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The Furlough Guidance - further Guidance. TUPE Holidays.

MICHAEL DUGGAN Q.C.

The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at least three months starting from 1 March 2020. We expect the scheme to be up and running by the end of April. It is designed to support employers whose operations have been severely affected by coronavirus (COVID-19). The Government has given further Guidance (https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme?mc_cid=177bacbc11&mc_eid=fbb90dbedd.). ACAS has also provided guidance on holidays. The main points are:

1. How much you can claim

You'll need to claim for:

- 80% of your employees' wages (even for employee's on National Minimum Wage) - up to a maximum of £2,500. Do not claim for the worker's previous salary.
- minimum automatic enrolment employer pension contributions on the subsidised wage.

The Guidance does appear to now state that you take the gross salary and work out the 80% from that; it. You gross down.

2. Apprentices

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed. However, you must pay your Apprentices at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) as appropriate for all the time they spend training. This means you must cover any shortfall between the amount you can claim for their wages through this scheme and their appropriate minimum wage. Guidance is available for changes in apprenticeship learning arrangements because of COVID-19.

3. Administrators

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme. However, we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business.

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4. If your employee is self-isolating or on sick leave

If you're employee is on sick leave or self-isolating, they'll be able to get Statutory Sick Pay. You cannot claim for employees while they're getting Statutory Sick Pay, but they can be furloughed and claimed for once they are no longer receiving Statutory Sick Pay.

5. Shielding Employees

You can claim for furloughed employees who are shielding in line with public health guidance (or need to stay home with someone who is shielding) if they are unable to work from home and you would otherwise have to make them redundant.

6. Employees with caring responsibilities

Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed.

7. If your employee has more than one job

Employees can be furloughed in one job and receive a furloughed payment but continue working for another employer and receive their normal wages.

8. If your employee is on a fixed term contract

Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee's contract ends because it is not extended or renewed you will no longer be able claim grant for them.

9. Eligible individuals who are not employees

As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE: * office holders (including company directors) * salaried members of Limited Liability Partnerships (LLPs) * agency workers (including those employed by umbrella companies) * limb (b) workers.

10. Office Holders

Office holders can be furloughed and receive support through this scheme. The furlough, and any ongoing payment during furlough, will need to be agreed between the office holder and the party who operates PAYE on the income they receive for holding their office. Where the office holder is a company director or member of a Limited Liability Partnership (LLP), the furlough arrangements should be adopted formally as a decision of the company or LLP.

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11. Company Directors

As office holders, salaried company directors are eligible to be furloughed and receive support through this scheme. Company directors owe duties to their company which are set out in the Companies Act 2006. Where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed. Where one or more individual directors' furlough is so decided by the board, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned. Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.

12. Salaried Members of Limited Liability Partnerships

(LLPs)Members of LLPs who are designated as employees for tax purposes ('salaried members') under the Income Tax (Trading and Other Income) Act (ITTOIA) 2005 are eligible to be furloughed and receive support through this scheme.

13. Agency Workers (including those employed by umbrella companies)

Where agency workers are paid through PAYE, they are eligible to be furloughed and receive support through this scheme, including where they are employed by umbrella companies. Where Limb (b) Workers are paid through PAYE, they can be furloughed and receive support through this scheme. Those who pay tax on their trading profits through Income Tax Self-Assessment, may instead be eligible for the Self-Employed Income Support Scheme (SEISS), announced by the Chancellor on 26 March 2020. Read more information on the Self-Employed Income Support Scheme, including eligibility criteria and how to claim.

14. The normal rules for maternity and other forms of parental leave and pay apply

You can claim through the scheme for enhanced (earnings related) contractual pay for employees who qualify for either: maternity pay; adoption pay; paternity pay; shared parental pay

15. Agreeing to furlough employees

Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.

IMPORTANT - To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. A record of this communication must be kept for five years.
You do not need to place all your employees on furlough. However, those employees who you do place on furlough cannot undertake work for you.

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16. Past Overtime, Fees, Commission, Bonuses and non-cash payments

You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

We expressed concern that this was likely to hugely disadvantage some employees, who receive a very small salary and whose earnings are primarily based on commission. The Guidance makes it clear now that commission can be claimed provided that it was already earned before the 28th February 2020. It will be based upon the calculation set out in the next paragraph. Fees can also be claimed – the Guidance has changed the position. Non monetary benefits such as a car or health insurance are not included.

17. Benefits in Kind and Salary Sacrifice Schemes

The reference salary should not include the cost of non-monetary benefits provided to employees, including taxable Benefits in Kind. Similarly, benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should also not be included in the reference salary.

18. Working for a different employer

If contractually allowed, your employees are permitted to work for another employer whilst you have placed them on furlough. For any employer that takes on a new employee, the new employer should ensure they complete the starter checklist form correctly. If the employee is furloughed from another employment, they should complete Statement C.

Other Matters

STOP PRESS

19. TUPE

In a tweet, David Johnston MP has stated that the Treasury has confirmed that employees transferred after 28th February 2020 can get the benefit of the Scheme.

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HOLIDAY ENTITLEMENT

20. Requiring employees to take holiday

There was a debate whether employees can be on furlough and take holiday at the same time. ACAS has produced Guidance (https://www.acas.org.uk/coronavirus/using-holiday). The original guidance stated

"Carrying over holiday

During the coronavirus outbreak, it may not be possible for staff to take all their holiday entitlement during the current holiday year.

Employers should still be encouraging workers and employees to take their paid holiday. Employees and workers should also make requests for paid holiday throughout their holiday year, if possible.

The government has introduced a temporary new law allowing employees and workers to carry over up to 4 weeks' paid holiday over a 2-year period. This law applies for any holiday the employee does not take because of coronavirus, for example if:

- they're self-isolating or too sick to take holiday before the end of their leave year
- they've been temporarily sent home as there's no work ('laid off' or 'put on furlough')
- they've had to continue working and could not take paid holiday

The second bullet point suggested that it is not possible to be furloughed and take holiday at the same time. Whilst the first and third categories are understandable and in accordance with existing case law, the second category is more difficult. The employee is limited as to what he or she can do when on furlough so that the argument is that this is similar to being off sick or on maternity leave where the ability to take holi8day is limited (following such cases as *Pereda v Madrid Movilidad SA* [C-277/08, [2009] IRLR 959 (referred to in our first Bulletin) and *Merino Gomez v Continental Industrias del Caucho SA* [2004] IRLR 407 – see Duggan QC on Contracts of Employment at K47). On the other hand the quality of the leave is irrelevant provided that there is rest (*Russell v Transocean International Resources Limited* [2012] ICR 185, Duggan at I17 & 56).

We were of the view that they can but they must be paid 100% of their salary based upon the reference period.

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IMPORTANT

The Guidance has been changed by ACAS. It now states:
"Requiring staff to take or cancel holiday

Employers have the right to tell employees and workers when to take holiday.

An employer could, for example, shut for a week and tell everyone to use their holiday entitlement.

If the employer decides to do this, they must tell staff at least twice as many days before as the amount of days they need people to take.

For example, if they want to close for 5 days, they should tell everyone at least 10 days before.

Employers can also cancel pre-booked paid holiday. If they decide to do this, they must give staff at least the same number of days' notice as the original holiday request.

For example, if an employee has booked 5 days holiday, the employer must tell them at least 5 days before the holiday starts that it's cancelled.

This could affect holiday staff have already booked or planned. So employers should:

· explain clearly why they need to do this

· try and resolve anyone's worries about how it will affect their holiday entitlement or plans"

21. The Government gave the right to carry over holiday pay in the Working Time (Coronavirus) (Amendment) Regulations 2020which amends regulation 13 of the WTR to allow workers to carry over EU holiday into the next two leave years, where it is not reasonably practicable for them to take some, or all, of the holiday they are entitled to due to coronavirus. This applies to the first 4 weeks but does not cover additional holiday leave. We are of the view that holiday pay must be paid at 100% since it will be calculated on the reference period (after 6th April 2020 on the previous 52 weeks).

22. If holiday leave is incompatible with furlough, it would mean that day's leave will break the 3-week requirement. This may be particularly an issue when it comes to bank holidays if they are normally regarded as a paid leave day.

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THE CORONAVIRUS CRISIS: FOURTH REPORT

THE FURLOUGH SCHEME & SELF-EMPLOYED GUIDANCE

THE THIRD GUIDANCE DA TED 9 TH APRIL. PRACTICAL EXAMPLES

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The Coronavirus Crisis: The Furlough Scheme & the Further Guidance

The Government has published its THIRD Guidance on the operation of the Furlough Scheme, entitled Claim for wage costs through the Coronavirus Job Retention Scheme.

It is clear that there will not be Regulations that will set out the entitlement and operation of the Scheme. The Guidance document is at **https://www.gov. uk/guidance/claim-for-wage-costs-through-thecoronavirus-job-retention-scheme**.

The further guidance dated 9TH April is at https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme?mc_cid=177bacbc11&mc_eid=fbb90dbedd.

The Guidance sets out in broad terms the manner in which the Scheme will operate, the period for which employees must be absent before they are entitled, anti-avoidance measures and the way in which a claim is to be made.

The Guidance is being gradually refined, though here is much that remains unclear. The Reader is referred to A Collaborative View on the Coronavirus Job Retention Scheme - David Reade QC, Michael Ford QC, Sean Jones QC & Caspar Glyn QC for a very helpful exposition of the scheme which also sets out the issues that are still outstanding.

This Bulletin sets out the Guidance with this key:

The first guidance in blue.

The second guidance in purple.

The third guidance in Green.

Those parts that have been omitted are struck through – this shows the development of the Guidance.

The commentary is in red.

It then contains a worked example, which identifies some of the considerations and pitfalls that may need to be taken into account. Reference should also be made to the first bulletin that dealt with SSP, frustration, collective consultation and special circumstances.

Advice should be taken on the practical application of the scheme as there are a number of employment pitfalls, especially in relation to selection and consultation for furlough or redundancy.

This bulletin will consider the following –

The Furlough Guidance

1. Who can claim?
2. Employees you can claim for
3. Payroll Consolidation
4. Agreeing to furlough employees
5. How much you can claim
6. What you'll need to make a claim
7. Claim
8. After you've claimed
9. When your employees are on furlough
10. The Furlough Scheme: A Practical Example
11. Holidays
12. The Self Employed

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The Furlough Guidance (with the further Guidance)

In this section we have set out the content of the third Guidance with each of the sets out amendment in colour (in blue/purple/green so that it is clear) and commented on some of the issues that we see as likely to arise. These issues are further illustrated by the worked example in the next section.

Guidance for employers on the coronavirus (COVID-19) Job Retention Scheme.
Published 26 March 2020, 4th April 9th April
From:

HM Revenue & Customs

Contents

The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at least three months starting from 1 March 2020. ~~We expect the scheme to be up and running by the end of April. It is designed to support employers whose operations have been severely affected by coronavirus (COVID-19).~~

The online service you'll use to claim is not available yet. We expect it to be available by the end of April 2020.

If you cannot maintain your current workforce because your operations have been severely affected by coronavirus (COVID-19), you can furlough employees and apply for a grant that covers 80% of their 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.~~ plus the associated Employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on that subsidised furlough pay.

This is a temporary scheme in place for 3 months starting from 1 March 2020, but it may be extended if necessary and employers can use this scheme anytime during this period. It is designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy. However, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus.

Clearly, the Government is hoping that the Scheme will be temporary and will cover a 12-week period from 1st March 2020 to the end of May 2020. Bear in mind that the Government has opted for furlough to be implemented in at least three-week tranches. As will be set out below, unless there is some provision in the contract of employment, **consent** will be required. Employees may be happy to consent to being paid 80% of their salary, rather than redundancy, but the process becomes more difficult when some employees are to be furloughed and some to be made redundant.

~~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.~~

~~The scheme is open to all UK employers that had created and started a PAYE payroll scheme on 28 February 2020.~~
It appears that the £2500 per month is to be calculated gross and then you add on NI and the pension contributions. The limits on the Scheme will mean that a higher earner will not be receiving 80% of their wages. It is now clear that the approach to adopt is to take the gross wage and apply 80%. This means if you commence with a gross figure of £37500 and reduce it by 20% you get to £30,000 annualised or £2500 a month. This would mean an employee on £36000 would not get the ceiling figure of £2500 but would get £2400.

Someone on £50,000 or £4166 a month will get £30,000 on an annualised basis which will be 60% of the actual wage. Thus the higher earning employee will not in fact receive 80% of their wages. Nevertheless, this appears to be in contrast with self-employment where the proposal is that anyone who earned over £50,000 will be **disqualified** from receiving anything.

There is nothing to stop employers from topping up the 80%. From a costs point of view it may be that employers can manage their cash flow to some degree, going forward. If the wages are to be grossed down, then an employee earning £37,500 or £3125 a month would mean that the £2500 ceiling would be topped up by £725 a month (or £7250 in the case of 10 employees). An employee earning £30,000 a year on the grossing down basis would give an entitlement of £2400 a month with a top up of £600 a month). This is the more likely approach under the revised Guidance.

The guidance also states that the 80% "plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage" can be claimed.

1. Who can claim?

~~Any UK organisation with employees can apply, including:~~

- **~~businesses~~**
- **~~charities~~**
- **~~recruitment agencies (agency workers paid through PAYE)~~**
- **~~public authorities~~**

~~You must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.~~

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- ~~**charities**~~
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- ~~**public authorities**~~

~~**You must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.**~~

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You must have:

- **created and started a PAYE payroll scheme on or before 28 February 2020**
- **enrolled for PAYE online - this can take up to 10 days**
- **a UK bank account**

Any entity with a UK payroll can apply, including businesses, charities, recruitment agencies and public authorities.

Apprentices

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed.

However, you must pay your Apprentices at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) as appropriate for all the time they spend training. This means you must cover any shortfall between the amount you can claim for their wages through this scheme and their appropriate minimum wage. Guidance is available for changes in apprenticeship learning arrangements because of COVID-19.

See Coronavirus (COVID-19): guidance for apprentices, employers, training providers, end-point assessment organisations and external quality assurance providers - Published 23 March 2020, updated 6th April.

https://www.gov.uk/government/publications/coronavirus-covid-19-apprenticeship-programme-response/coronavirus-covid-19-guidance-for-apprentices-employers-training-providers-end-point-assessment-organisations-and-external-quality-assurance-pro

~~**Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme.**~~

Public sector organisations

The government expects that the scheme will not be used by many public sector organisations, as the majority of public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.
Where employers receive public funding for staff costs, and that funding is continuing, we expect employers to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.

It is to be noted that the Guidance says **we expect** employers not to furlough their employees where they receive Government funding. There is not an express disqualification.

Organisations who are receiving public funding specifically to provide services necessary to respond to COVID-19 are not expected to furlough staff.

In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the scheme may be appropriate for some staff.

Individuals

Individuals can furlough employees such as nannies provided they pay them through PAYE and they were on their payroll on, or before, 28 February 2020.

Administrators

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme. However, we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business.

The administrator will often hope to sell the business as a going concern as this is the first requirement under an administration. In those circumstances there should be access to the scheme.

2. Employees you can claim for

~~**Furloughed employees must have been on your PAYE payroll on 28 February 2020, and can be on any type of contract, including:**~~

- ~~**full-time employees**~~
- ~~**part-time employees**~~
- ~~**employees on agency contracts**~~
- ~~**employees on flexible or zero-hour contracts**~~

You can only claim for furloughed employees that were on your PAYE payroll on or before 28 February 2020.
Employees hired after 28 February 2020 cannot be furloughed and claimed for in accordance with this scheme.
Employees can be on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts. Foreign nationals are eligible to be furloughed.

Grants under the scheme are not counted as 'access to public funds', and you can furlough employees on all categories of visa.

The Scheme has been drawn as widely as possible to cover all types of employee.
The fact that it will cover those on flexible or zero-hour contracts is particularly welcome. However, it is not clear how this will work. It is for the employer to decide to furlough a person and to make a claim. Where someone is on zero hours contract the whole point is that if there is no work then the employee is not paid. The Scheme does not give employees a right to bring a claim. On the face of it the employer may decide not to furlough someone on zero hours even through there is nothing for that person to do and there appears to be no recourse for the employee.
~~**The scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.**~~
~~**To be eligible for the subsidy, when on furlough, an employee can not undertake work for or on behalf of the organisation. This includes providing services or generating revenue. While on furlough, the employee's wage will be subject to usual income tax and other deductions.**~~
To be eligible for the grant, when on furlough, an employee cannot undertake work for, or on behalf, of the organisation or any linked or associated organisation. This includes providing services or generating revenue. Employers are free to consider allocating any critical business tasks to staff that are not furloughed. While on furlough, the employee's wage will be subject to usual income tax and other deductions.

The Guidance does not explain what is to happen where employees have been made redundant and already paid a redundancy payment. Nor is it clear what is to happen about redundancy payments where the employee's contract has already been terminated, they are entitled to a redundancy payment, but it has not yet been paid. Strictly speaking, the employee was

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entitled to a redundancy payment on termination (provided they have the qualifying service). Since the entitlement is a matter of law under the Employment Rights Act 1996 we cannot see how it can, as a matter of strict law, be made a condition that the payment is waived if the employee is to be furloughed.

The Guidance also states that "To be eligible for the subsidy, when on furlough, an employee can not undertake work for or on behalf of the organisation". What is the position if the employee does some work for another organisation? For example, the employee may decide to carry out some shelf stacking at Tesco to supplement income. It appears, from the answer to the question of what happens if the employee has more than one job, that this is permitted, as the response states "If your 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."

There may also be problems of scrutiny where the employee does some work from home as it is difficult to see how this can be policed by HMRC, especially where the employee's salary is being topped up to a full salary.

It is be noted that the visa requirements are not applicable. Employees from abroad will get the benefit of the scheme provided that they are on PAYE.

~~**This scheme is only for employees on agency contracts who are not working.**~~
Does this mean not working for that organisation or does the fact that the agency worker does some work for organisation B rule out payment under furlough by organisation A? It appears from the answer dealt with in the last section that agency workers may do some work for one employer whilst getting the furlough pay in relation to another organisation. The requirement set out below is that the organisations are not linked.

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme and you will have to continue paying the employee through your payroll and pay their salary subject to the terms of the employment contract you agreed.

We see this as one of the most difficult issues, as set out in our worked example. Where an employee is placed on reduced hours and paid as such, he or she may be worse off than employees who have been furloughed which may act as a disincentive. Given that changes may be a matter of **consent** we can see various contractual issues as set out below. There may also be serious issues about selection.

~~**Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.**~~

The Guidance refers to changes by agreement so that consultation is clearly envisaged, and the situation will be more acute where employees are treated differently.

The Guidance confirms that equality and discrimination laws will apply as normal. We have already come across one case where the employer wished to furlough a female employee because of child care difficulties and the capacity to work at home with young children and a baby, whilst continuing to employ a male employee on full pay; both were on large salaries which meant that the £2500 a month was just over 25% of their salary. Clearly, this raises issues about fairness of selection and discrimination. We will discuss the issues in the worked example.
~~**To be eligible for the subsidy employers should write to their employee confirming that they have been furloughed and keep a record of this communication.**~~

If you made employees redundant or they stopped working for you after 28 February

If you made employees redundant, or they stopped working for you on or after 28 February 2020, you can re-employ them, put them on furlough and claim for their wages through the scheme.

This is an important point since employees can be re-engaged and then furloughed. It has been noted in the media that there is still a category that lose out- those that were genuinely employed after 28th February and before the scheme was announced – see Lord John Hendy QC's briefing on the gaps at https://www.ier.org.uk/news/lord-john-hendy-qc-briefs-on-the-gaps-in-the-coronavirus-job-retention-scheme/.
.

If your employees are working reduced hours

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme.

~~**Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme.**~~
~~**You do not need to place all your employees on furlough.**~~
~~**However, those employees who you do place on furlough cannot undertake work for you.**~~

If your employee is on unpaid leave

~~**Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February**~~**. You can only claim for employees that started unpaid leave after 28 February 2020.**
It is clear that employees can return to work then be put on furlough.

If your employee is self-isolating or on sick leave

~~**If you're employee is on sick leave or self-isolating, they'll be able to get Statutory Sick Pay.**~~
~~**You cannot claim for employees while they're getting Statutory Sick Pay, but they can be furloughed and claimed for once they are no longer receiving Statutory Sick Pay.**~~
If your employee is on sick leave or self-isolating as a result of Coronavirus, they'll be able to get Statutory Sick Pay, subject to other eligibility conditions applying. The Coronavirus Job Retention Scheme is not intended for short-term absences from work due to sickness, and there is a 3 week minimum furlough period.
Short term illness/ self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.

This is an important point since employees may wish to be furloughed rather than receive sick pay. See also the next paragraph guidance.

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Employers are also entitled to furlough employees who are being shielded or off on long-term sick leave. It is up to employers to decide whether to furlough these employees. You can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate scheme for the same employee but not for the same period of time. When an employee is on furlough, you can only reclaim expenditure through the Coronavirus Job Retention Scheme, and not the SSP rebate scheme. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, then you might qualify for the SSP rebate scheme, enabling you to claim up to two weeks of SSP per employee.

~~**If your employee is on Statutory Sick Pay Employees on sick leave or self-isolating should get Statutory Sick Pay but can be furloughed after this.**~~

~~Shielding Employees~~

~~**You can claim for furloughed employees who are shielding in line with public health guidance (or need to stay home with someone who is shielding) if they are unable to work from home and you would otherwise have to make them redundant.**~~

Employees who are shielding in line with public health guidance can be placed on furlough.

It is important to note that the amended Guidance states that employees who are self-isolating (See our first Bulletin) and are deemed to be incapacitated **cannot** be furloughed until after they are out of self isolation. However, given that many people may be self-isolated because they have mild symptoms and could be regarded as fit to work it is not clear what the position would be if the employee presents him or herself as fit to work at home so that the employer then wishes to furlough. It would appear that, as long as there is deemed incapacity, furlough cannot take place. The Guidance above makes it clear that you can claim for employees who are shielding and now appears to leave it to the discretion of the employer whether an employee who is self-isolating can be furloughed.

Employees with caring responsibilities

Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed.

This is another important point as many families may not be able to work at home because of child caring responsibilities.

~~**If your employee has more than one job**~~
~~**If your 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.**~~
If your employee has more than one job
If your 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.
Employees can be furloughed in one job and receive a furloughed payment but continue working for another employer and receive their normal wages.

On the basis of the above, there does not appear to be anything to prevent an employee from working elsewhere whilst on furlough. It is also clear now that an employee may take up another job whilst on furlough provided that the organisations are not linked.

If your employee is on a fixed term contract

Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee's contract ends because it is not extended or renewed you will no longer be able claim grant for them.

Eligible individuals who are not employees

As well as employees, the grant can be claimed for any of the following groups, if they are paid via PAYE: * office holders (including company directors) * salaried members of Limited Liability Partnerships (LLPs) * agency workers (including those employed by umbrella companies) * limb (b) workers
The guidance below sets out specific considerations for those individuals who are paid via PAYE, but who are not necessarily employees in employment law. Unless explicitly set out below, all other guidance is applicable to these cases, and should be followed.

Office Holders

Office holders can be furloughed and receive support through this scheme. The furlough, and any ongoing payment during furlough, will need to be agreed between the office holder and the party who operates PAYE on the income they receive for holding their office. Where the office holder is a company director or member of a Limited Liability Partnership (LLP), the furlough arrangements should be adopted formally as a decision of the company or LLP.

Company Directors

As office holders, salaried company directors are eligible to be furloughed and receive support through this scheme. Company directors owe duties to their company which are set out in the Companies Act 2006. Where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed. Where one or more individual directors' furlough is so decided by the board, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned.
Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.
This also applies to salaried individuals who are directors of their own personal service company (PSC).

The Guidance makes it clear that directors can claim. They can perform their statutory duties but should not carry out any other work for the Company. The Guidance does not set out a definition of statutory duties. The Companies Act 2006 (the Act) codified certain common law and equitable duties of directors. Sections 171 to 177 of the Act set out the seven general duties:

- to act within powers; in accordance with the company's constitution (its articles of association) and only exercise powers for the purposes for which they were given.
- to promote the success of the company - by acting, in good faith, in a manner considered for the benefit of the

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company's members as a whole. In so doing, a director must consider: the likely long term consequences of any decision; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between members of the company.

- to exercise independent judgment.
- to exercise reasonable care, skill and diligence, taking into account the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and the knowledge, skill or experience that the particular director has.
- to avoid (direct or indirect) conflicts of interest.
- not to accept benefits from third parties.
- to declare an interest (direct or indirect) in a proposed transaction or arrangement with the company - before the proposed transaction or arrangement is entered into. If the interest is in an existing transaction, the duty to declare that interest arises under s182 of the Act.

Directors also owe duties such as to deliver accounts and the annual report as well as under the Act and other legislation.

We note the comment that where "**furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.**" It would appear that the duty to promote the success of the company is subject to the caveat that work should not be carried out that would generate commercial revenue or provide services on behalf of the company. There is an apparent tension between the Guidance and what the Act states.

Salaried Members of Limited Liability Partnerships (LLPs)

Members of LLPs who are designated as employees for tax purposes ('salaried members') under the Income Tax (Trading and Other Income) Act (ITTOIA) 2005 are eligible to be furloughed and receive support through this scheme.
The rights and duties of a member of an LLP are set out in an LLP agreement and in the absence of an agreement, default provisions in the LLP Act 2000, based upon company and partnership law. Such an agreement may include separate agreement between the LLP and an individual member setting out the terms applicable to that member's relationship with the LLP.
To furlough a member, the terms of the LLP agreement (or any such agreement between the LLP and the member) may need to be varied by a formal decision of the LLP, for example to reflect the fact that the member will perform no work in the LLP for the period of furlough, and the effect of this on their remuneration from the LLP. For an LLP member who is treated as being employed by the LLP (in accordance with s863A of ITTOIA 2005), the reference salary for this scheme is the LLP member's profit allocation, excluding any amounts which are determined by the LLP member's performance, or the overall performance of the LLP.

Agency Workers (including those employed by umbrella companies)

Where agency workers are paid through PAYE, they are eligible to be furloughed and receive support through this scheme, including where they are employed by umbrella companies.
Furlough should be agreed between the agency, as the deemed employer, and the worker, though it would be advised to discuss the need to furlough with any end clients involved. As with employees, agency workers should perform no work for, through or on behalf of the agency that has furloughed them while they are furloughed, including for the agency's clients.
Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.

Limb (b) Workers

Where Limb (b) Workers are paid through PAYE, they can be furloughed and receive support through this scheme.
Those who pay tax on their trading profits through Income Tax Self-Assessment, may instead be eligible for the Self-Employed Income Support Scheme (SEISS), announced by the Chancellor on 26 March 2020.
Read more information on the Self-Employed Income Support Scheme, including eligibility criteria and how to claim.

Contingent workers in the public sector

The Cabinet Office has issued guidance on how payments to suppliers of contingent workers impacted by COVID-19 should be dealt with where the party receiving the contingent worker's services is a Central Government Department, an Executive Agency of a Central Government Department or a Non-Departmental Public Body.
Read more information on contingent workers impacted by COVID-19. This guidance applies to agency workers paid through PAYE, as well as those paid through umbrella companies on PAYE and off-payroll workers supplying their services through a Personal Service Company (PSC).

Contractors with public sector engagements in scope of IR35 off-payroll working rules (IR35)

Public sector bodies will follow the Crown Commercial Services guidance in the vast majority of cases. In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, it may be appropriate to claim under the CJRS. Contractors who are deemed employees according to the off-payroll working rules might be eligible for this scheme.

In this scenario, if the public sector organisation wished to furlough a contractor, they would have to confirm this with both the contractor's Personal Service Company (PSC) and the fee-payer (as set out in the off-payroll working rules, usually the agency paying the contractor's PSC). It should be formally agreed between these parties that the contractor is to do no work for the public sector organisation during their period of furlough. The fee-payer would be able to apply for the furlough payment of 80% of the monthly contract value, up to a maximum of £2,500, as well as the employer NICs on that subsidised wage. The fee-payer would then pay at least the amount of wage-grant received to the PSC, and report the payment via PAYE using the contractor's details, making the usual tax and National Insurance contributions (NICs) deductions for contracts in scope of the off-

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payroll rules. The PSC would then be required to report the amount it pays to the contractor as deemed employment income via PAYE using box 58A on the PAYE Real Time Information return.

Where a contractor is continuing to receive payments from a public sector client (including through the CJRS or other any other scheme), income from this client should be excluded from any calculation of the reference pay for the purposes of the CJRS if the contractor also decides to furlough themselves as an employee or director of their own company.

Employee transfers under TUPE and on a change in ownership
A new employer is eligible to claim under the CJRS in respect of the employees of a previous business transferred after 28th February 2020 if either the TUPE or PAYE business succession rules apply to the change in ownership.
Read more guidance on TUPE rules.
Read more guidance on business succession.
Payroll Consolidation
Where a group of companies have multiple PAYE schemes and there is a transfer of all employees from these schemes into a new consolidated PAYE scheme after 28 February 2020, the new scheme will be eligible to furlough those employees and claim the grants available under the CJRS.

In a tweet David Johnston MP had stated that the Treasury has confirmed that employees transferred after 28th February 2020 can get the benefit of the Scheme.

The above is an important concession as there was much argument about whether TUPE could apply to the Scheme.

3. Payroll Consolidation

Where a group of companies have multiple PAYE schemes and there is a transfer of all employees from these schemes into a new consolidated PAYE scheme after 28 February 2020, the new scheme will be eligible to furlough those employees and claim the grants available under the CJRS.

If your employee does volunteer work ~~or training~~

~~A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of your organisation.~~
A furloughed employee can take part in volunteer work, if it does not provide services to or generate revenue for, or on behalf of your organisation. Your organisation can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance.

~~However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/ NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.~~

If your employee undertakes training

Furloughed employees can engage in training, as long as in undertaking the training the employee does not provide services to, or generate revenue for, or on behalf of their organisation. Furloughed employees should be encouraged to undertake training.
Where training is undertaken by furloughed employees, at the request of their employer, they are entitled to be paid at least their appropriate national minimum wage for this time. In most cases, the furlough payment of 80% of an employee's regular wage, up to the value of £2,500, will provide sufficient monies to cover these training hours. However, where the time spent training attracts a minimum wage entitlement in excess of the furlough payment, employers will need to pay the additional wages (see National Minimum Wage Section for more details).

Presumably if you are being paid for an online training course you do not meet the requirements that would enable an employer to furlough since you are being paid for work.

If your employee is on maternity Leave, adoption leave ~~contractual adoption pay~~, paternity leave ~~pay~~ or shared parental leave ~~pay~~

The normal rules for maternity and other forms of parental leave and pay apply.
You can claim through the scheme for enhanced (earnings related) contractual pay for employees who qualify for either:

- maternity pay
- adoption pay
- paternity pay
- shared parental pay

~~Individuals who are on or plan to take Maternity Leave must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth.~~
~~If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.~~
~~Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.~~
~~If you offer enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs that you can claim through the scheme.~~

~~The same principles apply where your employee qualifies for contractual adoption, paternity or shared parental pay.~~
The above deals with the general principles of leave and pay for maternity etc. However, it does not deal with the question whether an employee who has exhausted the 90% of average earnings for the first six weeks would wish to come back to work and then be furloughed. If the employee was to be paid the statutory flat rate for the balance of the 33 weeks that would amount to £4,989.60. Given that the cap on the 80% for furlough is £2500, if an employee was furloughed for 2 months that would exceed the 33 weeks SMP, as it would be £5000. Of course, if the Furlough scheme is extended beyond May an employee would be even better off (since the employee would receive £2500 a month if the 80% cap is reached as opposed to £604.80 a month SMP).
It also has to be born in mind that employees have to agree to be furloughed. An employee on enhanced maternity pay may not wish to be furloughed if the enhanced pay is more than the £2500 cap. If an employee is made redundant the Statutory Maternity Pay would still be payable and the employee would be likely to have a claim for discrimination under section 18 of the Equality Act 2010 as the real reason for the termination was to avoid the contractual enhanced pay.

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4. Agreeing to furlough employees

Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.
To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. A record of this communication must be kept for five years.
You do not need to place all your employees on furlough. However, those employees who you do place on furlough cannot undertake work for you.
The Amended Guidance makes it clear that the employer must notify in writing and this record will be kept for five years.

~~Work out what you can claim~~
~~Employers need to make a claim for wage costs through this scheme.~~
~~You will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage. Fees, commission and bonuses should not be included.~~
~~At a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. An employer can also choose to top up an employee's salary beyond this but is not obliged to under this scheme.~~
~~We will issue more guidance on how employers should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions, before the scheme becomes live.~~
~~Full time and part time employees~~
~~For full time and part time salaried employees, the employee's actual salary before tax, as of 28 February should be used to calculate the 80%. Fees, commission and bonuses should not be included.~~

5. How much you can claim

You'll need to claim for:

- 80% of your employees' wages (even for employee's on National Minimum Wage) - up to a maximum of £2,500 per month. Do not claim for the worker's previous salary.
- Employer National Insurance contributions that are paid on the subsidised furlough pay.

Employer pension contributions that are paid on the subsidised furlough pay, up to the level of the minimum automatic enrolment employer contribution. The maximum level of grant for employer pension contributions on subsidised furlough pay is set in line with the minimum automatic enrolment employer contribution of 3% on qualifying earnings. Grants for pension contributions can be claimed up to this cap provided the employer will pay the whole amount claimed to a pension scheme for the employee as an employer contribution.
You can choose to top up your employee's salary, but you do not have to. Employees must not work or provide any services for the business while furloughed, even if they receive a top-up salary.
Grants will be prorated if your employee is only furloughed for part of a pay period.

Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they written to confirming their furloughed status.
The way you work out your employees' wages is different depending on what type of contract they're on, and when they started work.

Full or part time employees on a salary

Claim for the 80% of the employee's salary, as of 28 February 2020, before tax.

Employees whose pay varies

If the employee has been employed for 12 months or more, you can claim the highest of either the:

- same month's earning from the previous year
- average monthly earnings for the 2019-2020 tax year

If the employee has been employed for less than 12 months, claim for 80% of their average monthly earnings since they started work.
If the employee only started in February 2020, work out a pro-rata for their earnings so far, and claim for 80%.

Employer National Insurance and Pension Contributions

~~All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.~~
~~You can claim a grant from HMRC to cover wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on paying those wages.~~
You'll still need to pay employer National Insurance and pension contributions on behalf of your furloughed employees, and you can claim for these too.
You cannot claim for:

- additional National Insurance or pension contributions you make because you chose to top up your employee's salary
- any pension contributions you make that are above the mandatory employer contribution

Past Overtime, Fees, Commission, Bonuses and non-cash payments

You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.

We expressed concern that this was likely to hugely disadvantage some employees, who receive a very small salary and whose earnings are primarily based on commission. The Guidance makes it clear now that commission can be claimed provided that it was already earned before the 28th February 2020. It will be based upon the calculation set out in the next paragraph. Fees can also be claimed – the Guidance has changed the position.
Non-monetary benefits such as a car or health insurance are not included.

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Benefits in Kind and Salary Sacrifice Schemes

The reference salary should not include the cost of non-monetary benefits provided to employees, including taxable Benefits in Kind. Similarly, benefits provided through salary sacrifice schemes (including pension contributions) that reduce an employee's taxable pay should also not be included in the reference salary.

Where the employer provides benefits to furloughed employees, this should be in addition to the wages that must be paid under the terms of the Job Retention Scheme.

Normally, an employee cannot switch freely out of a salary sacrifice scheme unless there is a life event. HMRC agrees that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly.

Note that all benefits in kind are excluded.

~~**Employees whose pay varies**~~
~~**If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, you can claim for the higher of either:**~~

- ~~**the same month's earning from the previous year**~~
- ~~**average monthly earnings from the 2019-20 tax year**~~

~~**If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work.**~~
~~**If the employee only started in February 2020, use a pro-rata for their earnings so far to claim.**~~
~~**Once you've worked out how much of an employee's salary you can claim for, you must then work out the amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions you are entitled to claim.**~~

It is likely that many employees will be able to argue that their pay varies, taking into account such matters as contractual overtime, shift allowances and other allowances of a similar nature to those we have seen in the holiday case litigation. Once an employee gets to the £36,000 a year or £3000 figure, the £2500 cap will apply (80% of £3,000 = £2500 a month) so that we can see arguments as to why various elements should be included to bring the annual figure up to the cap.

~~**You can choose to provide top-up salary in addition to the grant. Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).**~~

The Government has left it to the discretion of the employer to provide 'top up salary' if it wishes. It is to be noted that the Guidance does not say that a further 20% can be paid but that it can be **top up salary**. We query, in our example given earlier whether an employer may simply pay the balance to get the employee to their normal salary, ie, if it was £60,000 or £5000 a month – the employee would get the £2500 cap a month furlough which would be 50% of the salary; can the employer simply pay the balance?. There does not seem to be any reason why not. This may be relevant when one comes to arguments about breach of contract and the ability to reduce salary as set out in the worked example.

Apprenticeship Levy and Student Loans

Both the Apprenticeship Levy and Student Loans should continue to be paid as usual. Grants from the Job Retention Scheme do not cover these.

National ~~Living Wage/~~National Minimum Wage

~~**Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for the hours they are working.**~~
~~**Therefore, furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW.**~~
~~**However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/ NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.**~~

National Minimum Wage

Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW)/ Apprentices Minimum Wage (AMW) for the hours they are working or treated as working under minimum wage rules.
This means that furloughed workers who are not working can be paid the lower of 80% of their salary or £2,500 even if, based on their usual working hours, this would be below their appropriate minimum wage. However, time spent training is treated as working time for the purposes of the minimum wage calculations and must be paid at the appropriate minimum wage, taking into account the increase in minimum wage rates from 1 April 2020. As such, employers will need to ensure that the furlough payment provides sufficient monies to cover these training hours. Where the furlough payment is less than the appropriate minimum wage entitlement for the training hours, the employer will need to pay the additional wages to ensure at least the appropriate minimum wage is paid for 100% of the training time. Where a furloughed worker is paid close to minimum wage levels and asked to complete training courses for a substantial majority of their usual working time employers are recommended to seek independent advice or contact Acas.

Returning from statutory leave

Statutory leave includes maternity leave, paternity leave, shared parental leave, adoption leave, sick leave and parental bereavement leave.
In line with other employees, claims for full or part time employees returning from statutory leave after 28 February 2020 should be calculated against their salary, before tax, not the pay they received whilst on statutory leave.
Claims for those on variable pay, returning from statutory leave should be calculated using either the:

- **same month's earning from the previous year**
- **average monthly earnings for the 2019-2020 tax year.**

6. What you'll need to make a claim

Employers should discuss with their staff and make any changes to the employment contract by agreement. Employers may need to seek legal advice on the process. If sufficient numbers of staff are involved, it may be necessary to engage collective

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consultation processes to procure agreement to changes to terms of employment.
To claim, you will need:

- your ePAYE 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

You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim.

If you use an agent who is authorised to act for you for PAYE purposes, they will be able to make a claim on your behalf. If you use a file only agent (who files your RTI return but doesn't act for you on any other matters) they won't be authorised to make a claim for you and you will need to make the claim yourself. Your file only agent can assist you in obtaining the information you need to claim (which is listed above). We are making the claim process as straightforward as possible.

7. Claim

~~You can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1 March if applicable.~~
You should make your claim using the amounts in your payroll - either shortly before or during running payroll. Claims can be backdated until the 1 March where employees have already been furloughed.
If appropriate, worker's wages should be reduced to 80% of their salary within your payroll before they are paid. This adjustment will not be made by HMRC.

Minimum furlough periods

Any employees you place on furlough must be furloughed for a minimum period of 3 consecutive weeks. When they return to work, they must be taken off furlough. Employees can be furloughed multiple times, but each separate instance must be for a minimum period of 3 consecutive weeks.

This is an important addition to the requirements for furlough. It means that employers cannot alternate employees on a weekly basis (though they could on a three-weekly basis).
It is to be noted that employees have no right to bring a claim under the Scheme.

8. After you've claimed

~~Once HMRC have received your claim and you are eligible for the grant, they will pay it via BACS payment to a UK bank account.~~
~~You should make your claim in accordance with actual payroll amounts at the point at which you run your payroll or in advance of an imminent payroll.~~
~~You must pay the employee all the grant you receive for their gross pay, no fees can be charged from the money that is granted. You can choose to top up the employee's salary, but you do not have to.~~

HMRC will check your claim, and if you're eligible, pay it to you by BACS to a UK bank account.
You must pay the employee all the grant you receive for their gross pay in the form of money.
Furloughed staff must receive no less than 80% of their reference pay (up to the monthly cap of £2500).
Employers cannot enter into any transaction with the worker which reduces the wages below this amount. This includes any administration charge, fees or other costs in connection with the employment.

It is apparent from the above that you take the gross pay then apply the 80%.

When the government ends the scheme

When the government ends the scheme, you must make a decision, depending on your circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider termination of employment (redundancy).
HMRC will process all claims made before the scheme ends.

If the Government terminates the Scheme at the end of May then many employers and employees may find at that point that the redundancy situation has simply been deferred for 12 weeks. We deal with this issue in the worked example.
Employees that have been furloughed

8. When your employees are on furlough

You cannot ask your employee to do any work that:

- makes money for your organisation or any organisation linked or associated with your organisation.
- provides services for your organisation or any organisation linked or associated with your organisation.

They can take part in volunteer work or training.

~~Employees that have been furloughed have the same rights as they did previously. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments.~~
~~Once the scheme has been closed by the government, HMRC will continue to process remaining claims before terminating the scheme.~~

~~Income tax and Employee National Insurance~~

Employee taxes

Your employees will still pay the taxes they normally pay out of their wages.
This includes pension contributions (both employer contributions and automatic contributions from the employee), unless the employee has opted out or stopped saving into their pension.

~~Wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt out or to cease saving into a workplace pension scheme.~~
~~Employers will be liable to pay Employer National Insurance contributions on wages paid, as well as automatic enrolment contributions on qualifying earnings unless an employee has opted out or has ceased saving into a workplace pension scheme.~~

Employee rights

Employees still have the same rights at work, including:

- Statutory Sick Pay
- maternity and other parental rights
- rights against unfair dismissal
- redundancy payments

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Grants cannot be used to substitute redundancy payments. HMRC will continue to monitor businesses after the scheme has closed.

Working for a different employer

If contractually allowed, your employees are permitted to work for another employer whilst you have placed them on furlough.

For any employer that takes on a new employee, the new employer should ensure they complete the starter checklist form correctly. If the employee is furloughed from another employment, they should complete Statement C.

This makes it clear that an employee may be furloughed and work for another employee. The 80% will still be payable even though the employee is paid by the new employer. This would mean, for example, that someone could take a job shelf stacking at Tesco without losing the 80% that they are getting on furlough.

Tax Treatment of the Coronavirus Job Retention Grant

Payments received by a business under the scheme are made to offset these deductible revenue costs. They must therefore be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.
Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

Individuals with employees that are not employed as part of a business (such as nannies or other domestic staff) are not taxable on grants received under the scheme. Domestic staff are subject to Income Tax and National Insurance Contributions on their wages as normal.

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HOLIDAY ENTITLEMENT

There has been a debate whether employees can be on furlough and take holiday at the same time. ACAS has produced Guidance which is has revised as se tout below. ACAS at first appeared to state that you cannot take holiday whilst on furlough but have backtracked form this- see how the Guidance was amended below. See the amendments in purple.

(https://www.acas.org.uk/coronavirus/using-holiday).

Coronavirus (COVID-19): advice for employers and employees
Chapters

- Staying at home and social distancing
- Vulnerable people and those at high risk
- Self-isolation and sick pay
- If the workplace needs to close temporarily
- Using holiday
- If an employee needs time off work to look after someone
- If someone has coronavirus symptoms at work
- Good practice steps for employers
- More coronavirus advice

Using holiday

In most situations, employees and workers should use their paid holiday ('statutory annual leave') in their current leave year. This is 5.6 weeks in the UK.
This is important because taking holiday helps people:

- get enough rest
- keep healthy (physically and mentally)

~~If an employee is 'furloughed' (temporarily sent home because there's no work), they can still request and take their holiday in the usual way. This includes taking bank holidays.~~

if you're a furloughed worker

Employees or workers who are temporarily sent home because there's no work ('furloughed workers'), can request and take their holiday in the usual way, if their employer agrees. This includes bank holidays.
Furloughed workers must get their usual pay in full, for any holiday they take.
Carrying over holiday
During the coronavirus outbreak, it may not be possible for staff to take all their holiday entitlement during the current holiday year.

Employers should still be encouraging workers and employees to take their paid holiday. Employees and workers should also make requests for paid holiday throughout their holiday year, if possible.

The government has introduced a temporary new law allowing employees and workers to carry over up to 4 weeks' paid holiday over a 2-year period. This law applies for any holiday the employee does not take because of coronavirus, for example if:

- they're self-isolating or too sick to take holiday before the end of their leave year
- ~~they've been temporarily sent home as there's no work ('laid off' or 'put on furlough')~~
- they've had to continue working and could not take paid holiday

The second bullet point suggested that it is not possible to be furloughed and take holiday at the same time. Whilst the first and third categories are understandable and in accordance with existing case law, the second category was more difficult. The employee is limited as to what he or she can do when on furlough so that the argument is that this is similar to being off sick or on maternity leave where the ability to take holi8day is limited (following such cases as ***Pereda v Madrid Movilidad SA*** [C-277/08, [2009] IRLR 959 (referred to in our first Bulletin) and *Merino* ***Gomez v Continental Industrias del Caucho SA*** [2004] IRLR 407 – see **Duggan QC on Contracts of Employment** at **K47).** On the other hand the quality of the leave is irrelevant provided that there is rest (***Russell v Transocean International Resources Limited*** [2012] ICR 185, **Duggan** at I17 & 56)**.**

We were of the view that they can, but they must be paid 100% of their salary based upon the reference period and ACAS is now adopting this approach.

Some employers will already have an agreement to carry over paid holiday. This law does not affect any agreements already in place.

If an employee or worker leaves their job or is dismissed during the 2-year period, any untaken paid holiday must be added to their final pay ('paid in lieu').

Bank holidays

Bank holidays are usually part of the legal minimum 5.6 weeks' paid holiday.

~~Employees and workers must get their usual pay for bank holidays.~~

~~Employees and workers may still be required~~
Employers can still require employees and workers to take paid holiday on a bank holiday unless they're off sick. They must give employees or workers notice.

Employees and workers can also ask to take a day's paid holiday. If the employer agrees, they must get their usual pay in full for bank holidays.
If employees and workers are not sure if bank holidays need to be taken as paid holiday, they should:

- **check their contract**
- **talk to their employer**

If bank holidays cannot be taken off due to coronavirus, employees and workers should use the holiday at a later date in their leave year.
If this is not possible, bank holidays can be included in the 4 weeks' paid holiday that can be carried over. This holiday can be taken at any time over the next 2 holiday leave years.

~~to use a day's paid holiday for bank holidays, including when they're furloughed. If bank holidays are given on top of the 5.6 week's paid holiday, employees and workers should check their contract or talk to their employer about taking this holiday.~~

~~If employees and workers usually work on bank holidays but are currently furloughed, they should check with their employer to~~

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~~see if they have to take holiday on that day or if they can take the time off at a later date.~~

~~If employees and workers cannot take bank holidays off due to coronavirus, they should use the holiday at a later date in their leave year.~~

~~If this is not possible, bank holidays can be included in the 4 weeks' paid holiday that can be carried over. This holiday can be taken at any time over a 2 year period.~~

IMPORTANT - Note that the second bullet point has been removed.

Agreeing how extra holiday is carried over

If employers do not already have an agreement in place, they can decide whether they'll allow extra holiday (more than the 4 weeks' paid holiday) to be carried over.
Extra holiday may include:

- the remaining 1.6 weeks of statutory annual leave
- holiday that's more than the legal minimum

Employees and workers should check their employment contract or talk to their employer to find out what they're entitled to.

Reaching an agreement

If the workplace has a recognised trade union, or there are employee representatives who work with the employer on these matters, the employer should involve them in agreeing changes.

If any agreement is made, it's a good idea for it to be in writing.

Employers should get legal advice if they're not sure whether to allow extra holiday to be carried over.

Previously booked holidays

~~If an employee no longer wants to take time off they'd previously booked, for example because their holiday's been cancelled, their employer may still tell them to take the time off.~~

An employee may no longer want to take time off they'd previously booked, for example because their hotel cancelled the booking. Their employer can insist they still take the time off, but it's best practice to get agreement from the employee.

If the employee wants to change when they take this time off, they'll need to get agreement from their employer.

Requiring staff to take or cancel holiday

Employers have the right to tell employees and workers when to take holiday.

An employer could, for example, shut for a week and tell everyone to use their holiday entitlement.

If the employer decides to do this, they must tell staff at least twice as many days before as the amount of days they need people to take.

For example, if they want to close for 5 days, they should tell everyone at least 10 days before.

Employers can also cancel pre-booked paid holiday. If they decide to do this, they must give staff at least the same number of days' notice as the original holiday request.

For example, if an employee has booked 5 days holiday, the employer must tell them at least 5 days before the holiday starts that it's cancelled.

This could affect holiday staff have already booked or planned. So employers should:

- explain clearly why they need to do this
- try and resolve anyone's worries about how it will affect their holiday entitlement or plans

The Government gave the right to carry over holiday pay in the *Working Time (Coronavirus) (Amendment) Regulations 2020* which amends regulation 13 of the WTR to allow workers to carry over EU holiday into the next two leave years, where it is not reasonably practicable for them to take some, or all, of the holiday they are entitled to due to coronavirus. This applies to the first 4 weeks but does not cover additional holiday leave. We are of the view that holiday pay must be paid at 100% since it will be calculated on the reference period (after 6th April 2020 on the previous 52 weeks).

If holiday leave is incompatible with furlough, it would mean that day's leave will break the 3-week requirement. This may be particularly an issue when it comes to bank holidays if they are normally regarded as a paid leave day. However, note that the second bullet point relating to furlough has been removed so that ACAS are no longer taking a stance that holiday is incompatible with furlough.

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The Furlough Scheme: A Practical Example

The Guidance set out above gives us the bare bones of a Scheme and, not surprisingly, does not attempt to deal with issues such as discrimination that may arise. Taking the sequence of events logically we consider the following scenario:

- The employer has a number of employees who have had to self-isolate, as well as a number of employees who have operated social distancing because of vulnerability issues, before the Government announced the 'shutdown'.
- The Shutdown has led to employees having to work from home where they are able to do so.
- The employer does not need all the employees because of the downturn in business and wishes to furlough some employees and ask others to continue to work from home.
- The employer will wish some of those people to work from home on a part time basis with a reduced salary.
- The employer does not wish to make redundancies until it finds out what is going to happen to the continuation of the scheme and/or its business.

The workforce

Taking a simplified example, the employees that are under consideration consist of the following :

- Adam, who is in self-isolation but considers that he is fit to carry out work. He is in receipt of SSP.
- Barry who is at home, exercising social distancing and is able to work from home. He has a young family and his children are now being home schooled.
- Charles, who is fit and well and able to work from home. He is not as qualified as the others and his turnover has not been as great.
- Diane, who is fit and who is at home. She is a single mother with a child and baby and no longer has childcare because of social distancing. She is much better qualified and has a greater turnover than Charles, but it is accepted she could not work much more than a couple of hours a day during the core hours when clients are in contact.
- Elsie, who is fit and able to work from home. She is a high earner and has significant private expenses. She received a large bonus which is contractual the previous year.
- Frances, who is about to go on maternity leave.
- Graham, who is disabled and in relation to whom it will be necessary to consider reasonable adjustments to enable him to work from home.
- Harriet, who is on maternity leave and has already been paid for the first six weeks. She is now on SMP.
- Ian, who has been absent on long term sickness and is no longer entitled to sick pay but would be happy to be furloughed.

Stage One: Consent and the Contracts of Employment

The contracts of employment provide as follows:

- None of the contracts provide for a right of lay off.
- All of the contracts contain a provision for variation of contract, which is in the following terms:
  "The Company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation. A copy of the handbook is displayed on the colleague communication board in your store and on Pipeline, and replacement copies are available from your People Manager." (see *Bateman v ASDA Stores Limited* [2010] IRLR 370).
- There is an Enhanced Redundancy Scheme in relation to some employees.

It is clear to us that if the employer wishes to furlough then it will have to be with the consent of the employees. Whilst the above clause was held in *Bateman v ASDA Stores Limited* [2010] IRLR 370 to empower the employer to amend contracts to rationalise a pay structure no employee lost out and the case law has generally held that general clauses do not permit unilateral variations, such as reduction in pay or hours (See *Risk Management Services (Chiltern) Limited v Shrimpton* [EAT 803/77; *Brechin Bros v Kenneavy & Strang* [EAT 373 & 374/82]; *Simmonds v Dowty Seals Ltd* [1978[IRLR 311 where changing hours of work amounted to a breach of contract).

The fundamental change of placing someone on furlough will have to be agreed. If any of the employees, named above, make it clear that they would not be prepared to go on furlough or reduced hours working from home, the employer will have no real option other than to consider redundancy or retention on full pay.

As a first stage therefore we think that the employer should:

- Make it clear that if the employee is not prepared to **consent** to being furloughed, there is the possibility of redundancy.
- Ascertain whether the employees are prepared to be furloughed.

In the above example, Elsie may refuse to go onto furlough because she takes the view that she will lose so much salary. On the other hand, the employer may consider she is too expensive, at the present time, and that is why she is not being selected to work from home, but the employer wants to furlough her. It seems that an impasse may be reached, and the employer may decide to consider redundancy. Elsie's bonus may be included if it is contractual and was based on turnover or some objective criteria that occurred before the 28th February (Compare ***GX Networks v* Greenland** [2010] IRLR 991 and see **Duggan QC on Contracts of Employment** at **F22**).

Second Stage: Selection for Furlough At this stage, the employer will be considering who it wishes to continue to work – from home – to meet the needs of the business during the crisis. Assuming the employer wants four employees who can devote the maximum time to the business and work from home in as efficient a manner as possible. It reviews the position of the eight employees and decides on the four that it considers best equipped to carry the business through this difficult time. It seems to us that the following issues then arise:

SSP and Sickness

Adam is on SSP because he has manifested symptoms. Adam cannot get SSP and be furloughed at the same time. Ian is on long term sick leave and has exhausted his sickness entitlement. He considers himself fit to carry out full time work from home. However, he has a Fit Note which states that he is still not fit for work, and the employer would be entitled to reject his contention. In any event, there seems little benefit in permitting Ian to return to work so that he then goes on to furlough.

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Maternity

In the case of Frances and Harriet, Frances is about to go on maternity leave whilst Harriet has exhausted the first six weeks of her maternity pay and is now on statutory maternity pay. It may of course be the case that the employer pays enhanced maternity pay for a longer period, but it would appear that Harriet will be better off if she comes back and is then furloughed.

Can Frances be furloughed? The entitlement to statutory maternity leave is a matter of right provided that the provisions of the ERA 1996 and the Maternity and Parental Leave Etc Regulations 1999 [SI 1999/3312] (MAPLE) are met. The right to statutory maternity pay exists provided that the conditions in the Social Security Contributions and Benefits Act 1992 and the SMP (General) Regulations 1986 are met. **(see Duggan QC on Contracts of Employment (4th Ed)** at Chapter K for a full exposition of the rules). Section 164(1) of the 1992 Act states that where the conditions are satisfied "she shall be entitled" to SMP. When Frances has her baby she must be given compulsory maternity leave of 2 weeks (s 72 ERA 1996, MAPLE, regulation 8). The employer may decide to offer furlough to Frances in the meantime. However, this is potentially discrimination under section 18 of the Equality Act 2010 and, should Frances refuse, she cannot be subjected to a detriment because of her pregnancy.

Can Harriet come back? Where an employee wishes to come back early from OML the employer may insist on 8 weeks' notice (MAPLE, regulation 8) and the employer can postpone so that this is complied with. There is nothing to stop the employer permitting the employee to return straightway so that Harriet could return and be immediately furloughed. Of course, the employer is more interested in who it is going to select to continue working from home so that the return of Harriet early will not advance matters. Note that we considered maternity and suspension on pay in the First Bulletin.

Sex Discrimination

In the case of Diane, whilst she worked from the workplace and had childcare cover, she proved herself to be the highest earning employee and brought in more work than her counterparts. She cannot do so whilst at home, looking after her toddler and baby. The employer may decide that she is the least productive and that she will therefore be furloughed. Diane was earning £150,000 a year. She would be subject to the furlough cap of £2500, or about a fifth of her salary.

Diane may claim indirect discrimination contrary to section 19 of the Equality Act 2020. It would be for the employer to show that the decision to furlough Diane is a proportionate means of achieving a legitimate aim. In light of the nature of this crisis, is that defence likely to succeed?

If Barry and Charles are selected to continue to work there may be a claim for direct discrimination under section 13 on the basis that Diane has been less favourably treated than Barry or Charles. However, the employer would argue that sex had nothing to do with it and it was the fact that Barry and Charles were able to work full time from home. No doubt Diane can point to the fact that Barry has children at home, but if it can be shown that he is still able to work full time, for example because his partner is also at home and is carrying out the schooling, this may be the answer.

Disability Discrimination

Graham is disabled and is not able to work in a sedentary position for long periods of time without a special chair. Given that the employer knows that Graham is disabled the employer is under a duty to consider reasonable adjustments. For example it may be a reasonable adjustment to have his work chair couriered to his home – this is unlikely to be expensive compared to the cost of purchasing a new chair.

The law relating to disability discrimination, in particular reasonable adjustments, remains fully in place and the employer will need to have this in mind during the selection process. Advice should be taken where the employer has disabled employees before any steps to furlough or in relation to redundancy are implemented.

Age discrimination

There may also be age discrimination issues where a vulnerable person is social distancing because he or she are over the age of 70 and the employer therefore chooses the individual for redundancy and/ or furlough as opposed to continuing to work. We are of the view that the employer cannot simply adopt a blanket approach but must look at each individual on the facts. If the person is able to work from home this must be taken into account. By the same token the employer should not use the current crisis as a reason to make someone redundant as opposed to furlough them, because of their age. The legislation remains in full force.

Comment

The above are simple examples of issues that may arise where the employer wants to keep some employees working from home and furlough some. The employees may not wish to be furloughed because they will lose salary overall. However, that is likely to be better than the alternative of redundancy.

The other side of the coin is where the employer is deciding who to make redundant and who to furlough. We suggest that, at this stage, the employer will be following a more traditional redundancy selection process. The employees may now wish to be furloughed so that they are retained in the business rather than dismissed. See further below.

Holiday

We have had a number of cases where employers have given notice that holiday shall not be taken, in order to avoid the costs of paying holiday pay. We would note that, under Reg 15(3)(b) and 15(4)(b), the employer can give notice not to take leave but must do this at least as many days before the number of days holiday that was going to be taken. For Aa consideration of the ACAS Holiday guidance see above.

Homeworking

In our first Bulletin we made the point that the relevant statutory provisions still apply (and this is acknowledged by the Guidance) so that employers must have in mind matters of health and safety, a safe working environment etc.

On the other hand, the employer will want to ensure that the employee is properly carrying out his or her duties from home.

A draft checklist and policy is contained in **Duggan QC on Contracts of Employment** at **chapter 5.7.** and the various issues raised by home working are considered in detail.

Section 195, Trade Union and Labour Relations (Consolidation) Act 1992

The employer may seek to apply other alternatives, such as part time working, shorter days or reduced pay. Unless there is express contractual provision these approaches cannot be imposed unilaterally as that will amount to a breach of contract if the employee does not accept a change which the employer insists upon.

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If the employer decides to dismiss and offer new terms and conditions, then it must be borne in mind that the collective consultation provisions of TULR(C)A 1002 will apply.

Collective consultation

One of the major issues that arises is where the employer intends to put employees on the furlough scheme but will make those redundant who do not agree. The employer will be hoping to avoid redundancies but will dis miss if necessary. The employer is hoping to avoid redundancies. **Harvey notes:**

"As well as cases of a straightforward redundancy of 20 or more, this section may also cover a case where the employer intends to re-employ some of those being made redundant (so that the *net* number is under 20) if those re-employed will be on substantially different contracts: *Hardy v Tourism South East [2005] IRLR 242, EAT* (26 staff were subject to restructuring, the aim being to re-employ 14 on to new jobs and only actually lose 12; held: s 188 applied to the dismissal of all 26 from their original contracts, applying *Hogg v Dover College [1990] ICR 39, EAT* and *Alcan Extrusions v Yates [1996] IRLR 327, EAT*). Similarly, where at one site the employer (having stated that redundancies were to be made) accepted three voluntary redundancies and made 17 employees compulsorily redundant, it was held that this constituted the necessary 20 under s 188 to trigger the consultation requirements: *Optare Group Ltd v TGWU [2007] IRLR 931, EAT*."

There is a real likelihood that collective consultation will be needed in such circumstances.

We dealt with collective consultation in the first Bulletin. We have since been asked on a number of occasions about the 'special circumstances' defence.

To recap, by section 188 of TULR(C)A 1992 where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals, in good time and in any event

- where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least [45] days, and • otherwise, at least 30 days, before the first of the dismissals takes effect.

The consultation shall include consultation about ways of—

- avoiding the dismissals,
- (reducing the numbers of employees to be dismissed, and
- mitigating the consequences of the dismissals and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

- the reasons for his proposals,
- the numbers and descriptions of employees who it is proposed to dismiss as redundant,
- the total number of employees of any such description employed by the employer at the establishment in question,
- the proposed method of selecting the employees who may be dismissed,
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure
- including the period over which the dismissals are to take effect,
- the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed,
- the number of agency workers working temporarily for and under the supervision and direction of the employer,
- the parts of the employer's undertaking in which those agency workers are working, and
- the type of work those agency workers are carrying out.

That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.

The employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

We question the fitness of purpose of these provisions for the current crisis. Employees will need to be elected as representatives and to discuss the position with the workforce. This is going to be very difficult where the workforce is on lockdown at home and there is a very large workforce.

Can the special circumstances defence apply? Section 188(7) states that "If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection [(1A), (2) or (4)], the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."

We dealt with the problems in our first Bulletin. The reader is also referred to ***Shanahan Engineering Ltd v UNITE*** UKEAT/0411/09, [2010] All ER (D) 108 (Mar), in which one of the authors was involved. The employer in this case was a sub-contractor working on two plants. When it was told by the main contractor that work was to stop on one plant so that the work was to be done sequentially and that the workforce was to be off site that day, it made some 50 of the workforce redundant out of 145 craft employees. A procedure agreed with the Union was followed but the dismissals were a fait accompli. The Employment Tribunal stated:

"The fact that a sudden situation arises may or may not, depending on its circumstances, amount to special circumstances relieving the employer of the duty to consult, either entirely or in part. We are satisfied that the Respondents were faced with this sudden situation. Why it may have been that Alstom chose to drop this bombshell quite as quickly and suddenly as it did is a matter upon which we can only speculate, since we have had no evidence from them, but we are satisfied that in those circumstances, it was sufficient to relieve the Respondent from the obligation to consent to start consultation at least 30 days before the dismissals took effect."

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The Tribunal held that it was "not satisfied, however, that it relieved the Respondent in any other respect from the obligation to consult. Quite plainly the situation of 50 or so employees for whom there was no work is not something an employer could countenance for very long. We are not blind to the economic realities of life, but on the other hand we have no evidence before us that the Respondent's financial position was such that it had to dispense with the services of these individuals quite as quickly as it did. We see no reason why it would not have been open to the Respondents to have carried out some consultation with the appropriate representatives so as to comply with the other requirements of s 188. Although the ordinary requirement would be that the consultation should start at least 30 days beforehand, there is no requirement that it should last for 30 days. Consultation may be quite adequately completed within a matter of only a few days, depending on the circumstances and we see no reason why in this situation, this Respondent could not have consulted with the Union representatives commencing on 1 May and continuing perhaps only for a very few days thereafter, taking account of the fact that there was Bank Holiday. In the event the Respondent was accepting liability to pay a week's wages in lieu of notice. We have no evidence to suggest that would have placed them in any great difficulty if that period has been extended, perhaps by no more than two or three days, whilst consultation took place. There was an agreed selection procedure in place, and we do not think that the consultation process would have taken very long. . . certainly no more than a few days."

In the EAT, HHJ Richardson stated that "In this case, while there was a complete failure to consult, there was material in the tribunal's own findings which would justify a lesser protected period. There were, as the tribunal found, special circumstances lying behind that failure – namely, the sudden and unexpected direction by Alstom to cease work on one of two generators and to reduce resources on the site. That, to our mind, is at least potentially a mitigating circumstance of considerable power and importance. In an ordinary case of complete failure to consult there will not be a special circumstance brought about by an outside agency." However:

"However, when assessing the seriousness of a default, it is relevant both to consider the culpability of the employer and the harm or potential for harm of the default. The tribunal should take into account all the circumstances and make such award as is just and equitable. It is relevant that no consultation took place at all. It is also relevant (for example) that the consultation could in any event have taken place over a short period by reason of the special circumstances of this case; and that there was already an agreed redundancy selection procedure which the employer operated. Taking into account such factors does not, we emphasise, mean that the award should be tailored to the length of time consultation would have taken. It should not. But the tribunal in assessing the seriousness of the default should take into account all the circumstances in order to reach a rounded judgment as to what is just and equitable."

The case was remitted to the Tribunal, which reduced the protective award from 90 days to 30 days. It can thus be seen that **there is a serious risk of an award even if there are special circumstances if there is no consultation.**

Advice should be taken about this aspect of the process before there are collective dismissals.

Redundancy, furlough or working from home: who to select

We considered the issue of frustration, collective consultation and special circumstances in the first bulletin and reference should be made to this.

The employer may decide that it has to select some employees for redundancy, some for furlough and others to work from home to pull the business through. Those who are asked to continue to work may object if their terms and conditions are changed to their detriment and they are worse off than if they had been furloughed.

So far as a redundancy process is concerned, we envisage that this will have to be a process with proper selection criteria and meaningful consultation. We have been asked whether a refusal to co-operate with any notion as to furlough may be taken into account. Provided that the employee is made aware of this, we consider, in this altered climate, that it may be a legitimate matter to take into account provided that the employee has been warned that this may be so. Whilst refusal to co-operate may be dangerously close to subjective criteria, in *Graham v ABF LTD* [1986] IRLR 90 the employer's criteria of "quality of work, efficiency in carrying it out and the attitude of the persons evaluated to their work" passed the reasonableness test. The employee had displayed hostility to new tasks.

We also think it needs to be borne in mind that this crisis is hopefully not long term so that an inability to do the job from home should be weighed against the value of the employee to the business before the crisis loomed.

At the end of the day, the business needs will dictate who is to be retained and who is to be made redundant.

We would point out that where the employer is choosing who to make redundant and who to furlough, it is effectively looking to a time when the crisis has passed and employees return to work (since the furloughed employees will not be working anyway during the crisis but the employer has in mind that they will return to the business).

We therefore do consider that rigorous selection criteria and procedures should be followed, in such circumstances, which are in reality no different from those where the employer is selecting as between persons it wants to retain to continue to work and those that are redundant.

Advice should be taken about how to proceed. It has become apparent that many employers are simply asking employees to work from home without thinking through the issues and we suggest that a structured approach should be taken as set out above.

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The Self Employed

Whilst the Government announced the 'Furlough' package for employers and employees, considerable concern has been expressed about the impact of staying at home on the self-employed. To this end the House of Commons, Public Bill Committee had proposed an amendment to the Coronavirus Bill "Statutory Self-Employment Pay" which provided that there must be regulations to cover freelancers and the self-employed, who will receive guaranteed earnings of 80% of their monthly net earnings averaged over the previous three years, or up to £2917 a month, whichever is the lower.
The Government has now produced a Scheme for the self-employed.

The essential points are that:

- **You must be trading when you apply and intend to continue to trade, which is totally different from employees, who must not work.**
- **If your trading profits are more than £50,000 you cannot claim.**
- **The grant will be based on the last three years of profits.**

The self employed

On Thursday 26th March 2020, the Chancellor announced the nature of the help that would be given to the self-employed. We set out the nature of the Scheme below in blue.

Guidance
Claim a grant through the coronavirus (COVID-19) Self-employment Income Support Scheme
Use this scheme if you're self-employed or a member of a partnership and have lost income due to coronavirus. Published 26 March 2020 From:
HM Revenue & Customs
Contents

1. **Who can apply**
2. **How much you'll get**
3. **How to apply**
4. **After you've applied**
5. **Other help you can get**

This scheme will allow you to claim a taxable grant worth 80% of your trading profits up to a maximum of £2,500 per month for the next 3 months. This may be extended if needed.

Who can apply
You can apply if you're a self-employed individual or a member of a partnership and you:

- have submitted your Income Tax Self Assessment tax return for the tax year 2018-19
- traded in the tax year 2019-20
- are trading when you apply, or would be except for COVID-19
- intend to continue to trade in the tax year 2020-21
- have lost trading/partnership trading profits due to COVID-19

Your self-employed trading profits must also be less than £50,000 and more than half of your income come from self-employment. This is determined by at least one of the following conditions being true:

- having trading profits/partnership trading profits in 2018-19 of less than £50,000 and these profits constitute more than half of your total taxable income
- having average trading profits in 2016-17, 2017-18, and 2018-19 of less than £50,000 and these profits constitute more than half of your average taxable income in the same period

If you started trading between 2016-19, HMRC will only use those years for which you filed a Self Assessment tax return.

If you have not submitted your Income Tax Self Assessment tax return for the tax year 2018-19, you must do this by 23 April 2020. HMRC will use data on 2018-19 returns already submitted to identify those eligible and will risk assess any late returns filed before the 23 April 2020 deadline in the usual way.

How much you'll get
You'll get a taxable grant which will be 80% of the average profits from the tax years (where applicable):

- 2016 to 2017
- 2017 to 2018 • 2018 to 2019

To work out the average HMRC will add together the total trading profit for the 3 tax years (where applicable) then divide by 3 (where applicable) and use this to calculate a monthly amount.
It will be up to a maximum of £2,500 per month for 3 months.
We'll pay the grant directly into your bank account, in one instalment.

How to apply
You cannot apply for this scheme yet.
HMRC will contact you if you are eligible for the scheme and invite you to apply online.
Individuals do not need to contact HMRC now and doing so will only delay the urgent work being undertaken to introduce the scheme.
You will access this scheme only through GOV.UK. If someone texts, calls or emails claiming to be from HMRC, saying that you can claim financial help or are owed a tax refund, and asks you to click on a link or to give information such as your name, credit card or bank details, it is a scam.

After you've applied
Once HMRC has received your claim and you are eligible for the grant, we will contact you to tell you how much you will get and the payment details.
If you claim tax credits you'll need to include the grant in your claim as income.

Other help you can get
The government is also providing the following additional help for the self-employed:

- **deferral of Self Assessment income tax payments due in July 2020 and VAT payments due from 20 March 2020 until 30 June 2020**
- **grants for businesses that pay little or no business rates**
- increased amounts of **Universal Credit** • **Business Interruption Loan Scheme**

If you're a director of your own company and paid through PAYE you may be able to get support using the **Job Retention Scheme**.

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We will update this Bulletin with new editions to keep up to date with developments.

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