, if the needs of the business require it, for the furlough leave to be ended so that the employee can return to work, the employee's manager should contact the employee to discuss this. The employer should try to give adequate notice but timing on this will be heavily reliant upon business needs.

Does the employer still have to pay employees on the National Living Wage (NLW) or National Minimum Wage (NMW) 100% of their weekly NLW/NMW earnings if it furloughs them since, if they receive only 80%, it is below the NLW/NMW?

No. Individuals are only entitled to the NLW or NMW for the hours they are working. Since furloughed employees must not be working in order to receive the furlough payment, the NLW/NMW is not relevant because no work is being performed. However the new guidance states that if workers are, for example, required to complete online training courses while they are furloughed, the NLW/NMW would need to be paid for those hours, even if this is more than the grant.

How does an employer decide who is furloughed and who is not?

It depends on factors like the availability of useful work to be performed, the ability of some staff to work remotely and the capabilities and qualifications of staff relative to the business needs. Discrimination law will apply to the decision-making process so employers should be mindful of their obligations under the Equality Act not to discriminate because of protected characteristics.

What about the employer's communication with the furlough employee?

Written confirmation to an employee that they have been placed on furlough leave is required to claim the Government grant. According to the latest guidance, a written record of the employer's communication



with the employee confirming that they have been furloughed must be kept by the employer for five years.

What about collective consultation?

This may need to be considered where there are 20 or more employees who are being furloughed. If agreement is reached with the employees that they will accept a variation to their contract leading to reduced pay and no requirement to work while on furlough then it may not be necessary to undertake collective consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

However, if there is a clear risk that contract change will need to be imposed, or where the alternative to furlough would be a redundancy programme, the consultation requirements are likely to be engaged. It will be difficult for employers to carry out a full consultation exercise, which may include an initial stage for the election of employee representatives, in time for furlough to be meaningful. However in some cases it may be sensible to start the collective consultation process at the same time as seeking agreement to furlough. We imagine the tribunals will be forgiving in terms of awards if the statutory time scale for consultation is not met but we strongly recommend taking specific advice on your situation.

Can furlough leave be imposed by an employer?

No, the employer can only designate an employee as a furloughed worker by agreement with that employee. However, where the alternative for employees is that they are made redundant, or laid off without pay, we would expect that most will agree to the scheme, particularly as the Government is providing quite substantial financial assistance for employees on furlough leave who are not required to do any work for their employer.

Can employees put themselves on furlough leave?

Not without the agreement of their employer.

Can an employer's failure to offer furlough leave lead to an unfair dismissal claim?

An employee has no right to be furloughed: it is an agreement by the employer as much as by the employee. That said, employers should be careful to ensure that they act in a non-discriminatory manner when deciding who to ask to go on furlough leave.

Further, if an employee is required to work in circumstances where they believe they are in serious and imminent danger, and they are subsequently dismissed as a result of their refusal to work, they would be able to bring a claim for automatic unfair dismissal for health and safety reasons. Employers who require staff to continue to work in situations where they might be at risk should carry out proper risk assessments and consider requests from individuals to be furloughed.

If employees are offered furlough and refuse, is it possible that the alternative could be to make their role redundant?

Further discussions should be held with the employee should they not agree to take furlough leave. However, given the current circumstances, the likely outcome would be that it would result in the termination of their current employment due to the fact that the employer cannot afford to pay full wages at this time and/or has no work for them to do and is operating the furlough scheme as an alternative to lay-off and compulsory redundancy. Please see above for comments on collective consultation.



Can an employer rotate furlough leave amongst staff, and can employees dip in and out of it?

Yes, although the minimum period of furlough leave is three consecutive weeks, so working “one week on, one week off” would not be possible.

Can the employee take on other work during the period of furlough leave?

This is permitted under the Government’s guidance but it is the employer’s decision as to whether or not to allow the employee to take up work with another employer during the period of furlough leave. If the employee takes up other work, the employer should make clear that it will remain the employee’s primary employer and may recall them for duty at any time, with reasonable notice. They may not carry out any work for the primary employer while on furlough leave, and can receive furlough pay from more than one employer, if they already have more than one job.

If an employee is asked to take furlough leave, can they swap with someone else who has not been asked to take furlough leave?

This is a matter for the employer but we suggest that requests are considered on a case by case basis. An employee has no right to be placed on furlough leave.

What happens to the employee’s service and other entitlements during furlough leave for the purpose of accruals?

The period of furlough leave does not affect a furloughed employee’s continuity of service with their employer. The period will therefore be counted as service for the purposes of accrual of benefits (including pension benefits (both defined contribution and defined benefit) under occupational pension schemes, since there will be continuous “pensionable service” and “qualifying service”) and in respect of employment rights.

Can employees be called back from furlough leave? If so, will they be reimbursed for the portion of unpaid wages from this period of furlough leave?

Employees must be on furlough leave for a minimum of three weeks. They can then either be called back from furlough leave permanently, or can be called back on a temporary basis after which they could resume furlough leave (provided the second period of furlough leave lasts at least three weeks). There would be no obligation to top up their wages for the period on furlough. See above, however the arrangements permitted for part-time furlough from 1 July 2020.

If an employee is being asked to take furlough leave and is on a fixed term contract, what happens?

If the term of their employment ends during the furlough period then their contract of employment will end in accordance with the contract, unless it is renewed. There would then be no ongoing obligation to pay furlough pay but the employer may agree to renew the contract so that the employee can benefit from furlough leave. Remember that the ending of a fixed term contract is a dismissal, and the usual considerations about fairness will apply.

Specific issues

Can employees on long-term sick leave announce they want to return to work, to take advantage of the furlough leave scheme?



An employer is responsible for deciding who is placed on furlough leave. The guidance states that employers are entitled to furlough employees who are being shielded or on long-term sick leave in the same way as other employees. However, there is conflicting guidance on this point following the Treasury Direction and new SSP regulations which provide that a person is deemed to be incapable of work if they are unable to work because they are shielding. The Treasury Direction suggests that SSP will not be payable to anyone on furlough leave and such entitlement should be exhausted before considering furlough leave. This potentially places those on long-term sick leave who are disabled at a disadvantage. The position remains unclear and further advice should be sought in particular cases as the date when sick leave and/or furlough leave began may have an impact.

Does holiday accrue during furlough leave, and can we require employees to take their holiday? We are worried about the amount of accrued holiday when things return to normal.

Holiday entitlement will continue to accrue as normal during furlough leave. If it is not practicable for an employee to take their leave before the end of a holiday year for reasons related to coronavirus, then new regulations permit them to carry over up to four weeks of their annual leave rather than use it and the carried over leave can be taken in the next two holiday years. Employers will be able to refuse requests for carried over leave to be taken at a specific time provided they have good reasons for doing so.

The Government has implicitly confirmed that holiday (including bank holidays) taken during furlough leave will not break furlough as employees will still not be doing any work for their employers. Employers who are happy for holiday to be taken during furlough leave should therefore communicate this to their staff.

The Government does not address the issue of whether employees can be required to take holiday during furlough leave. In the absence of clear guidance on this point, from a commercial perspective we believe that employers can strongly encourage, and possibly require, employees to take their leave during the furlough period. This view is supported by the guidance from ACAS on holidays during furlough. However, employers are encouraged to be as flexible as they can about holiday during this pandemic, particularly where the lockdown restricts their employees' ability to have the rest and relaxation which their 5.6 weeks' statutory holiday is intended to provide.

What is the position on holiday pay for employees on furlough leave?

The Government guidance confirms that employers should pay their employees their usual pay, as opposed to the furlough rate, for leave (including bank holidays) taken whilst on furlough leave. Employers will therefore need to "top up" any amount over and above the furlough rate when staff take holiday.

That said, holiday pay during furlough leave is one of the areas that the Government has said that it will keep under review. We will update you if there are any changes in the Government's policy on this point.

If an employee is currently on annual leave, can they be asked to go on furlough leave?

If they are on annual leave, they should be contacted by their manager whilst on leave to discuss what this means for them. Their leave could continue as normal and any agreed period of furlough leave could commence at the end of their annual leave.

If an employee is currently on unpaid leave, can they be asked to go on furlough leave?

Periods of unpaid leave or sabbatical taken on or after the 19 March 2020 cannot be covered by the furlough scheme. Any such leave taken before 28 February must first expire before the employee can be



furloughed.

What is the position of employees on maternity leave?

The Government guidance states that the usual rules about maternity (and other forms of parental leave and pay) apply. It also indicates that employers can claim for enhanced maternity pay through the CJRS, which suggests employers can furlough employees who are on maternity leave. The same principles would also apply to paternity leave, adoption leave and shared parental leave.

What happens if an employee becomes ill whilst on furlough leave or is already off on sick leave?

If an employee becomes ill during furlough leave they must be paid at least their SSP. If a furloughed employee becomes sick and is moved to SSP the employer can no longer claim for the furloughed salary. If an employee not on furlough is on sick leave the Treasury Direction states that they can only move to furlough leave once their period of incapacity for work ceases and they are no longer in receipt of statutory sick pay. The timing of the end of the aforementioned period of incapacity for work is to be determined by an agreement between the employer and employee, according to the 20 May 2020 Treasury Direction.

Can employees shielding in line with public health guidance, or staying at home with someone who is shielding, be furloughed?

Potentially. The guidance states that employers are entitled to furlough employees who are being shielded or off on long-term sick leave in the same way as other employees. However, there is conflicting guidance on this point following the Treasury Direction and new SSP regulations which provide that a person is deemed to be incapable of work if they are unable to work because they are shielding. The Treasury Direction suggests that SSP will not be payable to anyone on furlough leave and such entitlement should be exhausted before considering furlough leave. This potentially places those on long-term sick leave or who are shielding and have a disability at a disadvantage. The position remains unclear and further advice should be sought in particular cases as the date when sick leave and/or furlough leave began may have an impact.

What if the 20% decrease in salary for the period of furlough leave takes any employee below the threshold for auto-enrolment?

The important point to note here is the amount of the employee's "qualifying earnings" over the "reference pay period" which the employer uses for auto-enrolment. If, overall, the employee earns over the qualifying threshold for the reference period despite the period of furlough leave, clearly contributions must continue. But if the drop in salary takes the employee below the threshold for the entire reference period, our view is that contributions can cease. We recommend, in any case, that employers keep full and accurate records of pay levels and corresponding contributions and it would be good practice to inform affected employees.

What needs to happen to any employee due to be automatically re-enrolled into an auto-enrolment pension scheme (having previously opted out) during a period of furlough leave?

Since the employee remains an employee but is just on leave, the obligation to re-enrol still applies. The employer should keep good records of any re-enrolment and all communications around this with the furloughed employee.

Can businesses that engaged in payroll consolidation schemes after 19 March 2020 be furloughed?

Yes, according to the latest Government guidance.



Will employers face claims from employee members of occupational pension schemes (defined contribution and defined benefit, although it is more important for defined benefit) that there have been changes to “pensionable” and “final” salary definitions for the purpose of calculating benefits for the period of furlough leave?

A change to pension terms as a result of furloughing employees may trigger a requirement to consult with employees on the change, although this will depend on the terms of the relevant pension scheme. For example, changing the elements of pay that constitute “pensionable” earnings may be a “listed change” for occupational defined benefit schemes and reducing the level of employer contributions to occupational defined contribution schemes will also be a listed change. In general, employers have to consult on listed changes. The Pensions Regulator is relaxing its stance on this during the Covid-19 crisis, however, we advise employers to seek specialist advice on this question as it is not clear cut for all employers.

And in conclusion...

What happens once the CJRS ends in October? Can the employer make redundancies?

Yes, if there is no work, or a need for fewer employees. The employees would need to be paid their normal wages for the appropriate consultation period (which can take place during furlough) unless an alternative agreement can be reached.

If the employer needs to make redundancies at the end of the furlough period, would it follow that those who are put on furlough would be the ones who would be made redundant or does the employer have to carry out a further formal selection process?

A further formal selection process should be carried out. Being furloughed is not a pre-selection for redundancy.

If a contractor has furloughed its employees but the company to which the contractor is contracted terminates the contract (which means that the employees should TUPE transfer to the company), how does the company deal with the furloughed staff, and in particular can it require them to start working again from the point of transfer? Is requiring them to start work again as soon as the transfer is complete a “measure”?

The employees transfer as they usually would under TUPE, as they remain employed. If they are furloughed but the company needs them to work, that could be perceived as a measure if they would have remained furloughed had the transfer not occurred, and the company should inform and consult in respect of it.

Is the system capable of abuse? What is the scope for fraud, for example, an employer suddenly employing family members, or increasing the entire workforce’s salary for three months while the Government is paying?

As this is a cash reimbursement scheme rather than a set-off against NIC/income tax, the system is likely to be open to abuse. However, government officials say that companies will not be able to claim too much because they can cross-check the applications for grants against PAYE records. Companies will be required to: make one claim for the entire workforce; record how many workers are covered and maintain records; and can make only one claim every three weeks. However, some companies have concerns as to how HMRC would enforce the rules. “*What is to stop a perfectly fine firm from declaring that it put half its workforce on furlough even as they work like mad and collect the grant?*” is a question that has been asked.



Government officials have said it would be easy to monitor large companies and they hoped that unions and employees would blow the whistle on anyone involved in such fraud. However, they recognised that it would be harder to police in smaller companies, especially family businesses. We would expect to see provisions outlining the circumstances in which the grant can be clawed back, particularly where it is shown that there has been abuse of the system.

What about employees who have transferred under TUPE since 19 March 2020?

The Government has recently clarified that the transferee employer can still furlough TUPE'd staff if they were transferred after 19 March 2020.

What about employees on work permits?

In relation to furloughed employees on Tier 2, 4 and 5 visas: UK Visa and Immigration (UKVI) confirmed on 3 April 2020 that employers who have temporarily reduced or ceased trading, can temporarily reduce the pay of their sponsored employees to 80% of their salary or £2,500 per month, whichever is the lower.

Any reductions must be part of a company-wide policy to avoid redundancies and in which all workers are treated the same. These reductions must be temporary, and the employee's pay must return to at least previous levels once these arrangements have ended.

Employers should therefore be able to seek an extension of stay for the Tier 2, 4 and 5 furloughed employees without an issue regarding the salary. Grants under the Scheme are not counted as 'access to public funds' which means that employers can furlough employees on all categories of visa.

We also advise making a report on the Sponsor Management System concerning the temporary change in salary. This is the UKVI system for sponsoring and reporting any changes for sponsored workers.

Can furloughed employees work for organisations linked or associated to their employer?

No, according to the latest Government guidance.