

# COVID-19

## Operator Employment Support

*26 March 2020*

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## COVID-19

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Please note that the situation in respect of COVID-19 ("Coronavirus") is a fluid one and one that is both rapidly and constantly changing. The information below is based on current guidance produced by government from various announcements; as such the information may be subject to change and is **valid as at 26 March 2020**.

*Note: this note does not constitute legal advice and operators are advised to seek specific advice in relation to their business*

#### 1. What is "Furlough" leave

The term "furlough" has not been commonly used within UK employment but was introduced by the Chancellor of the Exchequer when announcing the intention to implement the **Coronavirus Job Retention Scheme**. It means that an employee is granted a leave of absence from work whilst maintaining the employment relationship. In its current context it has been utilised by the government as a means to prevent mass redundancies and maintain employment so that business can continue after the coronavirus pandemic.

#### 2. How much is a furloughed employee paid?

The government have committed to reimburse businesses 80% of the salary paid to workers who are furloughed and therefore at home, **not doing work**, up to a maximum of £2,500.00 p/m.

If an employee **does not** have a "lay off" clause in their contracts of employment, then the employer must seek the consent of the individual before placing them on furlough. This can be done utilising the letter attached at **Annex 1** but it is advised that employers first discuss matters with the employee(s) to explain the

reasons for seeking to agree furlough leave. The employer will also have to seek the agreement of the employee that they will be paid 80% of their salary during the period in which they are furloughed. In absence of their agreement the employer may have to pay the employee(s) their full wage but they would only be able to recover 80% from the government under the Coronavirus Job Retention Scheme.

If the employee **does** have a "lay off" provision in their contracts of employment, then the employer can furlough the employee without consent. They will also be able to pay them 80% of their wage without the requirement to seek further consent. However, given the novelty of furlough leave employers are advised to get their employees to sign a letter confirming the intention to place them on furlough leave.

It is also advisable that meetings with employees are documented and evidence is kept.

### **3. Does the employer pay the furloughed employee or does the government pay directly?**

The employer will be primarily responsible for paying the employee their wage. They can then reclaim the 80% (or £2,500) from the government. In order to reclaim, employers will be required to log details of the employees designated as furloughed on the HMRC portal.

We understand that this portal and the recovery scheme is likely to be finalised by the end of April.

### **4. Can furlough be backdated to cover employees already made redundant?**

Furlough can be backdated to the **1 March 2020**. Current indications suggest that employers who have already made individuals redundant will be able to re-engage those employees and recover any wages, where the employee has not worked, under the Coronavirus Job Retention Scheme.

## 5. Can an employer rotate an employee from furloughed status to working status?

It would appear (although not explicitly stated in law) that a worker must be furloughed for a minimum of 3 weeks for their employer to be eligible to claim under the Coronavirus Job Retention Scheme. This is to ensure consistency with public health guidance seeking to minimise the number of people outside of their homes on a regular basis.

This would, therefore, make it difficult for an employee to be rotated into and out of furlough.

## 6. What is the process of furloughing an employee?

The current guidance from the government suggests the employers should:

- designate affected employees as 'furloughed workers' and notify your employees of this change - changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation
- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal (HMRC will set out further details on the information required)

Given that current employment laws remain enforceable, it is advised that you follow a compressed consultation process with your employees as follows:

- a) **Volunteers** – the first stage should be to ask your workforce who is willing to be furloughed and accept the terms of that furlough;
- b) **Vulnerable Persons** – the second stage is to enter into a discreet dialogue with those individuals within your workforce who have already been identified (in accordance with government guidance) as being "vulnerable" and discuss with them (if they have not already volunteered)

the possibility of being furloughed. If these individuals do not consent then you may want to select them for furlough or alternatively move to the next stage; and

- c) **Objective Criteria** – the last stage would be to take the entire workforce and carry out assessment of each individual and whether they should be furloughed with reference to **a fair and objective criteria**.

There is argument to suggest that you may be able to prioritise vulnerable individuals (stage 2 above) as identified in government guidance when consulting regarding furlough leave. However, care needs to be taken to protect the business against discrimination claims such as age or disability albeit given the current guidance set by government it is possible that these measures may be objectively justified.

## 7. How is the 80% calculated for furlough?

Whilst not yet confirmed, it is understood that the 80% reimbursement will be based on the employees' gross pay and will be subject to Income Tax and National Insurance contributions.

For those employees or workers who have varied income and hours it is likely that the 80% will be calculated on the higher of; (i) the earnings in the same pay period in the previous year; or (ii) the average earnings in the previous 12 months (or less, if they've worked for less).

### ***Example:***

*A haulage Ltd pays driver A £24,000 pa (£2,000 p/m). Driver A does not participate in the auto enrolment pension scheme.*

*Driver A net monthly wage is £1,665 (following deduction of £191 PAYE and £144 employee NIC). The Employers NIC is £174.*

*The available amount for the employer to recover under the scheme is the lower of: -*

*(1) 80% of (£2,000 + £174) = £1739; or*

*(2) £2,500*

*In this case, the entitlement is £1739 which is the lower sum.*

## **8. Is there a "cut off" point for when employees can be placed on furlough?**

It is believed that an individual taken on by the business on or after 1 March 2020 will not qualify for the scheme and therefore employers will need to think careful as to whether these individuals are placed on furlough leave knowing that recover is not possible or alternative action is taken. Employers facing this situation should seek advice.

## **9. What is "lay-off?"**

"Layoff" is where the employer suspends both an employee's work and their pay. This can be for 4 weeks continuous, or 6 weeks in one 13-week period. If the situation looks to be extending beyond these periods, then the employee can request to be made redundant and receive a redundancy payment. An employer can only take advantage of lay-off if there are provisions allowing them to do so in their employment contracts or alternatively via agreement with the employee.

During the first 5 days of lay-off the individual will be entitled to a statutory payment of £29 per day.

Given the government's announcement of support for business under Coronavirus Job Retention Scheme it is anticipated that employers are less likely to need to lay-off employees under these provisions.

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## 10. What is "Short Time?" Working

Short time working is where the employee's working hours and pay are reduced. There are further provisions for employees to acquire redundancy payments at the end of certain timeframes. Again, an employer can only make use of this if they have the right to do so in their employment contracts or by agreement.

Some employers may still need to utilise staff during the current pandemic and introduction of short time working is a potential way to create flexibility within the workforce. However, employers should be aware that individuals who are placed on or agree to short time working will not be eligible for furlough leave.

## 11. What is Emergency Volunteer Leave (EVL)?

Under the Coronavirus Act 2020, employees can by application to their employer go on EVL. Employees effectively take unpaid leave from their employment to volunteer at one of the designated organisations (e.g. NHS) in response to the Coronavirus crisis.

The employer is entitled to 3 working-days-notice in writing and to see an emergency volunteering certificate. An employee can only take a period of EVL for an interval of 2, 3 or 4 weeks within a block of 16 weeks. Holiday leave is still accrued during this period. Other benefits such as company care, healthcare, etc. are retained as well. Further, an employee on EVL will still keep their pension rights during the period in which they are on EVL.

Importantly, an employee cannot be the subject of detriment because they have taken, are taking or are proposing to take a period of EVL. In addition to this, any dismissal of an employee where they have proposed are going to or have taken EVL is automatically unfair dismissal. The employee does not need 2 years continuous employment to make this claim and the award is uncapped.

Individuals who choose to undertake EVL will still be eligible for furlough leave.

## 12. When do I have to pay SSP?

Historically, an employee who is incapable of work by means of illness would only begin receiving SSP after 3 days.

In the case of coronavirus related absences, SSP is payable on the first day of illness where the individual is forced into isolation because they have displayed symptoms or where they have self-isolated because of medical advice or a member of their home are displaying symptoms. Eligible employees are entitled to up to 28 weeks of SSP in any period of absence.

Employers with fewer than 250 employees will be able to reclaim SSP paid in respect of the first 14-days of Coronavirus-related sickness absence – something that has retrospective effect going back to 14 March 2020.

## 13. I have an employee who lives with a person experiencing Coronavirus symptoms and has self-isolated as a result, do I have to pay them SSP?

Government guidance advises that if an individual lives with others and they or someone in their household has symptoms of COVID-19, all household members must stay at home and not leave the house for 14 days. The 14-day period starts from the day when the first person in the house becomes ill. If the individual or individuals in question are not able to work from home and, therefore, by reason of their self-isolation cannot work, then they are entitled to SSP.

Individuals who are caring for someone with Coronavirus symptoms should be paid SSP as well. This is because they would be living or have been in contact with someone who has begun to show symptoms and are instructed by government to self-isolate for 14 days.



**14. I have a pregnant employee who I would like to send home because I am worried that we cannot implement “social distancing” measures, do I have to pay her SSP if I send her home?**

An employer has an obligation in respect of pregnant women to account for the fact that she is pregnant in their risk assessment and in conjunction with the current working conditions, e.g. Coronavirus. Therefore, if that employer cannot ensure that “social distancing” measures are put in place to protect the pregnant employee, then that employee must be sent home and must be sent home on full pay.

**15. I have an employee who is 74 years old and falls into the category of a “vulnerable person” as identified by the NHS, they have chosen to self-isolate but are not showing any symptoms, do I have to pay them SSP?**

Current guidance suggests that individuals falling within the “vulnerable persons category” are strongly advised to stay home. However, this is not mandated and employers should encourage open dialogue with the employee to understand their concerns and support the decision to self-isolate. This will include SSP payments.

Employers should also encourage these individuals to seek medical advice and guidance.

If an employer has concerns over an individual falling within the vulnerable persons category who is deciding not to self-isolate then, employers should conduct a risk assessment and if it is not possible for the individual to continue working and meet social distancing guidelines (or where applicable work from home) then it is recommend that the individual is advised to seek medical guidance and encouraged to self-isolate.

If the individual still does not decide to self-isolate and the employer suspends the individual on health and safety grounds then, it is likely that the individual will be entitled to full pay.

- 16. I am worried about my employee with chronic asthma, although they are showing no Coronavirus symptoms, and I would like to send them home, will I have to pay them if I do?**

As above, the individual should be encouraged to seek medical advice and self-isolate. If the individual chooses not to do so and the employer suspend on health and safety grounds it is likely that they have the right to continue to receive full pay.

- 17. What happens if I furlough an employee and then they go and take up another job whilst on furlough?**

The purpose of furlough is to retain continuity of employment and circumvent the need for employers to make redundancies. Any individual placed on furlough leave should not do any work for you or take up another job unless they are volunteering or training, provided that work does not generate any money for their employer.

If an employer suspect that an employee has sought alternative employment whilst on furlough leave they should take immediate steps to clarify the situation and obtain advice.

## Summary

- Ensure you document and are able to show the reasons you believe employees are to be designated on furlough leave – in all likelihood there needs to be a redundancy type situation/downturn in work.
- Check your contracts of employment to determine whether you have the right to lay off your employees without their agreement.
- Consult with your employees about your thought processes and if necessary, obtain their agreement to be placed on furlough leave.
- Ensure all furloughed employees are provided a letter or other written document setting out (1) the fact that they have been furloughed (2) the reasons they have been furloughed (3) any terms that will apply during the furlough period i.e. how much they will be paid and (4) reaffirm that those wages will be paid by the company but it is the intention to reclaim from the government under the Coronavirus Job Retention Scheme
- Do not permit your employees to undertake any work for your business during the furlough period.

We will continue to share further information and clarity as it becomes available. In the meantime, if you have specific cases in which you require legal advice, we actively encourage you to contact Backhouse Jones at 01254 828 300 or via our website at <https://www.backhousejones.co.uk>.

*Disclaimer: This note is not intended to constitute legal advice and operators should seek specific advice which will be provided based on their particular circumstances.*

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## Annex 1 Letter Consenting to Furlough

*[ON HEADED NOTEPAPER OF EMPLOYER]*

[EMPLOYEE'S NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[POSTCODE]

[DATE]

Dear [EMPLOYEE'S NAME],

### Furlough Agreement

Following our discussion on [DATE], I am writing to advise you that due to operational and economic circumstances beyond our control, it is our intention to register selected staff to benefit from the Government Coronavirus Job Retention Scheme.

Furlough Leave has been introduced by the Government during the coronavirus pandemic to mean leave offered which keeps employees on the payroll without having to work in order to minimise the need for redundancies.

This letter sets out a variation to your contract of employment, designed to implement and take advantage of the government's Coronavirus Job Retention Scheme.

1. As discussed in our meeting, we propose that with effect from [DATE] you shall be on Furlough Leave. This means your contract of employment continues, but you shall not be required to come into work. We will pay you [80%] / [80% subject to a maximum liability for us of £2,500 per month, including employer's national insurance contributions and employer's pension contributions] / [100%] of your salary during that time.

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2. Your Furlough Leave shall end on the earliest of the following events: -
    - (a) the government's Coronavirus Job Retention Scheme ending;
    - (b) either you or us ceasing to be eligible for funding under that scheme; or,
    - (c) us deciding to cancel Furlough Leave and bring you back to work.
  3. As I discussed, we believe that this current situation is likely to be temporary and we hope that by putting in place this furlough leave arrangement, we will avoid the need to implement a compulsory redundancy programme and ensure the business is on a good footing to preserve the long-term employment of all members of staff.
  4. During the period of your furlough leave, your employment will continue and therefore you may not work for any other organisation, or on your own account. If you do, you must tell us, and you may be liable to repay any sums we have paid you under this scheme if we become liable to repay it to the Government. Anyone found to be doing so may also be dealt with in line with the Company's Disciplinary Procedure. We understand at this time that you are able to carry out volunteer work for free.
  4. When your Furlough Leave ends, while we will always endeavour to provide you with work, in the event of insufficient work being available you agree we are entitled to place you on short time or lay you off without any pay except for statutory guarantee payments

The remaining terms of your Contract shall be unaffected by this change.

It is my belief that this arrangement falls within the terms of your contract of employment under the lay-off provisions, so the Company does not require your consent to implement it however as part of the consultation process, I discussed the proposals with you and you confirmed your agreement to the proposed furlough leave. Please can you therefore sign and return a copy of this letter confirming your agreement to ensure we have an accurate record of the position.

Please note that the Company will be consistently monitoring the guidance available with regards to the ongoing COVID-19 pandemic, and reserves the right to revert your

employment status with immediate effect should we be in a position to bring you back to work.

We realise that this is a difficult time for all and appreciate your understanding and cooperation during this period of uncertainty. Please be reassured that business continuity and maintaining employment are imperative to the Company at this time.

If you have any questions, please contact [NAME].

Yours sincerely,

EMPLOYER NAME

I, [NAME OF EMPLOYEE], hereby agree to these temporary changes to my contract:

.....

DATE: .....

BACK

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