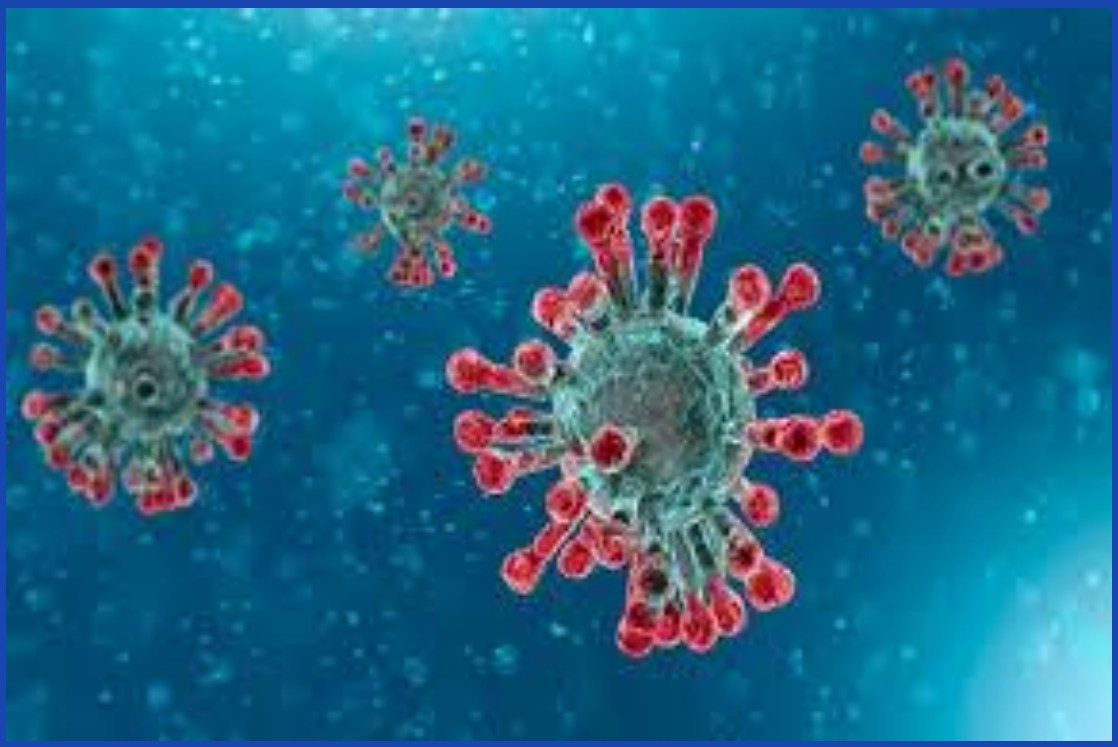
An Overview of the Coronavirus Crisis & Work
2nd VERSION



Michael Duggan QC

www.dugganqc.com

michael@dugganqc.com

07957 365 302

This document aims to set out the current legal position as at 25th May 2020 with regard to the coronavirus crisis in the UK and the legal impact upon work. It is not a substitute for advice.

Michael Duggan QC may be contacted at michael@dugganqc.com for any queries. See www.dugganqc.com in relation to Michael's practice.

Clicking on the internet URLs should take you to the relevant document. Any queries or comments about this document or suggestions for inclusion are welcome and should be sent to the above email. The document will be updated in accordance with developments.

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CASES

USEFUL ARTICLES

The following are especially useful (you should get the document if you click on the link):

- **A Bogg and M Ford: Not legislating in a crisis? The Coronavirus Job Retention Scheme Part 2. https://uklabourlawblog.com/2020/03/31/not-legislating-in-a-crisis-the-coronavirus-job-retention-scheme-part-2-by-michael-ford-and-alan-bogg/**
- **Stuart Brittenden - The Implied Term of Trust and Confidence & the Coronavirus Job Retention Scheme. http://www.oldsquare.co.uk/news-and-media/news/the-implied-term-of-trust-and-confidence-the-coronavirus-job-retention-sche**
- **Council of Europe: Respecting Democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. https://www.coe.int/en/web/portal/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law**
- **Daniel Ferguson: FAQs Coronavirus Job Retention Scheme. House of Commons Briefing Paper number CBP 8880. 9th April 2020**
- **Daniel Ferguson, Briefing Paper updated - 1stMay - https://commonslibrary.parliament.uk/research-briefings/cbp-8880/**
- **ELA "Issues in respect of which guidance is required to assist employers and employees/workers coming out of lockdown, relating to health and safety concerns and data privacy". (https://www.elaweb.org.uk/content/issues-respect-which-guidance-required-assist-employers-and-employeesworkers-coming-out)**
- **Mayhew, Nicholls & Platts'Mills -** "Whistleblowing in a coronavirus (COVID-19) world" (https://www.devereuxchambers.co.uk/resources/blog/employment/view/whistleblowing-in-a-coronavirus-covid-19-world)
- **TUC: Covid 19: Coronavirus, Guidance to unions. https://www.tuc.org.uk/resource/covid-19-coronavirus-guidance-unions-updated-16-april**
- **Reade, Ford, Jones & Glynn: A collaborative view on the Coronavirus Job Retention Scheme. https://482pe539799u3ynseg2hl1r3-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/4-Silks-CJRS-Collaborative-View1.pdf**
- **SHP, Coronavirus Advice for Employers. https://www.shponline.co.uk/asia/coronavirus-advice-for-employers/**
- **SHP, Returning to work once COVID-19 lockdown relaxes – What's expected in health and safety criminal law and how can you avoid prosecution? https://www.shponline.co.uk/legislation-and-guidance/returning-to-work-once-covid-19-lockdown-relaxes/?elq_mid=3619&elq_cid=1703129**

See the earlier Intelligence Reports on the CJRS at www.dugganpress.com

1. INTRODUCTION

A1. This Report aims to bring up to date and to bring together an overview of the various strands relating to work during the coronavirus crisis. It brings together the Government Guidance about isolating and social distancing, the Coronavirus Job Retention Scheme, and employment issues that arise, including statutory sick pay, holiday, redundancy and dismissal. There has been a wealth of commentary about the various aspects of employment law and this report will refer to the various issues that have been debated. The main Guidance and Directions are set out in this Report and the various issues dealt with by way of commentary. This 2nd Edition is to take into account the second iteration of the Directions from HMRC and to update certain parts.

A2. The internet, Linkedin and twitter have been replete with articles and reports about the impact of Covid 19 on work. I have read in excess of 300 entries on the websites of solicitors, barristers and unions, as well as specific articles that deal with some difficult issues that have been thrown up. The Government Guidance and the sites of ACAS and the HSE contains essential information. The announcement by the Prime Minister at 8.30 pm on 23rd March 2020 that employees should stay at home and the country should effectively go into lockdown has fundamentally changed the landscape of work. The legal requirement to isolate, followed by the guidance and directions about furlough are aimed at getting the country through the crisis without irredeemable harm to the economy. It is estimated that at present, some 6.3 million employees have been furloughed. The impact upon the self employed has also been considered and the Government has sought to cushion the impact with guidance and directions which are similar, but not the same as, the employer/employee guidance and directions.

A3. This Report is divided into sections:

(1) In the first Part we consider the Guidance and Regulations relating to isolating. It needs to be remembered that, as long ago as, 23rd March, the so called 'lockdown' commenced with Guidance about self-isolating and social distancing, which have developed over time. These provisions continue to impact work and are likely to do so, even after the lockdown is relaxed or ended. Employees who display symptoms or are in a home where other display symptoms will need to isolate. The position of vulnerable individuals will remain the same. And there are still likely to be employment issues where employees have to remain at home to care for vulnerable persons or where the employee is too 'frightened' to return to work for fear of the consequences. This last point ties into health and safety issues and the provision of a safe environment, which we will consider further below in part. We also look at the doctrine of 'frustration' in this part, since it is the requirement to close down the workplace and send staff home that raises the spectre of termination by operation of law.

(2) The second Part considers Furlough; the Guidance in its 11th iteration as at 25th May as expanded upon and clarified by the second iteration of the Directions. In earlier Reports we considered the various iterations of the Guidance which have been through so many iterations, which we set out in different colours, that the rainbow symbol was perhaps apt. We have provided the latest versions of the various Guidance in this document and any further amendments will be in colour. No doubt further updates of this Report will lead to another colour spectrum. This part considers *who* can be furloughed and *how* it is to be done. We continue to cite the Guidance verbatim as it is essential that the source is first looked at. However, the Guidance does not tell us who is to be selected for furlough and we consider potential employment issues where some employees are furloughed and some are dismissed/kept on to work. The Practical example at page 47 should assist.

(3) The third Part considers *specific issues* whilst furlough is in place. These important issues concern SSP, holiday leave and holiday pay and the various issues thrown up by maternity etc.

(4) The fourth Part considers *payment*; how the 80% grant is to be calculated and the various intricacies of the Directions.

(5) The fifth part considers *Homeworking*. We have become a nation of homeworkers (if we are not furloughed) and this throws up its own specific employment issues.

(6) The sixth Part considers the workplace. This is of relevance for those who are currently working. It is likely to become of increasing significance once the lockdown is ameliorated or ends. We focus in particular on health and safety. The existing law must be applied, and we consider how this will tie in with a workplace that must have regard to the hazards of Covid 19.

(7) The seventh Part considers termination. There are three particular areas: the effect of notice on the furlough grant; selection for termination by reason of dismissal or other reasons and collective consultation.

(8) In the eight Part we consider the self-employed.

We shall update this Overview Report when feasible, taking into account the way in which matters continue to develop.

PART ONE: THE LOCKDOWN

Can it be argued that the crisis is so unprecedented that contracts are frustrated?

1.1. We have considered whether this crisis has created a situation so unexpected and so unprecedented that an employer who has to close down the business for an unspecified period of time can argue that the contracts of employment have not been terminated by dismissal but have been frustrated. The concept of frustration has always been a difficult one in employment law, but the principles are relatively clear.

1.2. **Harvey on Industrial Relations** defines the concept of frustration as the contract coming to an end by operation of law where "without the fault of either party, some supervening event occurs which was not reasonably foreseeable at the time when the contract was made and which renders further performance of the contract either totally impossible or something radically different from what the parties bargained for, then the contract is forthwith discharged by operation of law. The superseding event must be one that was unforeseen and not catered for in the contract."

1.3. The concept of frustration has arisen on a number of occasions in the context of employees who are absent because of sickness. Two of the leading cases are ***Marshall v Harland and Wolff Ltd*** **(No 2)** [1972] ICR 97, 7 ITR 132, NIRC and ***Egg Stores (Stamford Hill) Ltd v Leibovici*** [1976] IRLR 376, [1977] ICR 260, EAT, where the employee considered when sickness could be a frustrating event. Nine points made by Phillips J in **Egg Stores (Stamford Hill) Ltd v Leibovici [**1977] ICR 260 which could be considered in deciding whether a contract is frustrated:

> "It is possible to divide into two kinds the events relied upon as bringing about the frustration of a short-term periodic contract of employment. There may be an event (eg a crippling accident) so dramatic and shattering that everyone concerned will realise immediately that to all intents and purposes the contract must be regarded as at an end. Or there may be an event, such as illness or accident, the course and outcome of which is uncertain. It may be a long process before one is able to say whether the event is such as to bring about the frustration of the contract. **But there** *will* **have been frustration of the contract, even though at the time of the event the outcome was uncertain, if the time arrives when, looking back, one can say that at some point (even if it is not possible to say precisely when) matters had gone on so long, and the prospects for the future were so poor, that it was no longer practical to regard the contract as still subsisting.** Among the matters to be taken into account in such a case in reaching a decision are these:
>
> 1. the length of the previous employment:
> 2. how long it had been expected that the employment would continue:
> 3. the nature of the job;
> 4. the nature, length and effect of the illness or disabling event;
> 5. the need of the employer for the work to be done, and the need for a replacement to do it;

6 the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replacement employee:
7 whether wages have continued to be paid:
8 the acts and the statements of the employer in relation to the employment, including the
dismissal of, or failure to dismiss, the employee,
and
9 whether in all the circumstances a reasonable employer could be expected to wait any longer.
(emphasis added)"

1.4. We suggest that it will be very difficult but by no means impossible to argue frustration where the supervening event is the employee's absence because of the requirement to cease business. However, the requirements to isolate where some employees develop symptoms, or the employee has tested positive, or is shielding would not in themselves be sufficient. This will be the more so where there are provisions as to sickness/PHI in the contract of employment, as it may be argued that the coronavirus is but one form of sickness, therefore absence due to sickness is envisaged under the contract (*FC Shepherd & Co Ltd v Jerrom; Villella v MFI Furniture Centres Ltd* [1999] IRLR 468).

1.5. What then, about the case where the employer has had to close the premises/business because the coronavirus has meant that it is no longer viable for the business to continue? Given the uniqueness of this crisis it is not easy to find a case that is on point. In the old case of *Turner v Goldsmith* [1891] 1 QB 544 it was held that there was not a frustrating event where the employer's factory was burnt down. The employee was provided with samples and worked as a canvasser, receiving commission on sales. It was not necessary to imply a term that the contract would only exist so long as the factory continued to exist. The employer was therefore not excused from performance. However, in the present case where the coronavirus has led to the business being closed or the business diminishing to such an extent that it is no longer tenable, we question whether it may be possible to rely upon the doctrine.

1.6. Perhaps the crucial point is paragraph 9 of the criteria set out by Phillip J. It is likely to be a high risk strategy to rely upon the doctrine, though if it reached the stage where claims by employees were being made, it may be that this would be one of the matters put forward as a potential defence. Of course businesses on a reduced basis or taken advantage of the furlough scheme will struggle to run this argument. Those businesses that were require to close under the Regulations may have more of an argument.

Specific Legislation & Guidance relating to isolating etc

1.7. In considering the steps that an employer or employee should take, the following specific coronavirus provisions should be considered:

- The Coronavirus Act 2020.
- The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129)

- The Health Protection (Coronavirus Restrictions) (England() Regulations 2020 [2020 SI350]. These regulations have in reality overtaken the earlier statutory instrument.

1.8. The following general guidance is likely to be of relevance:

- The Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses which is applicable in England. This was last updated on 7th April 2020 (https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19). There is also guidance by the Welsh Government and, in Scotland, by Health Protection Scotland. ("The General Guidance")
- ACAS Guidance: Coronavirus (COVID-19): advice for employers and employees (**https://www.acas.org. uk/coronavirus**). ("ACAS General Guidance")

1.9. There is detailed information relating to the circumstances when individuals should be self isolated or can be required to be self-isolated, contained in Public Health England, "COVID-19: Stay at home guidance for households with possible coronavirus (COVID-19) infection" (**https://www.gov. uk/government/publications/covid-19-stay-at-homeguidance/stay-at-home-guidance-for-householdswith-possible-coronavirus-covid-19-infection**). This was last updated on 18th May 2020. There is similar guidance for Wales and for Scotland. ACAS has also produced Guidance on Working from Home.

1.10. There was guidance on social distancing and for vulnerable people: Public Health England: COVID-19: guidance on social distancing and for vulnerable people (**https://www.gov.uk/government/ publications/covid-19-guidance-on-social distancing-and-for-vulnerable-people**). This was withdrawn on 1st May 2020. There was then guidance contained in **"Guidance, Staying at home and away from others (social distancing), Updated 1 May 2020": (https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others). This guidance was withdrawn on 11 May 2020**

1.11. The current Guidance is in **Staying alert and safe (social distancing) updated on 22nd May 2020 (https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing).**

1.12. The Governments message about returning to work has changed and this Report will consider the impact of the latest Guidance.

1.13. **Staying at home**

111. At 8.30 pm on 23rd March 2020, the Prime Minister announced to the nation that the Government was putting the Country into lockdown, albeit with very limited exceptions where persons were permitted to leave their homes, once a day for exercise, to purchase food and to travel to and from work. In relation to travel to work, the Prime Minister said "Travelling to and from work…only where it is absolutely necessary and cannot be done from home" is permitted. It was unclear from the statement whether the Government envisaged that going to work was permitted or whether it was only permitted to go to work if it was "absolutely necessary" and the work could not be "done from home". It was also unclear whether the Government was stating that it was mandatory that employers permit (or were required to allow) employees to work from home, unless that work could not be done by being at the workplace. At the same time the Government further extended the businesses that were expected to close, in particular, shops save for exceptions that related to sale of food, medicine or other essentials.

1.12. The Government website then produced Guidance "Full guidance on staying at home and away from others" (https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others). This original Guidance stated:

> 1.13. **"When we reduce our day-to-day contact with other people, we will reduce the spread of the infection. That is why the government is now (23 March 2020) introducing three new measures.**
>
> 1. **Requiring people to stay at home, except for very limited purposes**
> 2. **Closing non-essential shops and community spaces**
> 3. **Stopping all gatherings of more than two people in public**
>
> **Every citizen must comply with these new measures. The relevant authorities, including the police, will be given the powers to enforce them – including through fines and dispersing gatherings."**

1.13. In relation to actual work, the Staying at Home Guidance (Guidance, Staying at Home and away from others (social distancing) , updated 1 May 2020) (the 'Stay at Home Guidance' set out the position as follows before it was withdrawn on 11th May 2020:

> ***1. Staying at home***
>
> **You should only leave or be away from your home for very limited purposes:**
>
> - **shopping for basic necessities, for example food and medicine, which must be as infrequent as possible**
> - **one form of exercise a day, for example a run, walk, or cycle - alone or with members of your household**
> - **any medical need, including to donate blood, avoid injury or illness, escape risk of harm, or to provide care or to help a vulnerable person**
> - **travelling for work purposes, but only where you cannot work from home**
>
> **These reasons are exceptions and a fuller list is set out in the regulations. Even when doing these activities, you should be minimising time spent away from the home and ensuring that you are two metres apart from anyone outside of your household.**
>
> **By following this guidance, you are helping to protect yourself, your family, the NHS and your community.**

1.14. The above appeared to state that you can only travel to and from work when it absolutely cannot be done from home. We have noted that the Government then sent out a 'tweet' in which it stated the only reason you may leave home to go to work are "if you're a key worker". The Mayor of Manchester then sent a tweet stating that "Have now spoken to No 10 & had it confirmed that people CAN leave home to work – as long as they fully observe the 2m distancing rule".

1.15. There was thus ambiguity in what the Government was stating, and the Regulations below now set out the position. Regulation 6(2) contains the 'reasonable excuse' provisions for being out, one of them being the need "to travel for the purpose of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide services, from the place where they are living".

1.16. The position at present appears to be

- You may travel to and from work where it is not 'reasonably practicable' to provide the work from home.
- You may go to work provided that the 2-metre rule is complied with (but this remains uncertain).
- If you are a key worker then you may go to work.

The Stay at Home Guidance and work

1.17. The Stay at Home Guidance had set out the position as follows:

> **4. Going to work**
>
> **As set out in the section on staying at home, you are allowed to travel for work purposes, including to provide voluntary or charitable services, where you cannot work from home.**
>
> **With the exception of the organisations covered above in the section on closing certain businesses and venues, the government has not required any other businesses to close to the public – indeed, it is important for business to carry on.**
>
> **Employers and employees should discuss their working arrangements, and employers should take every possible step to facilitate their employees working from home, including providing suitable IT and equipment to enable remote working.**
>
> **Sometimes this will not be possible, as not everyone can work from home. Certain jobs require people to travel to, from and for their work – for instance if they operate machinery, work in construction or manufacturing, or are delivering front line services.**
>
> **If you cannot work from home then you are allowed to travel for work purposes, but you should not do so if you are showing coronavirus symptoms, or if you or any of your household are self-isolating. This is consistent with advice from the Chief Medical Officer.**
>
> **Employers who have people in their offices or onsite should ensure that employees are able to follow the Guidance for employers and businesses including, where possible, maintaining a two metre distance from others, and washing their hands with soap and water often for at least 20 seconds (or using hand sanitiser gel if soap and water is not available).**
>
> **Work carried out in people's homes - for example by tradespeople carrying out repairs and maintenance, cleaners, or those providing paid-for childcare in a child's home - can continue, provided that the worker has no coronavirus symptoms. Again, it will be important to ensure that government guidelines are followed to ensure everyone's safety. These include practicing excellent hand and respiratory hygiene, and maintaining a two metre distance from household occupants as far as possible.**

No work should be carried out in any household which is isolating because one or more family members has symptoms or where an individual has been advised to shield - unless it is to remedy a direct risk to the safety of the household, such as emergency plumbing or repairs, or to provide emergency childcare in a child's home if a young child would be left unattended and where the worker is willing to do so. In such cases, Public Health England can provide advice to those working in other people's houses and households.

No work should be carried out by a tradesperson, cleaner or nanny who has coronavirus symptoms, however mild, or where someone in their household has symptoms.

Further sector specific guidance which sets out different scenarios as examples (including tradespeople working in people's homes, construction, outdoor businesses).

As set out in the section on closing certain businesses and venues, the government has published guidance on which organisations are covered by this requirement. Advice for employees of these organisations on employment and financial support is available at gov.uk/coronavirus.

At all times, workers should follow the guidance on self-isolation if they or anyone in their household shows symptoms.

The current Staying Alert and Safe (Social Distancing) has this to say about work:

You should travel to work, including to provide voluntary or charitable services, where you cannot work from home and your workplace is open.

With the exception of the organisations covered above in the section on closing businesses and venues, the government has not required any other businesses to close to the public – it is important for business to carry on.

All workers who cannot work from home should travel to work if their workplace is open. Sectors of the economy that are allowed to be open should be open – such as food production, construction, manufacturing, logistics, distribution and scientific research. As soon as practicable, workplaces should be set up to meet the new COVID-19 secure guidelines. These will keep you as safe as possible, whilst allowing as many people as possible to resume their livelihoods. In particular, workplaces should, where possible, ensure employees can maintain a two-metre distance from others, and wash their hands regularly.

At all times, workers should follow the guidance on self-isolation if they or anyone in their household shows coronavirus symptoms. You should not go into work if you are showing symptoms, or if you or any of your household are self-isolating. This is consistent with advice from the Chief Medical Officer.

There is specific guidance in relation to work carried out in people's homes – for example by tradespeople carrying out repairs and maintenance, cleaners, or those providing paid-for childcare in a child's home.

********NOTE THE FUNDAMENTAL CHANGE THAT YOU SHOULD TRAVEL TO WORK AND SECTORS OF THE ECONOMY THAT ARE ALLOWED TO BE OPEN SHOULD BE OPEN*******

The Stay at Home Guidance said:

Closed Businesses.
To reduce social contact, the government has required by law that certain businesses and venues close to the public. These include: pubs, cinemas and theatres clothing and electronics stores; hair, beauty and nail salons; and outdoor and indoor markets (not selling food)

- **libraries, community centres, and youth centres**
- **indoor and outdoor leisure facilities such as bowling alleys, arcades and soft play facilities**
- **communal places within parks, such as playgrounds, sports courts and outdoor gyms**
- **places of worship (except for funerals)**
- **hotels, hostels, bed and breakfasts, campsites, caravan parks, and boarding houses for commercial/leisure use, excluding use by those who live in them permanently and those who are unable to return home**

The Staying Alert and Safe Guidance, which currently applies states:

For the time being, certain businesses and venues are required by law to stay closed to the public. These include:

- restaurants and cafes, other than for takeaway
- pubs, cinemas, theatres and nightclubs
- clothing and electronics stores; hair, beauty and nail salons; and outdoor and indoor markets (not selling food)
- libraries, community centres, and youth centres
- indoor and outdoor leisure facilities such as bowling alleys, gyms, arcades and soft play facilities
- some communal places within parks, such as playgrounds and outdoor gyms
- places of worship (except for funerals)
- hotels, hostels, bed and breakfasts, campsites, caravan parks, and boarding houses for commercial/leisure use, excluding use by those who live in them permanently, those who are unable to return home and critical workers where they need to for work

Food retailers and food markets, hardware stores, garden centres and certain other retailers can remain open. Other businesses can remain open and their employees can travel to work, where they cannot work from home. The government has also allowed outdoor sports facilities – such as tennis and basketball courts, golf courses and bowling greens – to open, but you should only use these alone, with members of your household, or with one other person from outside your household, while keeping two metres apart at all times.

Guidance, Stay at home: guidance for households with possible coronavirus (COVID-19) infection, updated 18th May 2020.

1.18. This Guidance provides that:

- **if you live alone and you have symptoms of coronavirus illness (COVID-19), however mild, stay at home for 7 days from when your symptoms started. (The ending isolation section below has more information)**
- **after 7 days, if you do not have a high temperature, you do not need to continue to self-isolate. If you still have a high temperature, keep self-isolating until your temperature returns to normal. You do not need to self-isolate if you just have a cough after 7 days, as a cough can last for several weeks after the infection has gone**
- **if you live with others and you are the first in the household to have symptoms of coronavirus (COVID-19), then you must stay at home for 7 days, but all other household members who remain well must stay at home and not leave the house for 14 days. The 14-day period starts from the day when the first person in the house became ill. See the explanatory diagram**
- **for anyone else in the household who starts displaying symptoms, they need to stay at home for 7 days from when the symptoms appeared, regardless of what day they are on in the original 14 day isolation period. The ending isolation section below has more information, and see the explanatory diagram**
- **staying at home for 14 days will greatly reduce the overall amount of infection the household could pass on to others in the community**
- **if you can, move any vulnerable individuals (such as the elderly and those with underlying health conditions) out of your home, to stay with friends or family for the duration of the home isolation period**
- **if you cannot move vulnerable people out of your home, stay away from them as much as possible**
- **reduce the spread of infection in your home: wash your hands regularly for 20 seconds, each time using soap and water, or use hand sanitiser; cover coughs and sneezes**
- **if you have coronavirus (COVID-19) symptoms:**
  - **do not go to a GP surgery, pharmacy or hospital**
  - **you do not need to contact 111 to tell them you're staying at home**
  - **testing for coronavirus (COVID-19) is not needed if you're staying at home**
- **if you feel you cannot cope with your symptoms at home, or your condition gets worse, or your symptoms do not get better after 7 days, then use the NHS 111 online coronavirus (COVID-19) service. If you do not have internet access, call NHS 111. For a medical emergency dial 999**
- **if you develop new coronavirus (COVID-19) symptoms at any point after ending your first period of isolation (self or household) then you need to follow the same guidance on self-isolation again**

The Social Distancing Guidance & Vulnerable persons contained Guidance which is now in the Staying Alert and Safe Guidance.

1.19. The current Staying Alert and Sage Guidance advises on social distancing measures we should all be taking to reduce social interaction between people in order to reduce the transmission of coronavirus (COVID-19). It is intended for use in situations where people are living in their own homes, with or without additional support from friends, family and carers. It now refers to vulnerable individuals at Part 6 as follows:

If you have any of the following health conditions, you are clinically vulnerable, meaning you are at higher risk of severe illness from coronavirus. You are advised to stay at home as much as possible and, if you do go out, take particular care to minimise contact with others outside your household.

Clinically vulnerable people are those who are:

- aged 70 or older (regardless of medical conditions)
- under 70 with an underlying health condition listed below (that is, anyone instructed to get a flu jab each year on medical grounds):
- chronic (long-term) mild to moderate respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis
- chronic heart disease, such as heart failure
- chronic kidney disease
- chronic liver disease, such as hepatitis
- chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis (MS), or cerebral palsy
- diabetes
- a weakened immune system as the result of certain conditions, treatments like chemotherapy, or medicines such as steroid tablets
- being seriously overweight (a body mass index (BMI) of 40 or above)
- pregnant women

As above, there is a further category of people with serious underlying health conditions who are clinically extremely vulnerable, meaning they are at very high risk of severe illness from coronavirus. You, your family and carers should be aware of the guidance on shielding which provides information on how to protect yourself still further should you wish to.

See the Shielding Guidance - Guidance, Guidance on shielding and protecting people who are clinically extremely vulnerable from COVID-19 , Updated 18th May 2020 (https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19).

Key Worker

1.20. The concept of a 'key worker' had particular relevance in relation to schooling, as all but children of key workers should remain at home, whereas key workers may be permitted to take their children to school. The definition is therefore set out in some detail in the "Guidance for schools, childcare providers and local authorities in England on maintaining educational provision" dated 19th March 2020**:** (https://www.gov.uk/government/publications/coronavirus-covid19-maintaining-educational-provision/guidancefor-schools-colleges-and-local-authorities-onmaintaining-educational-provision). The Guidance covers "key worker" as follows:

> **Parents whose work is critical to the COVID-19 response include those who work in health and social care and in other key sectors outlined below. Many parents working in these sectors may be able to ensure their child is kept at home. And every child who can be safely cared for at home should be.**
>
> **If your work is critical to the COVID-19 response, or you work in one of the critical sectors listed below, and you cannot keep your child safe at home then your children will be prioritised for education provision:**
>
> **Health and social care**
>
> **This includes but is not limited to doctors, nurses, midwives, paramedics, social workers, care workers, and other frontline health and social care staff including volunteers; the support and specialist staff required to maintain the UK's health and social care sector; those working as part of the health and social care supply chain, including producers and distributers of medicines and medical and personal protective equipment.**
>
> **Education and childcare**
>
> **This includes childcare, support and teaching staff, social workers and those specialist education professionals who must remain active during the COVID-19 response to deliver this approach.**
>
> **Key public services**
>
> **This includes those essential to the running of the justice system, religious staff, charities and workers delivering key frontline services, those responsible for the management of the deceased, and journalists and broadcasters who are providing public service broadcasting.**
>
> **Local and national government**
>
> **This only includes those administrative occupations essential to the effective delivery of the COVID-19 response, or delivering essential public services, such as the payment of benefits, including in government agencies and arm's length bodies.**
>
> **Food and other necessary goods This includes those involved in food production, processing, distribution, sale and delivery, as well as those essential to the provision of other key goods (for example hygienic and veterinary medicines).**
>
> **Public safety and national security This includes police and support staff, Ministry of Defence civilians, contractor and armed forces personnel (those critical to the delivery of key defence and national security outputs and essential to the response to the COVID-19 pandemic), fire and rescue service employees (including support staff), National Crime Agency staff, those maintaining border security, prison and probation staff and other national security roles, including those overseas.**
>
> **Transport**
>
> **This includes those who will keep the air, water, road and rail passenger and freight transport modes operating during the COVID-19 response, including those working on transport systems through which supply chains pass.**

Utilities, communication and financial services This includes staff needed for essential financial services provision (including but not limited to workers in banks, building societies and financial market infrastructure), the oil, gas, electricity and water sectors (including sewerage), information technology and data infrastructure sector and primary industry supplies to continue during the COVID-19 response, as well as key staff working in the civil nuclear, chemicals, telecommunications (including but not limited to network operations, field engineering, call centre staff, IT and data infrastructure, 999 and 111 critical services), postal services and delivery, payments providers and waste disposal sectors.

If workers think they fall within the critical categories above, they should confirm with their employer that, based on their business continuity arrangements, their specific role is necessary for the continuation of this essential public service.

Financial Services – key workers

1.21. The FCA has also produced Guidance in relation to financial services: see "Key workers in financial services" at **https://www.fca.org.uk/firms/keyworkers-financial-services**. This Guidance states:

"Firms are best placed to decide which staff are essential for the provision of financial services. To help firms identify who they are, firms should first identify the activities, services or operations which, if interrupted, are likely to lead to the disruption of essential services to the real economy or financial stability. Firms should then identify the individuals that are essential to support these functions. Firms should also identify any critical outsource partners who are essential to continued provision of services, even where these are not financial services firms.

We recommend that the Chief Executive Officer Senior Management Function (SMF1) is accountable for ensuring an adequate process so that only roles meeting the definition are designated. For firms that do not have an SMF1 Chief Executive Officer this will be the most relevant member of the senior management team.

The types of roles that may be considered as providing essential services could be:

- **Individuals essential in the overall management of the firm, for example individuals captured by the Senior Managers Regime.**
- **Individuals essential in the running of online services and processing.**
- **Individuals essential in the running of branches and providing essential customer services, such as those dealing with consumer queries (including via call centres), client money and client assets and those maintaining access to cash and other payment services.**
- **Individuals essential to the functioning of payments processing and of cash distribution services.**
- **Individuals essential in facilitating corporate and retail lending and administrating the repayment of debt.**
- **Individuals essential in the processing of claims and renewal of insurance.**
- **Individuals essential in the operation of trading venues and other critical elements of market infrastructure.**
- **Risk management, compliance, audit and other functions necessary to ensure the firm meets its customers' needs and its obligations under the regulatory system.**
- **Any individual that provides essential support to allow the functioning of the above roles, such as finance and IT staff.**

Firms should consider whether they should issue a letter to all individuals they identify as key workers that clearly identifies them as such and that can be presented to schools on request. We recommend that the letter includes the sentence "the individual has been designated as a key worker in relation to their employment by [firm name]" and is signed by someone with appropriate authority."

The steps that you should now take.

We consider that employers should undertake an informed process to decide whether employees really should now be at home, as follows:

- **Is the employee a key worker, where it is essential that they be at their place of work to perform their job? In some cases, a key worker may still be able to work from home (ie certain aspects of financial services).**
- **If the employee is not a key worker, is it really necessary that they come into the workplace to perform their job or can they in reality work from home?**
- **If they cannot really work from home, nevertheless do the 'self-isolation' or 'social distancing' scenarios set out in (3) below apply? It is still necessary to consider the impact of coming into work and all of the scenarios set out below.**

THE HEALTH PROTECTION (CORONAVIRUS RESTRICTIONS) (ENGLAND() REGULATIONS 2020 [2020 SI350] AMENDED BY THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS) (ENGLAND) (AMENDMENT) REGULATIONS 2020 (S.I. 2020/447

1.22. The earlier version of the Guidance – Stay at Home and separate Social Distancing Guidance – were followed by the above Regulations which came into force at 1pm on 26th March 2020. The scheme is as follows:

(1) Regulation 1 contains definitions, in particular a vulnerable person is a person aged 70 or older, any person who is pregnant and any person under 70 who has an underlying health condition, including but not limited to those in schedule 1, which refers to chronic (long term) respiratory diseases, chronic heart disease, chronic liver disease, chronical neurological conditions, diabetes, problems with the spleen, a weakened immune system or being seriously overweight with a body mass of 40 or over.

(2) Regulation 4 sets out premises that are closed, whilst Regulation 5 contains further restrictions in relation to making deliveries or providing services. The position so far as the workplace is concerned is now that:

- There is the list of businesses in the Health Protection (Coronavirus Restrictions) (England) Regulations 2010 [SI2020/350). Regulation 4 required the businesses which are listed in Part 1 of Schedule 2 to be closed. These cover cafes, bars, public houses,.
- Part 2 of Schedule 2 refers to cinemas, theatres, nightclubs, bingo halls, concert halls, museums and galleries, casinos, betting shops, spas, , nail, beauty, hair salons and barbers, massage parlours, tattoo and piercing parlours, skating rinks, indoor fitness studios, swimming pools, gums, bowling alleys, amusement arcades, soft play areas and other indoor fitness or leisure facilities, funfairs, playgrounds, sports courts, outdoor gyms and swimming pools, outdoor markets except for livestock, car showrooms and auction houses. These businesses has to cease carrying out that business save that cinemas, theatres, bingo halls, concert halls or museums and galleries could broadcast a performance to people outside the premises and the above premises could be used to host blood donation sessions.

- The businesses not listed in Part 3 of Schedule 2 **of offering goods for sale or for hire in a shop, or providing library services,** were to cease except by making deliveries or providing services in response to orders received through website or by on line communication, telephone or post. The premises had to close and persons were not to be admitted to persons who were not required to carry on the business by those means that were permitted. The provision of holiday accommodation had to cease save for limited purposes such as where it was used as a main residence. Places of worship and community centres had to close save for funerals and other limited purposes.
- The businesses that are listed in Part 3 of Schedule 2 are ones that can expressly continue to be open. This covers food retainers, off licences, pharmacies, newsagents, homeware, building supplies and hardware stores, petrol stations, car repair and MOT services, bicycle shops, taxi or vehicle hire businesses, banks, building societies, credit unions, short term loan providers, savings clubs, cash points and some other financial undertakings, post offices, funeral directors, laundrettes and dry cleaners, dental services, veterinary surgeons and pet shops, agricultural supply shops, storage and distribution facilities, car parks, and public toilets.
- Other businesses are not expressly covered though many have chosen to shut down.

(3) Regulation 6 contains the restriction on movement. 6(1) provides that no one may leave or be outside the place they are living without reasonable excuse. Regulation 6(2)(f) includes, as reasonable excuses, the need "to work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide services, from the place where they are living". The provision that referred to travel was removed.

(4) By Regulation 7 no one may participate in a gathering in a public place or more than two people except *inter alia* where the gathering is essential for work purposes.

The Different Scenarios

1.24. With the above definitions in mind, we consider the rights and obligations of employer and employee in relation to self-isolation and pay. Note that this is separate from employer considerations regarding running the business where there has been a diminution in work, difficulties with the numbers in the workforce or the employer is trying to take steps to save the business. Statutory Sick Pay is also considered separately at 3.1. to 3.19. It is important to note that the ground has shifted since these matters were first considered. in our first Report when the country was not under lockdown. The position now is that employee will be at home under lockdown unless the work is one where the employee is an essential worker or the business is in one of the exceptions or where the work cannot be carried out from home (ie factories). We note, however, that where lockdown ceases or is ameliorated, these permutations will continue to apply since employees may exhibit COVID 19 symptoms or have issues about returning to work in certain circumstances.

1.25. The various factual permutations are applicable in relation to businesses that remain open and can be considered in this context as well as when business re-opens in general.

Scenario One: The employee decides to self isolate because the employee or someone in the household is displaying symptoms.

1.26. **I**n this case the employee has sought self-isolation because the individual is displaying symptoms or someone in the household is displaying symptoms or is positive. In such case there will be deemed incapacity for the purposes of SSP. The employee may also be entitled to contractual sick pay dependant upon what the contract of employment provides. The employee in this case is probably not entitled to contractual pay. The employee probably cannot demand that they work from home, when they are not well. However, it would be in the interests of both parties to explore homeworking and the employee is fit to work (and only incapacitated because of the deeming provisions for SSP). Note that where there is mandatory quarantine or detention the position is likely to be the same; in particular where the employee is fit to work.

Scenario Two: The employee decides to self-isolate because he or she is a vulnerable person or lives with a vulnerable person.

1.27. In this case, the employee is not displaying any symptoms but wishes to isolate to protect from the risk of infection. The position is likely to be the same as the first scenario.

1.28. However, where the employer wishes the employee to continue to work the position is more difficult. The initial Social Distancing Guidance strongly advised socially distancing steps. These have become more stringent. In addition, the Regulations provided that many businesses had to close down – see 1.23.

1.29. Where the employee comes within a business that is permitted to trade the employer may wish the person to continue to come to work. The employer will need to bear in mind that it owes its staff a duty of care and there may be an argument that there is a breach because the vulnerable person is placed at greater risk. Where the person has a disability there is also a duty to consider reasonable adjustments so that the question of home working may need to be considered. The businesses that are listed as being able to continue are ones which are 'essential' services and where there is a need for a workplace. When it comes to travelling to work, the Regulations state, at Regulation 6(2), that it is a reasonable cause to be out where there is a need to travel for the purposes of work **where it is not reasonably practicable for that person to work or provide those services from the place where they are living.**

1.30. It should be noted that where a pregnant woman cannot work from home and there is no suitable alternative role, there may be an issue of whether the person should be suspended on full pay under the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242). There is a duty to carry out a risk assessment and this is now likely to include a duty to assess the risk of infection. Where there is no suitable alternative work, by Regulation 16(3), the employee should be suspended on full pay.

Scenario Three: The employee does not wish to come to work but wants to self-isolate/work from home because of a fear of transport/coming to work and risk of infection.

1.31. We consider this scenario as one where the employee is fit and healthy and does not come within a vulnerable group. The employer owes a duty to provide a safe work environment and if this cannot be guaranteed the employee may wish to argue that there is a breach of this duty. However, where there are no symptoms and the Current Stay at Home Guidance does not apply we consider that it will be difficult for an employee to argue that the SSP provisions apply in such circumstances. This of course, will only apply to workplaces which the employer can currently have open but may become acute once the workplace is opened up.

Scenario Four: The employer wishes to send the employee home because the individual is displaying symptoms which means the Stay at Home Guidance applies.

1.32. The position here is one where the employee is displaying symptoms so that there could be a risk to the workforce. If there are reasonable grounds for concern that an employee is infected it may be that, if there is not an express right, there is an implied term that the employee can be required to stay at home. It must surely be the case that, if there is a risk of infecting the workforce, an employer can require that the employee be isolated from the workforce in those circumstances. Indeed the employer owes a duty to the other employees.

1.33. We have already come across a case where the employer has insisted that the employee went home because the employee had a cold, though temperature was normal, and the employee did not have any respiratory problems nor a dry cough. In such a case, where there is no express right to send home, can the employer insist that the employee go home but not be paid other than SSP? We do not think so. Nor, strictly speaking where the employee is asserting that she is fit, would SSP apply. This example illustrates the risk of over-reaction from an employer. The question then is whether the employee should be treated as on sick leave so that SSP will apply or contractual sick pay is payable. As an alternative, the employee may be requested to work from home on the basis that their normal terms and condition for pay etc will apply. We consider homeworking below, and this is going to take on great significance in the next few months as increasingly workers are being asked or required to work from home.

Scenario Five: The employer wishes to send the employee home because the individual is a vulnerable person which means the Social Distancing Guidance applies.

1.34. The position is likely to be the same as Scenario Four. The employer may want the employee to work from home to minimise risk and it could be argued that this is in the interests of the health and safety of the employee. However, where, for example, the employee is aged 71 and asserts that he or she wants to come to work, if there is no express power to require working from home, we think it would be difficult for the employer to not pay contractual salary if the employee is ready willing and able to work.

Scenario Six: The employer wishes to send the employee home as the employer wants home working to be implemented.

1.35. This is the case where the employer has decided to close the business premises and implement home working. Unless there is an express power it may be argued that the employer cannot do this. However, we cannot see, as a matter of common sense why employees will resist this if they are to be paid. It is already a practice that is being implemented nationwide.

Scenario Seven: The employer wishes to send the employee home/lay the person off for a period to save money.

1.36. This scenario, as with the next two scenarios, are cases where the employer is trying to send the employee home or lay the person off, for financial reasons to do with the business and not because of the health reasons associated with coronavirus. Short term lay off may have been historically commonplace but, these days, without some contractual provision it is likely to be very difficult to impose and can lead to arguments of constructive dismissal. It also raises the spectre of lay off and shorter term working redundancy payments under the Employment Rights Act 1996 (See Part 7).

Scenario Eight: Redundancy or changes to terms and conditions to save money.

1.30. See Part Seven.

Scenario Nine: The Furlough Scheme.

1.31. The Scheme is considered in the following Parts. Of course, the glaring issue that first arose when the Scheme was announced was that it would mean (i) employees would be worst off with only 80% of their salary up a limited of £2500 per month (ii) unless there was a contractual provision in the employment contract there would be no power to enforce such a change and it would be a breach of contract. Legal orthodoxy and practical reality have perhaps taken different routes, not least because the Regulations have dictated that so many businesses have had to close. It does not assist the employee who stands on their rights and refuses to be furloughed with the 80% grant if the alternative is to be dismissed. The concept of standing on one's rights and suing under the contract, as in the classic case of ***Rigby v Feredo*** [1988] ICR 29 is rendered nugatory where the alternative is to accept the furlough scheme or be terminated.

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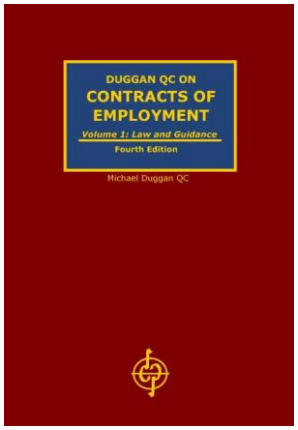

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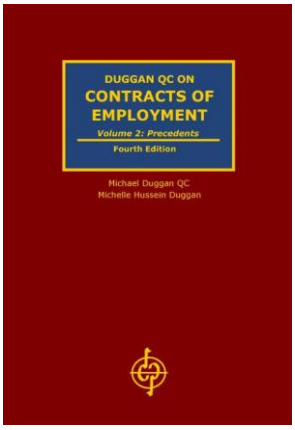

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PART TWO: FURLOUGH AND ABSENCE

The detrimental impact on business: managing an absent workforce

2.1. We have already seen the various permutations which will lead to an absent or reduced workforce. This may lead to there being insufficient numbers so that the workplace has to close on a temporary basis. Where the business has to close on a temporary basis and the employer hopes to re-open there may be a number of alternatives that can be considered, leaving aside any agreement to furlough on the 890% grant:

- The employer could ask employees to take unpaid temporary leave; we are aware of some employers suggesting the employees can volunteer for an unpaid 'sabbatical' but this is unlikely to be attractive to employees in these uncertain times.
- There may be a variation in terms, with a temporary reduction in salary. This is likely to depend on the terms of the contract of employment and/or the agreement of the workforce. In normal times this would be a very difficult proposition to get agreement on, but it may be that employees who are still working would be prepared to adopt such a measure. The position remains that any purported variation of terms and conditions will be a breach of contract if it is unilaterally imposed and advice should be taken about the terms of the contract before this is envisaged (See the cases referred to in **Duggan QC on Contracts of Employment** in Chapter C).
- There could be dismissals with offers on different terms, but this is likely to trigger the requirement to collectively consult because of section 195 of Trade Union and Labour Relations (Consolidation) Act 1992 – TULR(C)A 1992
- Temporary layoffs may be a possibility.
- The employer could seek to control holiday entitlement, which may retain an intact workforce, but will mean that holiday pay will have to be paid.
- The stage may be reached where there is no alternative than redundancies. In the first instance the employer may seek voluntary redundancies.
- The next stage may be to terminate those contracts of employment of employees who do not have qualifying service to claim unfair dismissal or redundancy payments.
- Failing all the above, the only other alternative may be to implement redundancies.

The Government's 80% bailout: what it means

2.2. The Job Retention (or Furlough Scheme) was announced by the Government on 20 March 2020. This provides that all UK employers, regardless of size or sector, can claim a grant from HMRC to cover 80% of the wages costs of employees who are not working but kept on the payroll. Up to £2,500 a calendar month may be claimed for each employee that is furloughed. The Government publication Guidance "COVID-19: support for Businesses" contained the following passages in relation to the Scheme:

> **"Support for businesses through the Coronavirus Job Retention Scheme**

Under the Coronavirus Job Retention Scheme, all UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis.

Eligibility

All UK businesses are eligible.

How to access the scheme **You will need to:**

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

HMRC will reimburse 80% of furloughed workers wage costs, up to a cap of £2,500 per month. HMRC are working urgently to set up a system for reimbursement. Existing systems are not set up to facilitate payments to employers."

2.3. The difficulties that arise include:

- The Guidance states that changing the status of employees remains subject to "existing employment law" but that it may be subject to negotiation. It therefore remains the position that consent would be needed for the change in status and a unilateral change is likely to be a breach of contract that could lead to claims for unlawful deduction from wages or constructive dismissal. The employee could 'stand and sue on the contract': ***Rigby v Feredo*** *[1988] ICR 29* and **Duggan QC on Contracts of Employment** at C54.
- The support is "for those employees that would otherwise have been laid off during this crisis." The employee who moves to part time work is not covered.
- The employee is to be kept on the payroll, but this does not explain the lawful mechanism by which the employer will no longer be under an obligation to pay nor the employee to demand the full salary if they remain in employment. This may become acute if the employer gives notice as the employee will argue that the furlough agreement did not cover notice.
- There appears to be no mechanism to legally change the contract of employment so that where the Guidance states that the contract may be "subject to negotiation" it means that there will have to be agreement between employer and employee to the furlough and the 80% payment.

Paying full salary

2.4. It has been stated that employers can choose to top up the remaining 20% if they wish. However, where the employee remains in employment the legal mechanism by which the employer may keep the employee "on the books" but not have to pay full salary is not explained. Of course the employee may have accepted the scheme rather than be made redundant and not have any income. We have already noted that an employee may refuse to accept the change in status which could lead to various claims so that advice really should be taken before any change is implemented.

There are various other financial measures for support set out in the Guidance.

Moving employees to part time work for a period

2.5. One possibility to save costs and because there has been a reduction in business would be to move employees onto part time work for a period, with a commensurate reduction in salary but with the business having the staff to cover the work that is carried out. A variation of the contract of employment of this nature would need the agreement of the parties. The difficulty is that the Furlough Scheme would not apply to a move to part time work so that the employer does not get the financial support and the employee does not receive as much pay as he or she would otherwise get by way of an 80 percent payment of salary. It may be that the situation will need to be addressed.

2.6. The Government published its Ninth Employer Guidance on the operation of the Furlough Scheme, on 1st May 2020.

2.7. The Furlough 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 was periodically refined, though here are areas 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 (though some have been covered off by the Government).

This Bulletin sets out the Guidance with this key:
The First guidance – 26th March.
The Second guidance – 4th April.
The Third guidance – 9th April. New information on eligibility and pension contributions has been added.
The Fourth Guidance – 15th April. Updated information on payroll date and eligibility.
The Fifth Guidance – 17th April. New information added on scheme extension, fraud, claims for employees you made redundant or who stopped working for you, fixed term contracts, agency workers and retaining records. Also, a new guide has been published with information on holiday pay, employees returning from family-related statutory leave and sick pay, how to treat grant payments in Real Time Information. Plus, more information on how to calculate the claim for 80% of your employees' wages, how much you can claim for National Insurance and pension contributions and how to claim.
The Sixth Guidance - 20th April. 20 April 2020 The online service you'll use to claim is now available: www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme
The Seventh Guidance – 28th April. New information has been added on collective agreement reached with a trade union. Clarified eligibility criteria, including for employees on fixed-term contracts.
The Eighth Guidance – 30th April. Information added on union and non-union representatives, company directors with an annual pay period, TUPE transfers, employees who started family-related statutory pay on or after 25 April 2020 and state aid. The date for the new consolidated PAYE scheme has been updated.

The Ninth Guidance – 1st May. Link to the webinar help and support page for businesses affected by coronavirus (COVID-19), has been added. Added links to apprenticeship learning arrangements for England, Scotland, Wales and Northern Ireland. Added a link to shared parental pay guidance and a new section for maternity allowance.
The Tenth Guidance 14th May. Moves "check which employees you can claim for" and extends the scheme until the end of July.
The eleventh guidance dated 21st May. Clarifies that eligibility depends on employment on or after certain dates.

2.8. The Guidance on 20th April stated that details of what you need to make a claim have been moved to: https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme. This separate Guidance is set out below. The Treasury has published the (Coronavirus Job Retention Scheme) Directions that set out the scheme for payments.

The CJRS Portal opened on 20th April at 5.30 am. There are still a number of issues that have not been made clear and the Employer Guidance appears to be inconsistent with the Employee Guidance and HMRC Directions in a number of respects though it must be said that the Government appears to be trying to iron these out.

The Furlough Guidance

2.9. In this section we have set out the content of the third Guidance and commented on some of the issues that arise. These issues are further illustrated by the worked example.

Guidance for employers on the coronavirus (COVID-19) Job Retention Scheme.

2.10. This Report considers the Furlough Guidance up to 21st May 2020. The current introduction provides:

Contents

1. Who can claim
2. Employees you can claim for
3. Agreeing to furlough employees
4. When your employees are on furlough
5. Before you claim
6. Contacting HMRC

If you've already worked out how much you can claim, you can claim for wages online through the Coronavirus Job Retention Scheme.
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 pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on that subsidised furlough pay.
This is a temporary scheme that was initially put in place for 4 months starting from 1 March 2020 and will continue in its current form until the end of July. Employers can use the scheme anytime during this period. From August, employers currently using the scheme will have more flexibility to bring their furloughed employees back to work part time whilst still receiving support from the scheme.

This will run for three months from August through to the end of October. Employers will be asked to pay a percentage towards the salaries of their furloughed staff. The employer payments will substitute the contribution the government is currently making, ensuring that staff continue to receive 80% of their salary, up to £2,500 a month. More specific details and information around its implementation will be made available by the end of May.

The scheme 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.

To use the scheme, the steps you'll need to take are:

1. Check if you can claim.
2. Check which employees you can put on furlough.
3. Calculate 80% of your employees' wages.
4. Claim for your employees' wages online - the service should be simple to use and any support you need available on GOV.UK.
5. Report a payment in PAYE Real Time Information.

Please use the online support and do not contact HMRC unless it is absolutely necessary - any questions should be directed at your agent, representative or our Web chat service.

HMRC will check claims made through the scheme. Payments may be withheld or need to be repaid in full to HMRC if the claim is based on dishonest or inaccurate information or found to be fraudulent.

Dishonest or deliberately fraudulent claims put our essential public services and the protection of livelihoods at risk during these challenging times.

HMRC has put in place an online portal for employees and the public to report suspected fraud in the Coronavirus Job Retention Scheme.

Coronavirus Job Retention Scheme grants are not classed as state aid.

2.11. The Government extended the scheme to the end of July in its current form. It is stated that "From August, employers currently using the scheme will have more flexibility to bring their furloughed employees back to work part time whilst still receiving support from the scheme".

2.12. 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. Note also the fact that if the employer pays less than 80% the benefit of the Scheme will not apply.

2.13. 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.

2.14. 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. The example set out by **Daniel Ferguson** is helpful:

> "The Treasury Direction says that employers can claim 80% of an employee's 'reference salary' up to £2,500 per month. In addition, employers can claim Employer National Insurance contributions (NICs) and auto-enrolment pension contributions that are payable on this reduced rate of pay.
> The Institute of Chartered Accountants in England and Wales (ICAEW) provides the following illustration of how a claim could work:
>
> > X Ltd employs Mr B at an annual salary of £42,000, so £3,500 per month. Mr B has opted out of auto enrolment.
> > Each month, Mr B currently receives net pay of £2,675 which is after deducting PAYE of £492 and employees NIC of £333. On this salary, the employer pays employers' NIC of £383.
> > The available grant for the employer is the lower of
> > (c) 80% of £3,500 = £2,800, and
> > (d) £2,500
> > Plus employers NIC, £245, on this amount
> > So X Ltd claims a grant of £2,500 plus £245 = £2,745."

2.15. 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). 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.

2.16. There is, however, a disturbing point made by **Daniel Ferguson,** who notes that if an employer pays less than 80% it appears they cannot recover anything. This is particularly worrying given the complexity of the Directions, where the employer may pay less than 80% by mistake:

> "However, the Treasury Direction has added a layer of complexity to the position set out in the Government guidance.
> Under the Direction an employer can only reclaim 'qualifying costs'. (Treasury Direction, para. 5(b).) Qualifying costs include earnings paid by an employer to its employee but only if:
> - The employee is paid more than £2,500 per month; or
> - The employee is paid 80% of their reference salary as defined under the Direction. (Treasury Direction, para. 7.1.)
>
> The effect of this provision is that if an employer has paid an employee less than 80% of their reference salary they will not be able to claim those costs under the Scheme. As discussed in Question 34, the rules for determining what constitutes 'reference salary' are very complicated.
> Jolyon Maugham QC has written that this provision is a "bear trap" for employers. He argues that if an employer miscalculated an employee's reference salary and paid them less than 80%, they would not be able to claim this under the Scheme. By contrast, if an employer chose to be safe and paid an employee £2,500, they would not be able to reclaim the full cost if 80% of their employee's reference salary was actually less than this amount. (Jolyon Maugham QC, Does the Job Retention Scheme apply to casual workers, Waiting for Godot, 18 April 2020 (accessed 20 April 2020).)"

EMPLOYERS THAT CAN CLAIM

2.17. The Guidance states that:

> **Who can claim?**
> You must have:
> - created and started a PAYE payroll scheme on or before 19th March 2020
> - enrolled for PAYE online (www.gov.uk/paye-online/enrol).
> - a UK bank account
>
> Any entity with a UK payroll can apply, including businesses, charities, recruitment agencies and public authorities

There was much criticism of the date on which employees had to have been employed, as it was considered that persons were unfairly excluded, so that the date has now been changed to 19th March, just before the scheme was announced. (See the paper by Lord Hendy referred to below).

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

2.18. 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. However, **Daniel Ferguson** sets out an important point in his Q&A paper:

> "The Department for Education has published guidance on the JRS for education, early years and children's care providers that receive public funds. The guidance says that where providers receive part of their funding from public funds and part from private income, they can furlough employees whose pay, as a proportion of their total pay bill, reflects the proportion of their funding that is private.(1) The guidance explains:
>
> If a provider's average monthly income is 40% from DSG [public funds] and 60% from other income, the provider could claim CJRS support for up to 60% of their paybill.
>
> This would be done by furloughing staff whose usual salary / combined salaries come to no greater than 60% of the provider's total paybill. (2)
>
> This would appear to be an elaboration of the general rule set out in the guidance for employers but it is not clear whether it applies to all public sector organisations.
>
> (1) See Coronavirus: Childcare providers FAQs, Commons Library Briefing Paper CBP8872, 29 April 2020 (Section 2.2).
> (2) Department for Education, Coronavirus (COVID-19): financial support for education, early years and children's social care, 22 April 2020.

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 sent HMRC an RTI submission notifying a payment in respect of the employee on or before 19 March 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.

2.19 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**.** In the first case which considered the Scheme , ***In the Matter of Carluccios Limited (in administration) and In the Matter of the Insolvency Act 1986,*** [2020] EWHC 886 (Ch) (https://www.j2.19. udiciary.uk/wp-content/uploads/2020/04/Caluccios-Approved-judgment-1.pdf), *Snowden J held that* the administrators of the restaurant chain Carluccio's were able to place the company's employees on furlough and claim for their wages under the Coronavirus Job Retention Scheme. The administrators had validly varied employees' contracts so as to put in place a furlough agreement. Administrators will be taken to have 'adopted' the contracts of furloughed employees for the purposes of insolvency law when they eventually apply for funding under the CJRS, meaning that monies paid under the scheme can be paid to the employees in priority over the administrators' fees and expenses and the distribution of assets to floating charge and unsecured creditors. The administrators had been concerned that, although the CJRS has set out the position in broad terms in the guidance, there has been no precise detail given of its legal structure and how it was intended to operate consistently with insolvency legislation. In particular, while the HMRC guidance is clear that the scheme is open to companies in administration, the scheme provided that monies must be paid to the employer rather than directly to employees. This would mean that they constitute assets of the administration and so must be disposed of in the order of priorities prescribed in the legislation. The administrators sought a ruling on the legal basis upon which they might place employees on furlough and pay them wages in priority to other claims against the company.

2.20. Mr Justice Snowden held that the variation letter had validly amended the contracts of the employees who had expressly agreed to it. The Judge rejected the argument that the contracts of those who had not yet responded had also been amended. Only days

had passed since the letter was sent. The consenting employees were currently employed on varied contracts that give them an entitlement to wages in the sum of the grants to be paid to the company under the CJRS.

2.21. Snowden J held that, when the administrators were to make an application under the CJRS in respect of a consenting employee or make any payment to the employee under the varied contract, that would constitute 'adoption' of that employee's contract for the purposes of insolvency law. By paragraph 99(5) of Schedule B1 to the Insolvency Act 1986, the employees would then have super-priority ahead of the administrators' fees and expenses, floating charge creditors and unsecured creditors, and so payments can be made to them using the grant monies as and when received under the CJRS. Snowden J concluded that employees who had not yet responded would be put in essentially the same position as consenting employees if they belatedly responded by agreeing the variation. However, unvaried contracts of the non-responders would not be treated as adopted at the end of the 14-day period and so the administrators would not have to take the precaution of dismissing those employees in order to avoid incurring super-priority liabilities towards them.

Employees you can claim for

This has been moved into its own separate section in the 10th version dated 14th May 2020. The 21st May version wording is as below:

> You can claim for employees 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.

2.22. 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. Zero hours individuals are also often not paid through PAYE (***Autoclenz v Belcher*** [2011] UKSC 41 and see **Duggan QC on Contracts of Employment (4th Ed)** Chapter One). Where the individual is paid through PAYE there is no obligation on the employer to furlough the zero hours employee, who will not receive anything without a positive decision on the part of the employer. **Bogg & Ford** have suggested that there should be a provision which gives the zero hours or agency work the right to apply directly after 21 days but that appears to be unlikely to be something that will be enacted.

> **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.

2.23. 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 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.

2.24. 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 a supermarket to supplement income. 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."

2.25. 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.

2.26. It appears clear that agency workers may do some work for one employer whilst getting the furlough pay in relation to another organisation. **The requirement is that the organisations are not linked.**

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

2.28. 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.

2.29. 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. **Note the apparent discrepancy between the Directions and Guidance on the nature of**

agreement in writing. See however the letter from HMRC at Appendix 1 that covers this.

2.30. 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.

> You can only claim for furloughed employees that employed on or and who were on your employee payroll on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020. If you had employees that were employed on 28 February 2020 but not on 19 March, please see the section below on employees who were made redundant or stopped working for you after 28 February 2020.

Was the employee employed with you as of this date?	Date RTI submission notifying payment was made to HMRC	Eligible for CJRS?
28 February 2020	On or before 28 February 2020	Yes
28 February 2020	On or before 19 March 2020	Yes
28 February 2020	On or after 20 March 2020	No
19 March 2020	On or before 19 March 2020	Yes
19 March 2020	On or after 20 March 2020	No
On or after 20 March 2020	On or after 20 March 2020	No

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 from the date on which you furloughed them even if you do not re-employ them until after 19 March 2020.

This applies as long as the employee was on your PAYE payroll as at 28 February 2020, which means an RTI submission notifying payment in respect of that employee must have been made on or before 28 February 2020.

If your employee stopped working for you and was on a fixed term contract, you should also refer to the section 'If your employee is on a fixed term contract' below.

2.31. This is an important point since employees can be re-engaged and then furloughed. It had 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/. This has now been covered off by the change in the date to 19th March 2020.

2.32. There are further difficulties with this provision in that if the employee had already been made redundant they continue to be liable for the earlier redundancy payment and the scheme does not deal with this. The reengagement provisions in sections 141 to 142 of the ERA 1996 are unlikely to apply. There is no provision to adjust the statutory redundancy entitlement if it has already arisen. There will also be issues of continuity.

If you made employees redundant or they stopped working for you after 19 March 2020

If you made employees redundant, or they stopped working for you on or after 19 March 2020, you can re-employ them, put them on furlough and claim for their wages through the scheme from the date on which you furloughed them.
This applies as long as the employee was employed on 19 March 2020 and was on your PAYE payroll on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020.

If your employee stopped working for you and was on a fixed term contract, you should also refer to the section 'If your employee is on a fixed term contract' below.

If your employee is on a fixed term contract

An employee on a fixed term contract can be re-employed, furloughed and claimed for if either:

- their contract expired after 28 February 2020 and an RTI payment submission for the employee was notified to HMRC on or before 28 February 2020
- their contract expired after 19 March 2020 and an RTI payment submission for the employee was notified to HMRC on or before 19 March 2020

If the employee's fixed term contract has not already expired, it can be extended, or renewed. You can claim for them if an RTI payment submission for the employee was notified to HMRC on or before 19 March 2020.

Employees that started and ended the same contract between 28 February 2020 and 19 March 2020 will not qualify for this scheme. This is not specific to employees on fixed-term contracts, the same would apply to employees on all other contracts.

If your employee had multiple employers over the last year

If an employee has had multiple employers over the past year, has only worked for one of them at any one time, and is being furloughed by their current employer, their former employer/s should not re-employ them, put them on furlough and claim for their wages through the 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.

The next few sections were moved around in the 10th version so that we now have:

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.

2.33. 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.**

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.

2.34. 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

If your employee does volunteer work

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.

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).

2.35. 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.

Furloughed employees working as union or non-union representatives

Whilst on furlough, employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers. However in doing this, they must not provide services to or generate revenue for, or on behalf of your organisation or a linked or associated organisation.

There is then a new heading which provides:

If your employee's health has been affected by coronavirus (COVID-19)

If your employee is Shielding

Employees who are unable to work because they are shielding in line with public health guidance (or need to stay home with someone who is shielding) can be furloughed. (https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#what-is-shielding)

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.**

If you employee has 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 becomes sick while furloughed

> Furloughed employees retain their statutory rights, including their right to Statutory Sick Pay. This means that furloughed employees who become ill must be paid at least Statutory Sick Pay. It is up to employers to decide whether to move these employees onto Statutory Sick Pay or to keep them on furlough, at their furloughed rate
> If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. Employers are required to pay SSP themselves, although may qualify for a rebate for up to 2 weeks of SSP. If employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for these costs through the furloughed scheme.

If your employee is on leave

If your employee is on unpaid leave

If an employee started unpaid leave after 28 February 2020, you can put them on furlough instead. If you put them on furlough then you should pay them at least 80% of their regular wages, up to the monthly cap of £2500.

If an employee went on unpaid leave on or before 28 February, you cannot furlough them until the date on which it was agreed they would return from unpaid leave

2.36. It is clear that employees can return to work then be put on furlough. There does not appear to be any reason why the parties cannot simply agree that the employee is to return from unpaid leave and then be furloughed. However, the above provision states that the original date should be adhered to.

If your employee is self-isolating or on sick leave

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.

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

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 maternity Leave, adoption leave, paternity leave or shared parental leave

The normal rules for maternity and other forms of parental leave and pay apply.
Although, you may need to calculate your employee's average weekly earnings differently, if your employee was furloughed and then started leave on or after 25 April 2020 for:

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

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
- parental bereavement pay

If your employee gets Maternity Allowance

If your employee is getting Maternity Allowance while they're on maternity leave, they should not get furlough pay at the same time.
If your employee has agreed to be put on furlough, tell them to contact Jobcentre Plus to stop their Maternity Allowance payments.

If your employee agrees to be put on furlough and end their maternity leave early, they will need to give you at least 8 weeks' notice and they will not be eligible for furlough pay until the end of the 8 weeks.

2.38. The above deals with the general principles of leave and pay for maternity etc. However, it did not originally deal with the question whether an employee who has exhausted the 90% of average earnings for the first six weeks *and who does not get enhanced contractual maternity pay* 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). The employee must, however, give 8 weeks' notice to come back early so that the window has disappeared if the scheme finished as the end of June.

2.39. 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. However, there is no reason why the employer cannot advise the employee that they are on furlough, claim the 80% and top up the enhanced pay. Nor would the end of furlough mean that the employee is regarded as returning to work.

2.40. 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.

2.41.The statement that "If your employee agrees to be put on furlough and end their maternity leave early, they will need to give you at least 8 weeks' notice and they will not be eligible for furlough pay until the end of the 8 weeks" appears to negate the possibility of giving notice to come back early.

Individuals you can claim for 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) and 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).

2.42. 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 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.

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

2.44. 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.**

Company directors with an annual pay period

Those paid annually are eligible to claim, as long as they meet the relevant conditions. This includes being notified to HMRC on an RTI submission on or before 19 March 2020, which relates to a payment of earnings in the 19/20 tax year. The requirement for there to be payment of earnings in the 19/20 tax year applies for any employee being claimed for under the scheme, irrespective of how frequently they are paid (e.g. weekly, fortnightly or monthly). This will be relevant for those on an annual pay period if the last payment notified to RTI was before 5 April 2019 and no further payments were notified until after 19 March 2020.
An employer can make their claim in anticipation of an imminent payroll run, at the point they run their payroll or after they have run their payroll.

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.

2.45. Only agency workers who are paid through PAYE come within the scheme. The problem for agency workers is that, for those who are employed and supplied by an agency, which is an employment business that retains the agency workers, (see **Duggan QC on Contracts of Employment (4th Edition)** at **5.1.6.** onwards), the agency may simply take the view that the end user has terminated the assignment (because the business has shut down) and there is no obligation to provide further work. These agency workers will not be able to claim under the self-employed scheme as they were on PAYE. This means that unless the Agency decides to furlough the agency worker will have no recourse other than to claim SSP (if entitled) or benefits.

2.46. 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).

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. (http://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme).

2.47. This provision includes workers, though the Directions does not appear to expressly encompass workers. Lim (b) workers are, by section 230(3) of the ERA 1996 those who work under "(*b*) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". Provided that such workers are paid on PAYE they are covered.

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.

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-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.

If you've consolidated your payroll and have new employees on it

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.

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.

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

After you've checked which employees you can claim for

Once you know whether you can put your employees on furlough and claim through the scheme for their wages, you should agree this with them before you start your claim.

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. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response. 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.

2.49. The Amended Guidance makes it clear that the employer must notify in writing and this record will be kept for five years. The HMRC Directions appeal to require that there is agreement in writing, but it is doubtful that it was the intention of the Government to change the goalposts in this way. See below.

The detrimental impact on business: managing an absent workforce

2.50 We have already seen the various permutations which will lead to an absent or reduced workforce. This may lead to there being insufficient numbers so that the workplace has to close on a temporary basis. Where the business has to close on a temporary basis and the employer hopes to re-open there may be a number of alternatives that can be considered as an alternative to furlough:

- The employer could ask employees to take unpaid temporary leave; we are aware of some employers suggesting the employees can volunteer for an unpaid "sabbatical" but this is unlikely to be attractive to employees in these uncertain times.
- There may be a variation in terms, with a temporary reduction in salary. This is likely to depend on the terms of the contract of employment and/or the agreement of the workforce. In normal times this would be a very difficult proposition to get agreement on, but it may be that employees who are still working would be prepared to adopt such a measure. The position remains that any purported variation of terms and conditions will be a breach of contract if it is unilaterally imposed and advice should be taken about the terms of the contract before this is envisaged (See the cases referred to in **Duggan QC on Contracts of Employment** in Chapter C).
- There could be dismissals with offers on different terms, but this is likely to trigger the requirement to collectively consult because of section 195 of Trade Union and Labour Relations (Consolidation) Act 1992 – TULR(C)A 1992
- Temporary layoffs may be a possibility.
- The employer could seek to control holiday entitlement, which may retain an intact workforce, but will mean that holiday pay will have to be paid.
- The stage may be reached where there is no alternative than redundancies. In the first instance the employer may seek voluntary redundancy
- The next stage may be to terminate those contracts of employment of employees who do not have qualifying service to claim unfair dismissal or redundancy payments.
- Failing all the above, the only other alternative may be to implement redundancies.

It has become self-evident that furlough is the preferred approach given the 80% cushion. It will only be where the employee is not prepared to furlough that the above alternatives will really come into play.

Using 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. Each period of furlough can be extended by any amount of time whilst the employee is on furlough. However the scheme end date is the last day you can claim for through this scheme.

2.51. 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).

2.52. It is to be noted that employees have no right to bring a claim under the Scheme.

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.

Your employee can:

- take part in training
- volunteer for another employer or organisation

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.

Keeping 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

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.

2.53. 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 a supermarket without losing the 80% that they are getting on furlough.

Before you claim

You will need to work out how much you can claim through the scheme. HMRC will retain the right to retrospectively audit all aspects of your 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 consultation processes to procure agreement to changes to terms of employment.
HMRC cannot provide your employees with details of claims you make on their behalf. Please help us by keeping your employees informed, answering any questions that they might have. Please ask them not to contact HMRC.

A Practical Example

2.54. 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

2.55. 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

2.56. 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.

2.57. 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).

2.58. 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.

2.59. 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.

2.60. 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**).

2.61. **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

2.62. 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.

Maternity

2.63. 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.

2.64. 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.

2.65. 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 would normally be nothing to stop the employer permitting the employee to return straightway so that Harriet could return and be immediately furloughed. However, the Guidance states that 8 weeks' notice must be given so that any benefit of coming back Is likely to be illusory. 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.

Sex Discrimination

2.66. 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.

2.67. 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?

2.68. 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

2.69. 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.

2.70. 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

2.71. 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

2.72. 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.

PART THREE: SPECIFIC ISSUES (Statutory Sick Pay, Sickness, Holiday)

Statutory sick pay

3.1. By section 151(4) of the Social Security Contributions and Benefits Act 1992 an employee absent due to incapacity will be entitled to statutory sick pay; the section providing that a day on which the employee is, or is deemed in accordance with regulations, to be incapable "by reason of some specific disease or bodily or mental disablement or doing work which he can be reasonably be expected to do" under the contract, will be incapacity.

3.2. The difficulty with fitting the requirements, whether enforced or voluntarily, into the Social Security Contributions and Benefits Act 1992, is that a person who is self-isolating may have only minor symptoms which do not make the individual incapable of carrying out work. Moreover, a person who is self-isolating due to a vulnerability may be capable of work. The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020, by Regulation 2(1)(c) provided that, with effect from 13th March 2020, (the date being amended to 16th March 2020,as below) the Statutory Sick Pay (General) Regulations 1982/894, were amended to provide:

> "(c) he is—
> i) isolating himself from other people in such manner as to prevent infection or contamination with coronavirus [...]6 , in accordance with guidance published by Public Health England, NHS National Services Scotland 7 or Public Health Wales8 and effective on [16th]9 March 2020; and
> ii) by reason of that isolation is unable to work."

3.3. The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations 2020 (SI 2020/304) changed the date from 13th to 16th March due to the publication of updated guidance on that date, of the Stay at Home Guidance and the Social Distancing Guidance – for the content of the Guidance see above.

3.4. The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129) contains detailed provisions in relation to detention and isolation. By Regulation 2(1)(b), the Statutory Sick Pay (General) Regulations 1982/894 provides for deemed incapacity where:

> "(b) he is—
> (i) excluded or abstains from work, or from work of such a kind, pursuant to a request or notice in writing lawfully made under an enactment; or
> (ii) otherwise prevented from working pursuant to an enactment, by reason of it being known or reasonably suspected that he is infected or contaminated by, or has been in contact with a case of, a relevant infection or contamination"

3.5. Statutory sick pay is therefore payable where a person is excluded from work under Regulation 2(1)(b), or where an employee isolates in order to avoid the risk of infection under the Stay at Home Guidance. Where a member of the household also has symptoms which leads the employee to self-isolate this scenario will also be covered.

3.6. A new system of isolation notes came into effect on 20th March 2020 which is intended to provide employees with evidence that they have been advised to self-isolate. The system is online at **https://111.nhs.uk/covid-19** which also contains stay at home advice.

The HMRC statutory Payments Manual provides that:

> **Statutory Sick Pay (SSP): general information - employee not entitled to SSP**
> **Employees do not qualify for SSP if: n they are furloughed as part of the coronavirus job retention scheme**

3.7. By section 151(4) of the Social Security Contributions and Benefits Act 1992 an employee absent due to incapacity will be entitled to statutory sick pay; the section providing that a day on which the employee is, or is deemed in accordance with regulations, to be incapable "by reason of some specific disease or bodily or mental disablement or doing work which he can be reasonably be expected to do" under the contract, will be incapacity.

3.8. The difficulty with fitting the requirements, whether enforced or voluntarily, into the Social Security Contributions and Benefits Act 1992, is that a person who is self-isolating may have only minor symptoms which do not make the individual incapable of carrying out work. Moreover, a person who is self-isolating due to a vulnerability may be capable of work. The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020, by Regulation 2(1)(c) provided that, with effect from 13th March 2020, (the date being amended to 16th March 2020,as below) the Statutory Sick Pay (General) Regulations 1982/894, were amended to provide:

> "(c) he is—
> i) isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus [...]6 , in accordance with guidance published by Public Health England, NHS National Services Scotland 7 or Public Health Wales8 and effective on [16th]9 March 2020; and
> ii) by reason of that isolation is unable to work."

3.9 The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations 2020 (SI 2020/304) changed the date from 13th to 16th March due to the publication of updated guidance on that date, of the Stay at Home Guidance and the Social Distancing Guidance – for the content of the Guidance see above.

3.10. The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129) contains detailed provisions in relation to detention and isolation. By Regulation 2(1)(b), the Statutory Sick Pay (General) Regulations 1982/894 provides for deemed incapacity where:

> "(b) he is—

(i) excluded or abstains from work, or from work of such a kind, pursuant to a request or notice in writing lawfully made under an enactment; or
(ii) otherwise prevented from working pursuant to an enactment, by reason of it being known or reasonably suspected that he is infected or contaminated by, or has been
(iii) in contact with a case of, a relevant infection or contamination"

3.11. Statutory sick pay is therefore payable where a person is excluded from work under Regulation 2(1)(b), or where an employee isolates in order to avoid the risk of infection under the Stay at Home Guidance. Where a member of the household also has symptoms which leads the employee to self-isolate this scenario will also be covered.

3.12. A new system of isolation notes came into effect on 20th March 2020 which is intended to provide employees with evidence that they have been advised to self-isolate. The system is online at **https://111.nhs.uk/covid-19** which also contains stay at home advice.

3.13. With effect from 16th April the Government further amended the SSP Regulations by the Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020 (2020 No. 427) (http://www.legislation.gov.uk/uksi/2020/427/made?mc_cid=33064410d3&mc_eid=fbb90dbedd). Regulation 2 adds a new 5A, which provides:

5A. The person—
(a) is defined in public health guidance as extremely vulnerable and at very high risk of severe illness from coronavirus because of an underlying health condition; and
(b) has been advised, by notification sent to, or in respect of, that person in accordance with that guidance, to follow rigorously shielding measures for the period specified in the notification."
(4) In paragraph 6, after the definition of "Deputy Chief Medical Officer" omit "and" and insert—
""public heath guidance" means guidance, as amended from time to time, issued by—
(a) Public Health England(4);
(b) the Scottish Ministers; or
(c) Public Health Wales National Health Service Trust(5); and".

3.14.The Regulations thus deem a person who is extremely vulnerable and shielding to be covered.

NB: See further the Employee Guidance below.*

Absence to care for a sick person

3..15. We have already noted that where the employee is from a household in which someone has contracted the infection of symptoms of the infection, that person may wish to self-isolate. There is no reason why the person should not, at the same time, be caring for the sick person.

3.16. We also note that section 57A of the Employment Rights Act 1996 provides for a reasonable period of time off to provide assistance where a dependant falls ill, to make provision for the care of such a dependant or because of the unexpected disruption or termination of the arrangements for the care of a dependant. We can envisage circumstances where this section could be relied upon; the carers of a housebound dependant are themselves self-isolating so that someone needs to take over the care of that dependant (See **Duggan QC on Contracts of Employment** at chapter I.04-I.1.11).

Normal sickness absence

3.17. It is important to remember that throughout this crisis, there will be employees who are absent due to sickness that has nothing to do with the coronavirus. In those circumstances the normal sickness absence procedures and provisions for payment will normally apply. Where, for example, someone is absent because of 'flu' and the absence has been diagnosed as such, the employee may prefer that the usual sickness provisions apply.

Holiday

3.18. There are three potential scenarios that need to be considered in relation to the provision of statutory holiday under the Working Time Regulations 1998:

(i) The employee has booked holiday but has to self-isolate or is tested positive. When an employee falls sick during a period when they would otherwise have been on holiday, then the holiday period may be converted to sick leave. This is because annual leave is for the purposes of relaxation and leisure which is different from sick leave (***Pereda v Madrid Movilidad SA*** [C-277/08, [2009] IRLR 959; **Duggan QC on Contracts of Employment at J45**). We take the view that an employee who has to remain at home, is self-isolating or social distancing is probably in the same position so that if holiday has been booked during such period it can probably now be regarded as a period of sickness absence rather than holiday.

(ii) On the other hand, employers may wish to instruct employees that they cannot take holiday during a such periods so that they receive SSP which is likely to be less than holiday pay.

(iii) The employer wants to give notice to the employee to take holiday. Query whether a worker who is not unwell but following Government guidance to stay at home under the 'Lockdown' rules can still be regarded as on holiday or instructed to take holiday during that period (with the appropriate notice given) so that holiday is used up.

The Employee Guidance- Holiday pay

Whilst furloughed you will continue to accrue leave as per your employment contract. You can agree with your employer to vary holiday pay entitlement as part of the furlough agreement, however almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below.

You can take holiday whilst on furlough. Working Time Regulations (WTR) require holiday pay to be paid at your normal rate of pay or, where your rate of pay varies, calculated on the basis of the average pay you received in the previous 52 working weeks. Therefore, if you take holiday while on furlough, your employer should pay you your usual holiday pay in accordance with the WTR. Employers will be obliged to pay the additional amounts over the grant, though will have the flexibility to restrict when leave can be taken if there is a business need. This applies for both the furlough period and the recovery period.

3.19. There has been a debate whether employees can be on furlough and take holiday at the same time. ACAS produced Guidance which it has revised as set out below. ACAS at first appeared to state that you cannot take holiday whilst on furlough but have backtracked form this- see how the ACAS Guidance was amended below. It is clear from the Employee Guidance that you can take holiday during furlough.

The ACAS Guidance – Holiday Pay

ACAS
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 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**

3.20. 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 holiday 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)**.** The counter argument that the employer cannot instruct the employee to take holiday has been canvassed by **Bogg & Ford** and is set out in the paper by **Daniel Ferguson**:

> "Alan Bogg and Michael Ford QC have argued that workers cannot be required to take annual leave during furlough as, in the current circumstances, furlough is more akin to a period of sick leave:
>
> > Although the CJEU case-law is not entirely clear, we think the better argument is that 'furloughing' for most workers in circumstances of the current lockdown is closer to sick leave, following the orthodox line in cases like Stringer, than it is to zero hours working or taking parental leave. First, 'furlough' leave is not foreseeable and it is entirely beyond the control of the employee. The decision to furlough is the employer's, not the employee's, and the current situation as regards employment and economic activity could scarcely have been predicted a matter of weeks ago. While that cannot provide the complete answer, more important may be a second factor. 'Furlough' leave in the current circumstances, like sick leave, is subject to extensive physical and psychological constraints. (Alan Bogg and Michael Ford QC, Furloughing and Fundamental Rights: The Case of Paid Annual Leave, UK Labour Law Blog, 6 April 2020 (accessed 7 April 2020))."

3.21. In our earlier reports we took the view that holiday could be taken but the employer must be paid 100% of their salary based upon the reference period and ACAS is now adopting this approach. Note that the second bullet point as set out above has been removed by ACAS.

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.

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.

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

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.

3.22. It is questionable whether the above comment is correct. Where an employee is sick so that holiday cannot be taken, even though it was booked, the employee may notify the employer and take the holiday at some other time. It is arguable that the same applies where the employee is self-isolating or shielding.

> 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

3.23. The ACAS guide is fairly clear that "Employers have the right to tell employees and workers when to take holiday." We have already noted that the position may not be that clear cut.

3.24. The Government has still not expressly stated whether employers can instruct employees to take holiday at a time when they are on furlough.

2.25. 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).

3.26. If holiday leave is incompatible with furlough, it would mean that a 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. The Employee Guidance supports this view. The Employer Guidance does not assist but we suggest that there is no reason why employers cannot give notice that holiday should be taken.

EMPLOYEE GUIDANCE

We set out below the Employee Guidance for completeness so that it may be compared with the Employer Guidance above. The Guidance has gone through 12 iterations. The latest amendments are dated 21st May.

Check if your employer can use the Coronavirus Job Retention Scheme
Find out if you're eligible, and how much your employer can claim if they put you on temporary leave ('furlough') because of coronavirus (COVID-19).
Published 26 March 2020
Last updated 1 May 2020 — see all updates
HM Revenue & Customs
Contents

If you and your employer both agree, your employer might be able to keep you on the payroll if they're unable to operate or have no work for you to do because of coronavirus (COVID-19). This is known as being 'on furlough'.

Your employer could pay 80% of your regular wages through the Coronavirus Job Retention Scheme, up to a monthly cap of £2,500.

You'll still be paid by your employer and pay taxes from your income. You cannot undertake work for your employer while on furlough.

This is a temporary scheme that was initially put in place for 4 months starting from 1 March 2020 and will continue in its current form until the end of July. Employers can use the scheme anytime during this period. From August, employers currently using the scheme will have more flexibility to bring their furloughed employees back to work part time whilst still receiving support from the scheme.

This will run for three months from August through to the end of October. Employers will be asked to pay a percentage towards the salaries of their furloughed staff. The employer payments will substitute the contribution the government is currently making, ensuring that staff continue to receive 80% of their salary, up to £2,500 a month. More specific details and information around its implementation will be made available by the end of May.

The scheme 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.

The Coronavirus Job Retention Scheme forms part of a collective national effort to protect people's jobs. You can play a vital role by reporting fraudulent claims to HMRC. Fraudulent claims risk the provision of public services and the protection of livelihoods.

If you're concerned that your employer is abusing the scheme you should report them. This could include your employer claiming on your behalf and not paying you what you're entitled to, being asked to work whilst on furlough, or making a backdated claim that includes times when you were working.

Check if you're eligible

Your employer is responsible for claiming through the Job Retention Scheme on your behalf and for paying you what you are entitled to. You cannot apply for the scheme yourself.

Both you and your employer must agree to put you on furlough - so speak to your employer about whether they can claim. If your employer and a trade union reach collective agreement that is also acceptable, for the purpose of your employer claiming through the scheme. Once

agreed your employer must confirm in writing that you have been furloughed to be eligible to claim. Contact your employer if you do not receive confirmation.

If you are concerned that your employer has not claimed on your behalf, you should speak to your employer. HMRC will not be able to provide information about individual applications.

Any employer with a UK payroll and a UK bank account will be able to claim, but you must have been employed on 19 March 2020 and on your employer's PAYE payroll on or before 19 March 2020. This means your employer must have made a Real Time Information (RTI) submission notifying payment in respect of you to HMRC on or before 19 March 2020.

Find out what happens if you were employed on 28 February 2020 but not on 19 March 2020.

You can be on any type of contract, including a zero-hour contract or a temporary contract.

You can be furloughed under the scheme if you are a foreign national.

This scheme does not apply if you are self-employed or to any income from self-employment. You may qualify for support under the Self-employment income support scheme.

If you're on sick leave or self-isolating because of coronavirus (COVID-19), speak to your employer about whether you're eligible to be furloughed – you should get Statutory Sick Pay (SSP) as a minimum while you are on sick leave or self isolating. Your employer can furlough you at any time- if they do, you will no longer receive sick pay, but should be treated as any other furloughed employee.

If you are shielding in line with public health guidance or required to stay home due to an individual in your household shielding and are unable to work from home, then you should speak to your employer about whether they plan to place staff on furlough.

If you are unable to work, including from home, due to caring responsibilities arising from coronarivus (COVID-19), such as caring for children who are at home as a result of school and childcare facilities closing, or caring for a vulnerable individual in your household, then you should speak to your employer about whether they plan to place staff on furlough.

The grant will start on the day you were placed on furlough and this can be backdated to 1 March 2020.

If you were made redundant or stopped working for your employer on or after 28 February 2020

Your employer can agree to re-employ you and place you on furlough. They'll still be able to claim a grant to cover 80% of your regular wages from the date you were placed on furlough, up to a cap of £2,500 a month. This applies if you were made redundant or stopped working for them on or after 28 February 2020, even if they do not re-employ you until after 19 March 2020.

This applies as long as you were on their payroll on or before 28 February 2020. This means an RTI submission notifying payment in respect of you to HMRC must have been made on or before 28 February 2020.

Find out what happens if you stopped working for your employer and were on a fixed term contract.

If you were made redundant or stopped working for your employer on or after 19 March 2020

Your employer can agree to re-employ you and place you on furlough. They'll still be able to claim a grant to cover 80% of your regular wages from the date you were placed on furlough, up to a cap of £2,500 a month. This applies if you were made redundant or stopped working for them on or after 19 March 2020.

This applies as long as you were on their payroll on or before 19 March 2020. This means an RTI submission notifying payment in respect of you to HMRC must have been made on or before 19 March 2020.

If you're on a fixed term contract

If you were on a fixed term contract your employer can re-employ, furlough and claim for you if your contract expired on or after either:

- 28 February 2020 and an RTI payment submission for you was notified to HMRC on or before 28 February 2020
- 19 March 2020 and an RTI payment submission for you was notified to HMRC on or before 19 March 2020

If your fixed term contract has not already expired, your employer can extend or renew it.

Your employer can claim for you if an RTI payment submission for you was notified to HMRC on or before 19 March 2020.

If you started and ended the same contract between 28 February 2020 and 19 March 2020 you will not qualify for this scheme. This is not specific to employees on fixed-term contracts, the same would apply to employees on all other contracts.

If you currently have more than one employer

You can be put on furlough by one employer and continue to work for another. If you're put on furlough by more than one employer, you'll receive separate payments from each employer. The 80% of your regular wage up to a £2,500 monthly cap applies to each job.

If you have had multiple employers over the past year, have only worked for one of them at any one time, and are being furloughed by your current employer, you cannot be furloughed by your previous employer.

If you are on tax credits

If you currently receive tax credits you should check to see what changes you have to report.

If you are on Universal Credit

If you're earning less because you're on furlough, your Universal Credit payment might change - find out how earnings affect your payments.

If you are on maternity leave, adoption leave, paternity leave, shared parental leave or parental bereavement leave

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

Although, your employer may need to calculate your average weekly earnings, if you were put on furlough and then started leave on or after 25 April 2020 for:

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

Your employer 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
- parental bereavement pay

If you're getting Maternity Allowance

If you're getting Maternity Allowance while you're on maternity leave, you cannot get furlough pay at the same time.

If you have agreed to be put on furlough, you must contact Jobcentre Plus to stop your Maternity Allowance payments.

If you agree to go on furlough and end your maternity leave early, you will need to give your employer at least 8 weeks' notice and you will not be eligible for furlough pay until the end of the 8 weeks.

If you are pregnant and about to start maternity leave

You should start maternity leave as normal. If your earnings have reduced because you were off sick before your maternity leave started, this may affect your Statutory Maternity Pay.

If your earnings have reduced because you were put on furlough and then you started family-related statutory leave on or after 25 April 2020, the amount you receive in pay should not be affected. If you started family-related statutory pay before 25 April 2020, your entitlement may be affected. The same rules apply to adoption pay, paternity pay, shared parental pay and parental bereavement pay.

If you're employed by an individual

If you're employed by an individual (for example, as a nanny) then your employer can furlough you under the scheme if you are paid through PAYE and were on their payroll on or before 19 March 2020. This means your employer must have made an RTI submission notifying payment in respect of you to HMRC on or before 19 March 2020.

If you're an apprentice

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

You must be paid at least the Apprenticeship Minimum Wage/National Living Wage/National Minimum Wage as appropriate for all of the time you spend training, even if this is more than 80% of your normal wages.

If you're a public sector employee

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. 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.

If you work for the public sector, you can get more information about how the scheme works for you from your UK Government Department, employer or, in the case of employers funded by the Scottish Government, Welsh Government or Northern Ireland Executive, through your respective administration.

Other specific categories

You may be eligible to be furloughed, and receive a grant of 80% of your regular wages up to a monthly cap of £2500, if you are paid via PAYE and are in one of the following categories.

- **You are an agency worker**
- **You are a company director**
- **You are a contractor with public sector engagements in scope of IR35 off-payroll working rules (IR35)**
- **You are a salaried member of a Limited Liability Partnership**
- **You are a Limb (b) worker**
- **You are an office holder**

Detail on how this scheme can apply to you is set out at the end of this guidance.

How much you'll get

Your employer will get a grant to cover 80% of your regular wages, up to a maximum of £2,500.

Firms will be eligible for the grant from the date you ceased work, from 1 March. Your employer:

- **will pay you at least 80% of your regular monthly wages, up to a maximum of £2,500, as your wage**
- **can claim for a minimum of 3 consecutive weeks and for up to 3 months - but this may be extended**
- **can choose to pay you more than the grant - but they do not have to**
- **cannot choose to pay you less than the grant**

Your employer must pay you all the grant they receive for your gross pay in the form of money. Your employer cannot enter into any transaction with you which reduces the amount you receive. This includes any administration charge, fees or other costs in connection with your employment.

Where you have authorised your employer to make deductions from your salary, these deductions can continue while you are furloughed provided that these deductions are not charges, fees or other costs in connection with your employment. You'll still pay Income Tax, National Insurance contributions, Student Loan repayments and any other deductions (such as pension contributions) from your wage.

How your monthly wages are calculated

If you are a full-time or part-time employee on a salary, then your monthly wages are based on your salary. You should speak to your employer for further information about how they will calculate this.

If your pay varies and you've been employed (or engaged by an employment business in the case of agency workers) for a full year, employers will claim for the higher of either:

- **the amount you earned in the same month last year**
- **an average of your monthly earnings from the last year**

If your pay varies and you've been employed for less than a year, employers will claim for an average of your regular monthly wages since you started work.

If you have been working for less than a month, your employer will pro-rata your earnings from that month.

The amounts your employer should use when calculating 80% of your wages are regular payments that they must make, including:

- **regular wages they pay you**
- **non-discretionary overtime**
- **non-discretionary fees**
- **non-discretionary commission payments**
- **piece rate payments**

They cannot include the following when calculating your wages:

- **payments made at their or a client's discretion - where they or a client was under no contractual obligation to pay you, including:**
  - **any tips, including those distributed through troncs**
  - **discretionary bonuses**
  - **discretionary commission payments**
- **non-cash payments**
- **non-monetary benefits like benefits in kind (such as a company car) and salary sacrifice schemes (including pension contributions) that reduce your taxable pay**

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. If you want to switch out of a salary sacrifice scheme as a result of COVID-19, you should speak to your employer.

Holiday pay

Whilst furloughed you will continue to accrue leave as per your employment contract. You can agree with your employer to vary holiday pay entitlement as part of the furlough agreement, however almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below.

You can take holiday whilst on furlough. Working Time Regulations (WTR) require holiday pay to be paid at your normal rate of pay or, where your rate of pay varies, calculated on the basis of the average pay you received in the previous 52 working weeks. Therefore, if you take holiday while on furlough, your employer should pay you your usual holiday pay in accordance with the WTR. Employers will be obliged to pay the additional amounts over the grant, though will have the flexibility to restrict when leave can be taken if there is a business need. This applies for both the furlough period and the recovery period.

If you usually work bank holidays then your employer can agree that this is included in the grant payment. If you usually take the bank holiday as leave then your employer would either have to top up your pay to your usual holiday pay or give you a day of holiday in lieu.

During this unprecedented time, we are keeping the policy on holiday pay during furlough under review.

This provision makes it clear that employees can take holiday by giving the appropriate nice. There is no corresponding provision in the Employer Guidance which states that Employers may instruct that holiday be taken. This has already been considered above.

Employers will be able to use the 80% and then pay the top up to the fill holiday pay.

Returning from family related statutory leave

Family related statutory leave includes maternity leave, paternity leave, shared parental leave, adoption leave, parental bereavement leave and unpaid parental leave.

If you're on fixed pay and are a full or part time employee who has been furloughed on return from family related statutory leave, your employer should calculate the grant against your salary, before tax, not the pay you received whilst on family related statutory leave.

If your pay varies and you are furloughed on your return from statutory leave, your employer should calculate the grant using the highest of either:

- **80% of the same month's wages from the previous year (up to a maximum of £2,500 a month)**
- **80% of the average monthly wages for the 2019 - 2020 tax year (up to a maximum of £2,500 a month)**

Employees returning to work after being on sick pay

If you're on fixed pay and are returning to work after time off sick, your employer will calculate how much you'll receive against your salary, before tax, not the pay you received whilst off sick.

If you're on variable pay and returning to work after time off sick, your employer will calculate how much you'll get using the highest of either:

- **80% of the same month's wages from the previous year (up to a maximum of £2,500 a month)**
- **80% of the average monthly wages for the 2019 - 2020 tax year (up to a maximum of £2,500 a month)**

While you're on furlough

Once you are on furlough you will not be able to work for your employer. You can undertake training or volunteer subject to public health guidance, as long as you're not:

- **making money for your employer or a company linked or associated to your employer**
- **providing services to your employer or a company linked or associated to your employer**
- **furloughed by your employer and volunteering for them in a different role**

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

Whilst furloughed your employer cannot ask you to do work for another linked or associated company.

If your contract allows, you may undertake other employment while your current employer has placed you on furlough, and this will not affect the grant that they can claim under the scheme. You will need to be able to return to work for the employer that has placed you on furlough if they decide to stop furloughing you, and you must be able to undertake any training they require while on furlough. If you take on new employment, you should ensure you complete the starter checklist form with your new employer correctly. If you are furloughed from another employment, you should complete Statement C. Any activities undertaken while on furlough must be in line with the latest Public Health guidance during the COVID-19 outbreak.

Your employer can still make you redundant while you're on furlough or afterwards.

Your rights as an employee are not affected by being on furlough, including redundancy rights.

If your employer chooses to place you on furlough, you will need to remain on furlough for a minimum of 3 consecutive weeks. However, your employer can place you on furlough more than once, and one period can follow straight after an existing furlough period, while the scheme is open. The scheme will be open for at least 4 months.

Whilst on furlough, you may still undertake union or non-union representatives' duties and activities for the purpose of an individual or collective representation of employees or other workers. However, in doing this, you must not provide services to or generate revenue for, or on behalf of your organisation or a linked or associated organisation.

If you do not want to go on furlough

If your employer asks you to go on furlough and you refuse you may be at risk of redundancy or termination of employment, depending on the circumstances of your employer. However, this must be in line with normal redundancy rules and protections.

Guidance for specific customers

If you're an agency worker (including if you are employed by an umbrella company)

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. 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 performing such work through or on behalf of the agency 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.

If you're an office holder

If you are an office holder who is remunerated by PAYE then you can be furloughed and receive support through this scheme. The furlough, and any ongoing payment during furlough, will need to be agreed between you and the party who operates PAYE on the income they receive for holding their office. Where you are 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.

If you're a company director

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 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 be judged reasonably necessary for the purposes, i.e. 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).

Company directors with an annual pay period

Those paid annually are eligible to claim, as long as they meet the relevant conditions. This includes being notified to HMRC on an RTI submission on or before 19 March 2020, which relates to a payment of earnings in the 19/20 tax year. The requirement for there to be payment of earnings in the 19/20 tax year applies for any employee being claimed for under the scheme, irrespective of how frequently they are paid (e.g. weekly, fortnightly or monthly). This will be relevant for those on an annual pay period if the last payment notified to RTI was before 5 April 2019 and no further payments were notified until after 19 March 2020.

An employer can make their claim in anticipation of an imminent payroll run, at the point they run their payroll or after they have run their payroll.

If you're a contractor 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 can 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-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.

If you're a salaried member of a Limited Liability Partnership (LLP)

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.

If you're a Limb (b) Worker

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, announced by the Chancellor on 26 March 2020.

You can find out more about the Self-Employed Income Support Scheme, including the eligibility criteria and how to claim.

If you're a contingent worker 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.

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). This guidance can be read here

Contacting HMRC

If you have questions about the scheme, you should contact your employer first.

We are receiving very high numbers of calls. Contacting HMRC unnecessarily puts our essential public services at risk during these challenging times.

Get help online

Use HMRC's digital assistant to find more information about the coronavirus support schemes.

You can also contact HMRC if you cannot get the help you need online or from your employer.

Other help and support

You can watch videos and register for free webinars to learn more about the support available to help you deal with the economic impacts of coronavirus.

Published 26 March 2020

Last updated 21 May 2020 - hide all updates

1. 21 May 2020

Information added to clarify that employee authorised salary deductions can be deducted from grant payments. A link has been added directing customers to check the impact on their tax credits. Corrected inconsistencies within the guidance around the dates of eligibility for the scheme.

2. 14 May 2020

Page has been updated with information about the extension of the Coronavirus Job Retention Scheme.

3. **13 May 2020**

Information added for employees that are furloughed and want to volunteer.

4. **1 May 2020**

Added a link to shared parental pay guidance and a new section for maternity allowance.

5. **1 May 2020**

Link to the webinar help and support page for businesses affected by coronavirus (COVID-19), has been added.

6. **30 April 2020**

New information added on union and non-union representatives, company directors with an annual pay period and employees who started family-related statutory pay on or after 25 April 2020. Also, clarified what employers can include in wages.

7. **23 April 2020**

New information has been added on collective agreement reached with a trade union. Also clarified eligibility criteria for employees on fixed-term contracts.

8. **17 April 2020**

New information added on how to report fraud or abuse of the scheme, fixed term contracts, holiday pay, returning from family related statutory leave, sick pay and agency workers.

9. **15 April 2020**

Updated information on payroll date and eligibility

10. **9 April 2020**

New information about eligibility has been added.

11. **4 April 2020**

This guidance has been updated with more information about the Coronavirus Job Retention Scheme.

12. **26 March 2020**

First published.

PART FOUR: PAYMENT AND THE HMRC DIRECTIONS

THE GUIDANCE WHICH REPLACES THE "WHAT YOU NEED TO MAKE A CLAIM" AND "CLAIM" SECTIONS FROM THE ORIGINAL GUIDANCE:

4.1. As at 6th May 2020, the news reported that about 2.5, million registered for the CJRS so that about 23% of the workforce or 6.3. million workers have been furloughed of the 27.9 million workforce. Another 1.8 million are claiming Universal Credit. £8 billion had been paid, averaging out at £1269 per employee. It is suggested the total cost could be £30 billion. Version 7 of the Guidance contained the following:

Guidance
Claim for wages through the Coronavirus Job Retention Scheme
Claim for 80% of your employee's wages plus any employer National Insurance and pension contributions, if you have put them on furlough because of coronavirus (COVID-19).
Published 20 April 2020
From:
HM Revenue & Customs
Contents

1. **Before you start**
2. **What you'll need**
3. **How to claim**
4. **After you've claimed**

Before you start
You'll need to:

- **check that both you and your furloughed employee can use the scheme**
- **work out how much you can claim**

What you'll need
To make a claim, you will need:

- **to be registered for PAYE online**
- **your UK bank account number and sort code**
- **your employer PAYE scheme reference number**
- **the number of employees being furloughed**
- **each employee's National Insurance number**
- **each employee's payroll or employee number (optional)**
- **the start date and end date of the claim**
- **the full amount you're claiming for including employer National Insurance contributions and employer minimum pension contributions**
- **your phone number**
- **contact name**

You also need to provide either:

- **your name (or the employer's name if you're an agent)**
- **your Corporation Tax unique taxpayer reference**
- **your Self Assessment unique taxpayer reference**
- **your company registration number**

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.
If an agent makes a claim on your behalf you will need to tell them which bank account you would like the grant to be paid into.

If you're putting more than 100 employees on furlough
If you're claiming for more than 100 furloughed employees, you'll need to upload a file containing each employee's:

- **full name**
- **National Insurance number**
- **payroll number (optional)**
- **furlough start date**
- **furlough end date (if known)**
- **full amount claimed**

The format of the file you upload must be either:

- **.xls**
- **.xlsx**
- **.csv**
- **.ods**

How to claim
You'll need the Government Gateway user ID and password you got when you registered for PAYE online.
Online services may be slow during busy times. Check if there are any problems with this service.

4.2. The latest version of the Guidance now merely states that:

You will need to work out how much you can claim through the scheme. HMRC will retain the right to retrospectively audit all aspects of your claim.

There is then a useful calculator that you are walked through. However, it has its limitations:

This calculator can currently be used to work out what you can claim for most employees who are paid either regular or variable amounts each pay period (for example, weekly or monthly). The exceptions to this are if employees:

- returned from statutory leave such as maternity leave in the last three months
- get director's payments
- have been transferred under TUPE
- have been employed at separate times throughout the year
- receive employer pension contributions outside of an auto-enrolment pension scheme

- have an annual pay period

4.3. It is necessary to consider the following:

- The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction
- Guidance - Work out 80% of your employees' wages to claim through the Coronavirus Job Retention Scheme.

4.4. The Guidance calculator at https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme sets out a step by step method of calculation. There are a number of important points that are made in the guidance which explains the stages, in particular:

> You can choose to top up your employees' wages, 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 wage.
> Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status.

What to include when calculating wages

> The amount you should use when calculating 80% of your employees' wages is regular payments you are obliged to make, including:
>
> - regular wages you pay to employees
> - non-discretionary payments for hours worked including overtime
> - non-discretionary fees
> - non-discretionary commission payments
> - piece rate payments
>
> You cannot include the following when calculating wages:
>
> - payments made at the discretion of the employer or a client - where the employer or client was under no contractual obligation to pay, including:
> - any tips, including those distributed through troncs
> - discretionary bonuses
> - discretionary commission payments
> - non-cash payments
> - non-monetary benefits like benefits in kind (such as a company car) and salary sacrifice schemes (including pension contributions) that reduce an employees' taxable pay

4.5. It will be a relief to many that commission and bonus is included in the calculation, though it should be borne in mind that commission or bonuses are often described as discretionary when in reality they are entitlements - see **Duggan QC on Contracts of Employment (4th Edition)** at **F03-25.**

> The entirety of the grant received to cover an employee's subsidised furlough pay must be paid to them in the form of money. No part of the grant should be netted off to pay for the provision of benefits or a salary sacrifice scheme.
> Where the employer provides benefits to furloughed employees, including through a salary sacrifice scheme, these benefits 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.

Non-discretionary payments

When you're working out if a payment is non-discretionary, only include payments which you have a contractual obligation to pay and to which your employee had an enforceable right. When variable payments are specified in a contract and those payments are always made, then those payments may become non-discretionary. If that is the case, they should be included when calculating 80% of your employees' wages.

Non-discretionary overtime payments

If your employee has been paid variable payments due to working overtime, you can include these payments when calculating 80% of their wages as long as the overtime payments were non-discretionary.

Payments for overtime worked are non-discretionary when you are contractually obliged to pay the employee at a set and defined rate for the overtime that they have worked.

National Minimum Wage

Individuals are only entitled to the National Living Wage, National Minimum Wage or Apprentices Minimum Wage 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 wages 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.

Holiday Pay

Furloughed employees continue to accrue leave as per their employment contract.
The employer and employee can agree to vary holiday entitlement as part of the furlough agreement, however almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below.
Employees can take holiday whilst on furlough. Working Time Regulations require holiday pay to be paid at the employee's normal rate of pay or, where the rate of pay varies, calculated on the basis of the average pay received by the employee in the previous 52 working weeks. Therefore, if a furloughed employee takes holiday, the employer should pay their usual holiday pay in accordance with the Working Time Regulations

4.6. This Guidance states that employees can take holiday whilst furloughed but it does not cast any light on whether the employer can instruct the employee to take furlough.

Employers will be obliged to pay additional amounts over the grant, though will have the flexibility to restrict when leave can be taken if there is a business need. This applies for both the furlough period and the recovery period.
If an employee usually works bank holidays then the employer can agree that this is included in the grant payment. If the employee usually takes the bank holiday as leave then the employer would either have to top up their usual holiday pay or give the employee a day of holiday in lieu.

4.7. Given that there are a number of bank holidays during the furlough period stipulated by the Government this needs to be kept in mind. The employer can tell the employee that holiday cannot be taken provided that the proper notice is given.

During this unprecedented time, we are keeping the policy on holiday pay during furlough under review.

Employees returning from family-related statutory leave

Family-related statutory leave includes maternity leave, paternity leave, shared parental leave, adoption leave, parental bereavement leave and unpaid parental leave.
For employees on fixed pay, claims for full or part time employees furloughed on return from family-related statutory leave should be calculated against their salary, before tax, not the pay they received whilst on family-related statutory leave. The same principles apply where the employee is returning from a period of unpaid statutory family-related leave.
Claims for those on variable pay, returning from statutory leave should be calculated using the highest of either:

- 80% of the same month's wages from the previous year (up to a maximum of £2,500 a month)
- 80% of the average monthly wages for the 2019 to 2020 tax year (up to a maximum of £2,500 a month)

Employees returning to work after being on sick pay

For employees on fixed pay, claims for full or part time employees furloughed on return to work after time off sick should be calculated against their salary, before tax, not the pay they received whilst off sick.
Claims for those on variable pay, returning to work after time off sick should be calculated using the highest of either:

- 80% of the same month's wages from the previous year (up to a maximum of £2,500 a month)
- 80% of the average monthly wages for the 2019 to 2020 tax year (up to a maximum of £2,500 a month)

Unpaid sabbatical or unpaid leave

If your employee has been on unpaid sabbatical or unpaid leave, you'll need to use the amount they would have been paid if they were on paid leave when calculating 80% of their wages.

Work out the maximum wage amount you can claim

The maximum wage amount you can claim is £2,500 a month, or £576.92 a week, plus any National Insurance and pension contributions you can claim for.

If the length of time you're claiming for is not one week or one month, you'll need to use the daily maximum wage amounts to work out the maximum amount you can claim for each employee.

To work out the maximum amount you can claim, multiply the daily maximum wage amount by the number of days your employee is furloughed for in your claim.

Month	Daily maximum wage amount
+March 2020	**£80.65 per day**
April 2020	**£83.34 per day**
May 2020	**£80.65 per day**
June 2020	**£83.34 per day**

If your employee is furloughed over two calendar months, you'll need to calculate the maximum amount for each calendar month and add them together.

If you're claiming for multiple pay periods in one claim, you can calculate the total maximum using a mixture of:

- the daily maximum wage amount
- the weekly maximum wage amount
- the monthly maximum wage amount

EXAMPLES

1.1 Example of working out the maximum wage amount for part of a pay period

A Limited company pays all of their employees weekly on each Friday and puts all of their employees on furlough on Wednesday 8 April 2020.

A Ltd will need to calculate the grant using the daily calculation for the first pay period which ends on Friday 10 April 2020. This is £83.34 multiplied by 3 days, which is £250.02.

For the next pay period, 11 April 2020 to 17 April 2020, the maximum amount is £576.92 because the pay period is a whole week, and the employee is furloughed on each day.

A Ltd makes a claim for 8 April 2020 to 17 April 2020. The maximum wage amount that they can claim for is the two amounts added, £826.94.

Read guidance on how to work out the maximum wage amount.

1.2 Example for working out 80% of wages for fixed rate full or part time employees on a salary

Worker started work for B Ltd in 1997 and is paid a regular monthly salary on the last day of each month. The worker agreed to be placed on furlough from 23 March 2020. The worker was paid £2,400 for the last full monthly pay period before 19 March 2020. There are 9 days between 23 March and 31 March.

1. Start with £2,400 (employee's wages)
2. Divide by 31 (the total number of days in March)
3. Multiply by 9 (the number of furlough days in March)
4. Multiply by 80% - which is £557.42

Read guidance on how to work out 80% of wages for fixed rate full or part time employees on a salary.

1.3 Example for working out if your employee has not been paid for a full pay period up to 19 March 2020

Employee started work for B Ltd on 21 February 2020 and is paid on the last day of each month. The employee had not had a full pay period up to 19 March 2020 but was paid £700 as a pro-rata of their salary on 29 February 2020. There are 9 days between 21 February and 29 February. The employee agrees to be furloughed from 25 March 2020. There are 7 days between 25 March and 31 March.

1. Start with £700 (the amount they were paid in their last pay period)

2. Divide by 9 (the number of days in their last pay period – including non-working days)
3. Multiply by 29 (days in February)
4. Divide by 31 (the total number of days in the March pay period)
5. Multiply by 7 (the number of furlough days in the March pay period)
6. Multiply by 80% - which is £407.46

Read guidance on how to work out 80% of wages if your employee has not been paid for a full pay period up to 19 March 2020.

1.4 Example of claiming for the same period last year

A Ltd pays an employee on a weekly basis. The employee's pay period starts on 23 March 2020 and ends on 29 March 2020. The employee was paid £350 for 23 March 2019 to 29 March 2019. The employee was furloughed for the whole week.

1. Start with £350 (the amount they earned in the same period last year)
2. Divide by 7 (the total number of days in this pay period)
3. Multiply by 7 (the number of furlough days in this pay period)
4. Multiply by 80% - this is £280

Read guidance on how to work out 80% of the same month's wages from the previous year.

1.5 Example of working out 80% of average monthly wages for the last tax year

Worker started work for A Ltd in 2010 and was placed on furlough on 23 March 2020, earning £15,000 between 6 April 2019 and 22 March 2020 inclusive. There are 353 days between 6 April 2019 and 22 March 2020. A Ltd is claiming for 23 March to 31 March 2020. There are 9 days between 23 March and 31 March.

1. Start with £15,000 (the amount they earned in the tax year up to the day before they were furloughed)
2. Divide it by 352 (the number of days from the start the tax year, up to the day before they were furloughed)
3. Multiply by 9 (the number of furlough days in this pay period)
4. Multiply by 80% - this is £306.82

Read guidance on how to work out 80% of average monthly wages for the last tax year.

1.6 Example of working out 80% of average monthly wages for the last tax year

Employee started work for A Ltd in 1 May 2019 and was placed on furlough on 23 March 2020, earning £15,000 between 1 May 2019 and 22 March 2020 inclusive. There are 327 days between 1 May 2019 and 22 March 2020. A Ltd is claiming for 23 March to 31 March 2020. There are 9 days between 23 March and 31 March.

1. Start with £15,000 (the amount they earned in the tax year up to the day before they were furloughed)
2. Divide it by 327 (the number of days from the start the tax year, up to the day before they were furloughed)
3. Multiply by 9 (the number of furlough days in this pay period)
4. Multiply by 80% - this is £330.28

Read guidance on how to work out 80% of average monthly wages for the last tax year.

The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction

In this part the first set of Directions are in purple whilst the amendments are in red.

THE REVISED DIRECTIONS ARE DATED 20th MAY 2020

4.8. The Directions are at the heart of the Scheme and have presumably been made pursuant to section 76 of the Act. They are set out in bold below. There was considerable disquiet about aspects of the original directions and some of this has been changed. We set out below the changes in track so that you can see what was amended.

The Directions are structured as follows:

(1) Introduction and Purpose of the Scheme: Paragraphs 1 & 2.
(2) Qualifying employer: 3.1. – 3.2. and more than one PAYE scheme – 4.
(3) Qualifying costs: 5 and 7.1. to 7.15
(4) Furloughed employees – 6 and 13.4.
(5) Expenditure to be reimbursed to the employer: 8.1. – 8.12
(6) Succession – new employer with no qualifying PAYE scheme: 9.
(7) Succession – new employer with qualifying PAYE scheme: 10.
(8) PAYE scheme reorganisations- 11.
(9) Duration – 12.
(10) Definitions – 13.
(11) Other directions – 14.
(12) HMRC accounts – 15.

The Chancellor of the Exchequer issued a new Treasury Direction modifying the effect of the Coronavirus Job Retention Scheme. The Updated Directions:

- Extends the scheme to 30 June 2020,
- Changes the wording the form of agreement required to place an employee on furlough. The new wording removes the explicit requirement in the original Direction that an agreement must be in writing. Paragraph 6.7(b) specifies that the agreement between employer and employee must specify 'the main terms and conditions upon which the employee will cease all work in relation to their employment'. It must be incorporated (expressly or impliedly) into the employee's contract. It must be made in writing 'or confirmed in writing' by the employer. The employer must retain the agreement or confirmation until at least 30 June 2025. **There is no requirement that the employee has signed the agreement.**
- Paragraph 6.3, in relation to SSP, provides that where SSP is in payment or due to be paid, furlough cannot begin until immediately after the end of the "period of incapacity for work" for which the SSP is being paid or due to be paid. It goes on to suggest that the timing of the end of the period of incapacity **should be determined by agreement between the employer and employee.**
- Paragraphs 6.4 and 6.5 go on to set out further detail of how the scheme applies to employees on unpaid leave.

- Paragraph 6.8 sets out detailed guidance on the kinds of study and training that an employee can do while on furlough without breaching the requirement that a furloughed employee do no work for the employer.
- Paragraphs 6.10-6.12 specifically allow pension scheme trustees to continue to do work for the sole purpose of fulfilling their duties.
- Paragraph 7.4 provides that "regular" pay means pay that "cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment". "Relevant matter" is defined by paragraph 7.5 to include business performance, the employee's contribution, the employee's performance of his or her duties, and any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity). Paragraph 7.19 clarifies "variations arising from a non-discretionary payment" to cover payments such as overtime, fees, commission or piece rates, payments made in recognition of the employee undertaking additional or exceptional responsibilities, payments made in recognition of the circumstances in which the employee undertakes his or her duties or the time when they are undertaken, and payments made in recognition of similar matters. Such payments are only covered if a legally enforceable agreement, understanding, scheme, transaction or series of transactions prescribes the method of calculating the amount of wages or salary payable (whether or not that method involves an exercise of discretion).
- **The updated Direction does not , deal with the extension of the scheme to October, which was announced on 12 May, nor the changes to the scheme that are due to take effect in August.**

The agreement must be in writing

4.9. This point is first dealt with because of its importance. By 6.7. of the original Directions it was provided that:

> 6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.

The phrase 'agreed in writing' would imply that the employee must have signed a document which agrees to furlough. However, the Guidance expressly states that the employee does not have to provide a written response. This paragraph generated a great deal of concern. it appears, however, that it is not necessary that there be a document from the employee provided that the document records that an agreement has been reached. See the letter from HMRC in response to the queries I raised on this point attached. The ACAS Furlough letter provides for the employee to sign the agreement – see Appendix 2 - however, the Guidance states that it is not necessary for the employee to respond so that under the Guidance this was not a requirement. The letter from HMRC at Appendix 1 appears to confirm this. Nevertheless, sone acknowledgement of agreement from the employee would be prudent. The new paragraph 6.7. provides:

> 6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if-
> (a) the employer and employee have **agreed** that the employee will cease all work in relation to their employment (such agreement may be made by means of a collective agreement between the employer and a trade union),
> (b) the agreement (including a collective agreement)-
> (i) **specifies** the main terms and conditions upon which the employee will cease all work in relation to their employment,
> (ii) is ***incorporated*** (expressly or impliedly) in the employee's contract, and
> (iii) is **made in writing or confirmed in writing** by the employer (such agreement or confirmation may be in an electronic form such as an email), and
> (c) the agreement (including a collective agreement) or confirmation is retained by the employer until at least 30 June 2025.

The above amendment brings the Directions into line with the Guidance and alleviates the worry that if there was not a signed agreement from the employee a claim could not be made.

(1) Introduction and Purpose of the Scheme: 1 & 2.

> **Introduction**
> **1. This Schedule sets out a scheme to be known as the Coronavirus Job Retention Scheme ("CJRS").**
>
> **Purpose of Scheme**

4.10. By Paragraph 2, the purpose of the Scheme is emphasised as being only for reimbursement of costs incurred as a result of costs of employment of furloughed employee. A claim may not be made if it is abusive or otherwise contrary to the exceptional purpose of the scheme (2.5.). The circumstances in which caveat this applies are not set out. For example, it is against the purpose of the scheme to use the grant as part of notice pay when employees are being made redundant. The idea behind the scheme was to avoid redundancies, though the Guidance does not contain any limitations that relate to purpose. Can it be argued that that using the grant to pay notice money is contrary to the exceptional purpose of the scheme? HMRC have not made this clear in the letter that queried this point.

> Purpose of scheme
> 2.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.
>
> 2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates.
>
> 2.3 The claim must be made in such form and manner and contain such information as HMRC may require at any time (whether before or after payment of the claim) to establish entitlement to payment under CJRS.
>
> 2.4 Before making payment of a CJRS claim, HMRC must, by publicly available guidance, other publication generally available to the public, or such other means considered appropriate by HMRC, inform a person making a CJRS claim that, by making the claim, the person making the claim accepts that-
> (a) a payment made pursuant to such claim is made only for the purpose of CJRS (and in particular as provided by paragraph 2.2), and
> (b) the payment must be returned to HMRC immediately upon the person making the CJRS claim becoming unwilling or unable use the payment for the purpose of CJRS.
> 2.5 No CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purpose of CJRS.

(2) Qualifying employers & more than one PAYE scheme

4.11. By paragraph 3 in order to claim the employer must have a qualifying PAYE scheme and, by paragraph 4, can make claims in respect of each qualifying scheme.

> 3.1 An employer may make a ~~claim for a payment under~~ **CJRS claim** if ~~the following condition is met~~ **the employer has a qualifying PAYE scheme.**
>
> ~~3.2 The employer must have a pay as you earn ("PAYE") scheme registered on HMRC's real time information system for PAYE on 19 March 2020 ("a qualifying PAYE scheme").~~
> 3.2 An employer has a qualifying PAYE scheme if-
> (a) at the time of making the CJRS claim, the employer has a PAYE scheme registered on HMRC's real time information system for PAYE, and
> (b) that scheme was registered as described in paragraph 3.2(a) on or before 19 March 2020.

Employers with more than one PAYE scheme

4. If an employer has more than one qualifying PAYE scheme-

(a) the employer must make a separate claim in relation to each scheme, and

(b) the amount of any payment under CJRS will be calculated separately in relation to each scheme.

4.12. The day is a relevant day, by paragraph 13.1. if it is 28th February 2020 or 19th March 2020.

(3) Qualifying costs: 5 and 7.1. to 7.15~~9~~9

4.13. Paragraphs 5 and 7 set out a formula by which costs will be claimable under the CJRS. By paragraph 5:

Qualifying costs

5. The costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which-

(a) relate to an employee-

(i) to whom the employer made a payment of earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before a day that is a relevant CJRS day,

(ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and

(iii) who is a furloughed employee (see paragraph 6), and

(b) meet the relevant conditions in paragraphs 7.1 to 7.15~~9~~9 in relation to the furloughed employee.

4.14. The conditions set out in paragraph 7 relate to qualifying costs. These cover

- a payment to an employee during a period of furlough.
- £2500 per month, or pro rata (7.1.(b)(i)), or 80% where the employee is paid less than £2500 per month (7.1.(b)(ii)).

Qualifying costs – further conditions

7.1 Costs of employment meet the conditions in this paragraph if-

(a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and

(b) the employee is being paid-

(i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or

(ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.

4.15. The question arises whether the employer must already have made a payment before a claim may be made. The conditions in (a) and (b) must be satisfied which in turn means that the conditions in 7.1. to 7.19 apply (four paragraphs having been added in the revised Directions. **The means that if an employer pays less than 80% the entitlement does not arise.**

Making good underpayments

4.16. By 7.11 where paragraph 7.12 applies, the sum of the original payment described in paragraph 7.12(a) and the further amount described in paragraph 7.12(c) must be treated as having been paid at the time of the payment of the original payment for the purposes of paragraph 7.1(b)(ii).

4.17. By a new paragraph 7.12 underpayments are covered going forward. A three day window up to the third day after the first Direction had originally given to make good any underpayments. This has now been amended in he new paragraph 7.12.so that underpayments can be made good within a reasonable period of time. It is to be noted paragraph 7.12 refers to "**or intends to pay "** and 8.1. refers to sums that **are to be paid** so that it appears (but is not certain) that if it is agreed that a payment was to be made then that should have been sufficient.

7.11 Where paragraph 7.12 applies, the sum of the original payment described in paragraph 7.12(a) and the further amount described in paragraph 7.12(c) must be treated as having been paid at the time of the payment of the original payment for the purposes of paragraph 7.1(b)(ii).

7.12 This paragraph applies where-

~~(a) in the period beginning on 1 March 2020 and ending on the third day after the making this direction an amount by way of wages or salary is paid in respect of a period of employment ("the original payment") to an employee,~~

(a) an amount by way of wages or salary is paid in respect of a period of employment ("the original payment") to an employee,

(b) the original payment is less than the amount required by paragraph 7.1(b)(ii) for the purpose of claiming CJRS,

(c) the employer has paid (or intends to pay within a reasonable period after receiving the payment claimed under CJRS) the employee a further amount ("the further amount") in respect of the period of employment to which the original payment relates, and

~~(c) before making a CJRS claim in respect of the original payment the employer pays the employee a further amount ("the further amount") in respect of the period of employment to which the original payment relates, and~~

(d) the sum of the original payment and the further amount meets the requirements of paragraph 7.1(b)(ii).

4.18. The above refers to a sum that "is paid". This would appear to contemplate a payment already having been made before a claim. However, 8.1. refers to sums that are reasonably expected to be paid. This is important, as an aid to construction of the Directions, since it may be that some employers cannot afford to pay but have agreed that the grant will be paid as soon as the money is received from the Government. Paragraph 8 refers as follows:

"(a) the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee;

(b) any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount;

(c) the amount allowable as a CJRS claimable pension contribution".

Dates of calculation of 80% - treating 28th February as the date

4.19. Now moved from 7.16 to 7.18 and from 7.17 to 7.18, where the latter applies, a person making their first CJRS claim in respect of a fixed rate employee may make that claim as if paragraph 7.7 referred to 28 February 2020 in place of 19 March 2020. By 7.18 where, in anticipation of making the first CJRS claim in respect of the employee mentioned in paragraph 7.17 and before the publication of the direction, the person determined the employee's reference salary as if paragraph 7.7 referred to 28 February 2020. These paragraphs are to ensure that employers who had been working to the 28th February date before it was changed to 19th March remain covered by the scheme.

> 7.~~16~~17 Where paragraph 7.18 applies, a person making their first CJRS claim in respect of a fixed rate employee may make that claim as if paragraph 7.7 referred to 28 February 2020 in place of 19 March 2020.
> 7.18 This paragraph applies where, in anticipation of making the first CJRS claim in respect of the employee mentioned in paragraph 7.16 and before the publication of this direction, the person determined the employee's reference salary as if paragraph 7.7 referred to 28 February 2020.

Non fixed rate employee

4.20. The Directions distinguish between fixed rate and non fixed rate employees. Employees whose salaries fluctuate are calculated under paragraphs 7.2. to 7.6. - it is to be noted that persons who are treated as employees under an LLP may be calculated in the same way. Except for a fixed rate employee, the reference salary of an employee or person treated as an employee (LLPs under 13.3(a)) is the greater of the average monthly or daily salary of pro rata amount paid for the tax year 2019-2020 before the furlough began and the actual amount paid to the employee in the corresponding calendar period in the previous year (7.2.)

- By 13.3.(a), where a person is treated as an employee for the purpose of the Income Tax Acts as being employed by an LLP under a contract of service instead of being a member that person is treated as an employee under the CJRS.
- No account is taken of anything that is not regular salary or wages (7.3.).
- 'Regular' means so much of the amount of salary or wages as:
  (a) cannot vary according to a relevant matter except where the variation arises form a non-discretionary payment under 7.19 and
  (b) arises from a legally enforceable agreement, understanding scheme, transaction or series of transactions.
- 7.5. provides that the 'relevant matters' are (a) the performance of or any part of any business of the employer or any business of a person connected with the employer; (b) the contribution made by the employee to the performance of, or any part of any business, (c) the performance by the employee of any duties of the employment, and (d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).

> 7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-
> (a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and
> (b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

7.3 ~~In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages.~~ The following must not be included in the calculation of an employee's reference salary for the purposes of paragraphs 7.2 and 7.7-

(a) benefits in kind;

(b) anything provided or made available in lieu of a cash payment otherwise payable to the employee (including salary sacrifice schemes);

(c) anything which is not regular salary or wages.

7.4 In paragraph 7.3(c) "regular" in relation to salary or wages means so much of the amount of the salary or wages as-

(a) cannot vary according to a relevant matter except where the variation in the amount arises from a non-discretionary payment (see paragraph 7.19), and

(b) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

7 ~~to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),~~

~~(b) is not conditional on any matter,~~

~~(c) is not a benefit of any other kind, and~~

~~(d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.~~

7.5 ~~The relevant matters are~~ For the purposes of paragraph 7.4(a), the following are relevant matters-

(a) the performance of or any part of any business of the employer or any business of a person connected with the employer,

(b) the contribution made by the employee to the performance of, or any part of any business,

(c) the performance by the employee of any duties of the employment, ~~and~~

(d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).

7.19 A variation in an amount of wages or salary arises from a non-discretionary payment only if-

(a) the payment-

(i) is in respect of overtime, fees, commissions or a piece rate,

(ii) is made in recognition of the employee undertaking additional or exceptional responsibilities,

(iii) is made in recognition of the circumstances in which the employee undertakes the employee's duties or time when they are undertaken, or

(iv) is made in recognition of other matters similar to those described in paragraph 7.19(a)(i) to (iii), and

(b) a legally enforceable agreement, understanding, scheme, transaction or series of transactions prescribe the method of calculating the amount of wages or salary

payable in respect of the payment (whether or not that method involves the exercise of discretion by the employer or a person connected with the employer).

Fixed rate employee:

4.21. A person is fixed rate employee if (7.6.):

(a) the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership),

(b) the person is entitled under their contract to be paid an annual salary,

(c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),

(d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,

(e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and

(f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.

4.22. By 7.7. the reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3).

4.23. By 7.8 in paragraph 7.6 "contract" means a legally enforceable agreement as described in paragraph 7.4(d). ~~(ie. which arises from a legally enforceable agreement, understanding scheme, transaction or series of transactions).~~

7.6 A person is a fixed rate employee if-

(a) the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership),

(b) the person is entitled under their contract to be paid an annual salary,

(c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),

(d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,

(e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and

(f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.

7.7 The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3).

7.8 In paragraph 7.6 "contract" means a legally enforceable agreement as described in paragraph 7.4(d).

7.9 In calculating an employee's reference salary in accordance with paragraphs 7.2 or 7.7 in the case of a person ("P") treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) then, in addition to the matters described in paragraphs 7.3 to 7.5, no account is to be taken of an amount payable to P unless, by virtue of arrangements described in section 863B(5) of the Income Tax (Trading and Other Income) Act 2005, that amount-

(a) is fixed,

(b) is variable, but is varied without reference to the overall amount of the profits or losses of the limited liability partnership, or

(c) Is not, in practice, affected by the overall amount of those profits or losses.

Unpaid sabbatical or unpaid leave

4.24. By 7.10, in relation to a fixed rate employee, where a period by reference to which the reference salary is determinable ("reference salary period") includes a period of unpaid sabbatical or unpaid leave ("unpaid period"), the reference salary must be determined on the basis of what would have been paid to the employee during the unpaid period if the sabbatical or leave had been granted on the same terms as the employee's paid leave during the reference salary period taking account of the matters described in paragraphs 7.13 to 7.16 as are appropriate. This paragraph is aimed at ensuring employees that have taken unpaid leave are still paid in accordance with the salary they would normally expect if they were on holiday and being paid in full.

- By 7.13, the holiday entitlement is what the employee would have been entitled to under the WTR 1998 and the references to unpaid leave and unpaid sabbatical include references to statutory payment leave and reduced paid leave.
- By 7.14, statutory payment leave covers statutory sick pay or the statutory payments in 8.7. or shared parental leave.

4.25 Paragraph 8.7 covers:

1. Statutory Maternity Pay pursuant to section 164 of SSCBA or section 160 of SSCB(NI)A;
2. Statutory Adoption Pay pursuant to section 171ZL of SSCBA or section 167ZL of SSCB(NI)A;
3. Statutory Paternity Pay pursuant to sections 171ZA and 171ZB of SSCBA or sections 167ZA and 167ZB of SSCB(NI)A;
4. Statutory Shared Parental Pay pursuant to sections 171ZU and 171ZV of SSCBA or sections 167ZU and 167 ZW of SSCB(NI)A;
5. Statutory Parental Bereavement Pay pursuant to section 171ZZ6 of SSCBA or any provision made for Northern Ireland which corresponds to that section.

7.10 In respect of a fixed rate employee, where a period by reference to which the reference salary is determinable ("reference salary period") includes a period of unpaid sabbatical or unpaid leave ("unpaid period"), the reference salary must be determined on the basis of what would have been paid to the employee during the unpaid period if the sabbatical or leave had been granted on the same terms as the employee's paid leave during the reference salary period taking account of the matters described in paragraphs 7.13 to 7.16 as are appropriate**.**

7.13 ~~**The provision made by paragraph 7.10 applies in relation to a fixed rate employee who is a relevant employee as if the references to unpaid sabbatical and unpaid leave also include references to social benefit leave.**~~ In paragraph 7.10-

(a) the reference to the terms of an employee's paid leave during a reference salary period is a reference to the terms applying in respect of the annual leave to which the employee would have been entitled to be paid pursuant to regulation 16 of the Working Time Regulations 1998 or regulation 20 of the Working Time (Northern Ireland) Regulations 2016 ("paid annual leave") if the period of unpaid leave had been a period of paid annual leave;

(b) the references to unpaid sabbatical and unpaid leave also include references to-

(i) statutory payment leave, and

(ii) reduced rate paid leave

7.14 ~~A person is a relevant employee if-~~

~~(a) the person is employed by an employer,~~

~~(b) the person has been granted a period of social benefit leave beginning before the period mentioned in paragraph 12 (duration of CJRS),~~

~~(c) at the time when it began, it was expected or considered likely that the period of social benefit leave would end at a time falling during the period mentioned in paragraph 12,~~
~~(d) the period of social benefit leave ended during the period mentioned in paragraph 12, and~~
~~(e) the period of furlough in respect of the person began after the end of the period of social benefit leave.~~ In paragraph 7.13(b)(i), "statutory payment leave" means a period of leave-

(a) in respect of which statutory sick pay or any of the statutory payments specified in paragraph 8.7 is in payment or due to be paid, or

(b) which is a period of shared parental leave as provided for by regulations made pursuant to sections 75E and 75G of the Employment Rights Act 1996 or articles 107E and 107G of the Employment Rights (Northern Ireland) Order 1996 (whether or not statutory shared parental pay described in paragraph 8.7(d) is in payment or due to be paid in respect of that period).

7.15 ~~For the purposes of paragraphs 7.13 and 7.14, social benefit leave means a period of time in respect of which any of the benefits specified in paragraph 8.7 is payable in respect of the person described in paragraph 7.14(a).~~ In paragraph 7.13(b)(ii), "reduced rate paid leave" means a period of leave granted immediately following the ending of a period of statutory payment leave on terms that are not the terms which would have applied to that period of leave if the leave had been granted on the same terms that would have applied if the leave had been a part of the employee's statutory leave entitlement.

7.16 For the purposes of paragraph 7.14(a), it does not matter if, by virtue of a legally enforceable agreement, understanding, scheme, transaction or series of transactions, the person described in that paragraph has been paid an amount in excess of the amount otherwise payable by way of statutory sick pay or the statutory payments specified in paragraph 8.7 to which the statutory payment leave relates.

(4) Furloughed employees - 6 & 13.4.

4.26. The conditions for being a furloughed employee are set out in paragraph 6, and are that:

(i) The employee has been instructed to cease all work.

(ii) The period is 21 calendar days or more.

(iii) The instruction is given as a result of coronavirus or coronavirus disease.

6.1 An employee is a furloughed employee if-

(a) the employee has been instructed by the employer to cease all work in relation to their employment,

(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

Instructions to cease all work

4.27. Paragraph 6.7. provides for the definition of instruction to cease all work.

6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if-

(a) the employer and employee have agreed that the employee will cease all work in relation to their employment (such agreement may be made by means of a collective agreement between the employer and a trade union),

(b) the agreement (including a collective agreement)-

(i) specifies the main terms and conditions upon which the employee will cease all work in relation to their employment,

(ii) is incorporated (expressly or impliedly) in the employee's contract, and
(iii) is made in writing or confirmed in writing by the employer (such agreement or confirmation may be in an electronic form such as an email), and

(c) the agreement (including a collective agreement) or confirmation is retained by the employer until at least 30 June 2025.

Connected employer

4.28. By paragraph 6.2. an employee will not have ceased work if working for a connected employer as defined in paragraph 13.4.

> 6.2 An employee has not ceased all work for an employer if the employee works for a person connected with the employer (see paragraph 13.4) or otherwise works indirectly for the employer.

4.29. Paragraph 13.4. provides that for the purposes of determining whether a person, company or charity is connected with an employer for the purposes of CJRS-

(a) whether a person is connected with an employer must be determined in accordance with section 993 of the Income Tax Act 2007 (13.4.(a).

(b) without prejudice to paragraphs 13.4(a) and 13.4(c), whether a company is connected with an employer (where the employer is a company) must be determined in accordance with section 1122 of CTA.

(c) without prejudice to paragraphs 13.4(a) and 13.4(b), whether a charity is connected with an employer (where the employer is a charity) must be determined in accordance with section 5 of SCDA construed as if-

(i) references to a tax year in that section were omitted, and
(ii) subsection (7) of that section were omitted.

> 13.4 For the purposes of determining whether a person, company or charity is connected with an employer for the purposes of CJRS-
> (a) whether a person is connected with an employer must be determined in accordance with section 993 of the Income Tax Act 2007;
> (b) without prejudice to paragraphs 13.4(a) and 13.4(c), whether a company is connected with an employer (where the employer is a company) must be determined in accordance with section 1122 of CTA;
> (c) without prejudice to paragraphs 13.4(a) and 13.4(b), whether a charity is connected with an employer (where the employer is a charity) must be determined in accordance with section 5 of SCDA construed as if-
> (i) references to a tax year in that section were omitted, and
> (ii) subsection (7) of that section were omitted.

4.30. Section 993 of the ITA 2007 provides:

> **993 Meaning of "connected" persons**
> (1) This section has effect for the purposes of the provisions of the Income Tax Acts which apply this section.
> (2) An individual ("A") is connected with another individual ("B") if—
> (a) A is B's spouse or civil partner,
> (b) A is a relative of B,
> (c) A is the spouse or civil partner of a relative of B,
> (d) A is a relative of B's spouse or civil partner, or
> (e) A is the spouse or civil partner of a relative of B's spouse or civil partner.

(3) A person, in the capacity as trustee of a settlement, is connected with—
(a) any individual who is a settlor in relation to the settlement,
(b) any person connected with such an individual,
(c) any close company whose participators include the trustees of the settlement,
(d) any non-UK resident company which, if it were UK resident, would be a close company whose participators include the trustees of the settlement,
(e) any body corporate controlled (within the meaning of section 995) by a company within paragraph (c) or (d),
(f) if the settlement is the principal settlement in relation to one or more sub-fund settlements, a person in the capacity as trustee of such a sub-fund settlement, and
(g) if the settlement is a sub-fund settlement in relation to a principal settlement, a person in the capacity as trustee of any other sub-fund settlements in relation to the principal settlement.

(4) A person who is a partner in a partnership is connected with—
(a)any partner in the partnership,
(b)the spouse or civil partner of any individual who is a partner in the partnership, and
(c)a relative of any individual who is a partner in the partnership.
But this subsection does not apply in relation to acquisitions or disposals of assets of the partnership pursuant to genuine commercial arrangements.

(5) A company is connected with another company if—
(a) the same person has control of both companies,
(b) a person ("A") has control of one company and persons connected with A have control of the other company,
(c) A has control of one company and A together with persons connected with A have control of the other company, or
(d) a group of two or more persons has control of both companies and the groups either consist of the same persons or could be so regarded if (in one or more cases) a member of either group were replaced by a person with whom the member is connected.

(6) A company is connected with another person ("A") if—
(a) A has control of the company, or
(b) A together with persons connected with A have control of the company.

(7) In relation to a company, any two or more persons acting together to secure or exercise control of the company are connected with—
(a) one another, and
(b) any person acting on the directions of any of them to secure or exercise control of the company.

Statutory sick pay

4.31. By paragraph 6.3. in calculating the period of 21 days, where SSP is payable that period is to be disregarded.

4.32. By 6.3 where Statutory Sick Pay is payable or liable to be payable in respect of an employee (whether or not a claim to Statutory Sick Pay is made) at the time when the instruction in paragraph 6.1(a) is given ("original SSP"), the period described in paragraph 6.1(b) in respect of the employee does not begin until the original SSP has ended (but any subsequent entitlement to Statutory Sick Pay by virtue of the employee becoming unfit for work again after the original SSP has ended must be disregarded).

6.3 Where Statutory Sick Pay is ~~payable~~ in payment or due to be paid ~~or liable to be payable~~ in respect of an employee ~~(whether or not a claim to Statutory Sick Pay is made)~~ at the time when the instruction in paragraph 6.1(a) is given ~~("original SSP"),~~ the period described in paragraph 6.1(b) in respect of the employee does not begin until ~~the original SSP has ended (but any subsequent entitlement to Statutory Sick Pay by virtue of the employee becoming unfit for work again after the original SSP has ended must be disregarded).~~ immediately after the end of the period of incapacity for work for which the Statutory Sick Pay is in payment or due to be paid (provided that the time of the end of that period of incapacity for work is determined by an agreement between the employer and employee).

4.33. This provision appears to be incompatible with the Guidance which provides that, in effect, the employee may be taken off sick pay and then furloughed. The original phrase "payable or liable to be payable in respect of an employee (whether or not a claim to Statutory Sick Pay is made)" would appear to have meant that if SSP is payable at all then the scheme does not apply. This would mean that an employer cannot access the scheme if there was an SSP entitlement, whether or not a claim was made for SSP. The effect would be that the scheme would not apply where SSP is payable except for Shielding employees prior to 15th April when the deeming provision came in. This is certainly not what the Guidance stated or what was intended. The wording has now been changed so that it states that the **employer and employee can agree that the period of incapacity is to be ended ('determined').**

Unpaid Sabbatical or unpaid leave.

4.34. Paragraphs 6.4. and 6.5. make it clear that periods of unpaid sabbatical or unpaid leave are to be disregarded where it has been agreed, the period was contemplated, or where its duration was uncertain but calculated by reference to particular circumstance, completion of a particular purpose or occurrence of a specified event, whether taken before 28th February or after 19th Marc

4.35. By 6.4, no claim to CJRS may be made in respect of an unpaid sabbatical or other period of unpaid leave. By 6.5. where the period began between 1st March and 30th June (paragraph 12) no claim can be made before the expiry of the period of relevant leave agreed or contemplated at the time when it began or where the duration of the relevant unpaid leave was uncertain at the time when it began because of its duration being determinable by reference to a particular circumstance, completion of a particular purpose or occurrence of a specified event, the time of the ending of the circumstance, completion of the purpose or occurrence of the event.

4.36. By 6.5.(b) ands (c) a relevant variation which is an agreement or arrangement (and if more than one, the latest of them) intended to determine the time of the ending of a period of relevant unpaid leave made after the time when the period of relevant unpaid leave began, and before 20 March 2020, which has effect between 1st March and 30th June shall have the effect on paragraph 6.5.(a) that references to the time when the relevant unpaid leave began shall be treated as references to the time when the relevant variation was made

~~6.4 If an employee was enjoying an unpaid sabbatical or other period of unpaid leave on 28 February 2020 ("relevant day"), the period described in paragraph 6.1(b) does not begin in respect of the employee until expiry of the period of leave agreed or contemplated at its commencement or, where the duration of the leave was uncertain on the relevant day because its duration is determinable by reference to a particular circumstance, completion of a particular purpose or occurrence of a specified event, the ending of the circumstance, completion of the purpose or occurrence of the event.~~

~~6.5 No claim to CJRS may be made in respect of an unpaid sabbatical or other period of unpaid leave of an employee beginning before or after 19 March 2020 (whether agreed or otherwise arranged conditionally or unconditionally on, before or after that day)~~

6.4 Where, during the period mentioned in paragraph 12, a period of unpaid sabbatical or other period of unpaid leave is enjoyed by an employee ("unpaid leave")-

(a) no CJRS claim may be made in respect of the period of unpaid leave,

(b) the period described in paragraph 6.1(b) must not begin during the period of unpaid leave.

6.5 Where a period of unpaid leave began before the period mentioned in paragraph 12 ("relevant unpaid leave")-

(a) the period described in paragraph 6.1(b) must not begin before-

(i) the expiry of the period of the relevant unpaid leave agreed or contemplated at the time when it began, or

(ii) where the duration of the relevant unpaid leave was uncertain at the time when it began because of its duration being determinable by reference to a particular circumstance, completion of a particular purpose or occurrence of a specified event, the time of the ending of the circumstance, completion of the purpose or occurrence of the event;

(b) where a relevant variation has effect in relation to a period of relevant unpaid leave, paragraph 6.5(a) must be construed as if references to the time when the relevant unpaid leave began were references to the time when the relevant variation was made;

(c) a relevant variation is an agreement or arrangement (and if more than one, the latest of them) intended to determine the time of the ending of a period of relevant unpaid leave made-

(i) after the time when the period of relevant unpaid leave began, and

(ii) before 20 March 2020.

Company director

4.37. Paragraph 6.6. specifies that work taken by a director to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company is to be disregarded. This appears tighter than the Guidance which refers to the director performing statutory duties.

~~6.6 Work undertaken by a director of a company to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company must be disregarded for the purposes of paragraph 6.1(a).~~

6.6 Work undertaken by a director of a company must be disregarded for the purposes of paragraphs 6.1 and 6.2 if the work undertaken directly relates to-

(a) fulfilling a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company,
(b) making a CJRS claim in respect of an employee of the director's company, or
(c) making a payment of salary or wages of an employee of the director's company.

Training

4.38. By 6.8. training is to be disregarded.

~~6.8 Training activities directly relevant to an employee's employment agreed between the employer and the employee before being undertaken must be disregarded for the purposes of paragraph 6.1(a).~~

6.8 Study or training undertaken must be disregarded for the purposes of paragraphs 6.1 and 6.2 if-
(a) the purpose of the study or training is to improve-
(i) an employee's effectiveness in the employer's business, or
(ii) the performance of the employer's business,
(b) except as generally improving an employee's effectiveness in, or the performance of, an employer's business, the study or training does not directly-
(i) provide a service to the employer or the business activities of the employer, or
(ii) contribute to the business activities of the employer or anything generating income or profit for the employer, and
(c) the study or training undertaken does not directly contribute to any significant degree-
(i) in the production of goods the employer intends to supply to another person as part of the making of a supply of goods or services for a consideration to that person, or
(ii) in the making to any person of a supply of services for a consideration by the employer.

6.9 References to "employer" in paragraphs 6.8(b) and 6.8(c) include a person connected with the employer.

(5) Reimbursement of Expenditure to the employer - 8.1. -8.12.

4.39. Paragraph 8 sets out the sums that will be reimbursed to the employer. By paragraph 8.1. the payment may reimburse:

(a) **the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee.** By 8.2 the amount to be paid to reimburse the gross amount of earnings must (subject to paragraph 8.6) not exceed the lower of (a) £2,500 per month, and (b) the amount equal to 80% of the employee's reference salary (see paragraphs 7.1 to 7.15).

Expenditure to be reimbursed

8.1 Subject as follows, on a claim by an employer for a payment under CJRS, the payment may reimburse-
(a) the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee;
(b) any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount;
(c) the amount allowable as a CJRS claimable pension contribution.

8.2 The amount to be paid to reimburse the gross amount of earnings must (subject to paragraph 8.6) not exceed the lower of-
(a) £2,500 per month, and
(b) the amount equal to 80% of the employee's reference salary (see paragraphs 7.1 to 7.19).

(b) **any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount**. By 8.3 the amount to be paid to reimburse any employer national insurance contributions must not exceed the amount of employer's contributions that would have been assessed on the amount of gross earnings being reimbursed under CJRS; and, by 8.4, the total amount to be paid to reimburse any employer national insurance contributions must not exceed the total amount of employer's contributions actually paid by the employer for the period of the claim. By 8.5, for the purposes of CJRS, "employer national insurance contributions" are the secondary Class 1 contributions an employer is liable to pay as a secondary contributor in respect of an employee by virtue of sections 6 and 7 of the Social Security Contributions and Benefits Act 1992 ("SSCBA") or sections 6 and 7 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 ("SSCB(NI)A").

8.3 The amount to be paid to reimburse any employer national insurance contributions must not exceed the amount of employer's contributions that would have been assessed on the amount of gross earnings being reimbursed under CJRS.

8.4 The total amount to be paid to reimburse any employer national insurance contributions must not exceed the total amount of employer's contributions actually paid by the employer for the period of the claim.
8.5 For the purposes of CJRS, "employer national insurance contributions" are the secondary Class 1 contributions an employer is liable to pay as a secondary contributor in respect of an employee by virtue of sections 6 and 7 of the Social Security Contributions and Benefits Act 1992 ("SSCBA") or sections 6 and 7 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 ("SSCB(NI)A").

(c) **the amount allowable as a CJRS claimable pension contribution.** See Paragraphs 8.8. to 8.12. below.

4.40. It is clear that you first calculate the gross amount paid and then apply the 80%.

4.41. As noted, 8.1. would appear to mean that if you have agreed what is to be paid to the employee, then this is covered even if the sum has not yet been paid.

Pension contributions

4.42. By 8.8 a payment by an employer of a pension contribution in respect of an employee to a registered pension scheme is a CJRS claimable pension contribution if it is paid in respect of an amount of gross earnings as described in paragraph 8.1(a). By 8.9, the amount allowable as a CJRS claimable pension contribution under paragraph 8.1(c) is the lower of-

(a) the contribution payable by the employer in respect of the employee to the registered pension scheme for the relevant CJRS period, and

(b) 3% of the part of the gross earnings paid to an employee in a pay reference period as applicable to the employee of 12 months that are-

(i) more than the lower limit for qualifying earnings in that pay reference period (as set out in section 13(1)(a) of the Pensions Act 2008), and

(ii) not more than the amount claimable by the employer under CJRS in respect of an amount of gross earnings as described in paragraph 8.1(a) in the same pay reference period.

4.43. By paragraph 8.10 in the case of a pay reference period of less or more than 12 months, paragraph 8.9(b) applies as if the amounts described in that paragraph were proportionately less or more as appropriate.

4.44 By Paragraph 8.11, for the purposes of determining whether sub-paragraph (a) or sub-paragraph (b) is applicable in paragraph 8.9-

(a) the same duration of relevant CJRS period and pay reference period shall be used to compare the lower of the amounts under sub-paragraphs 8.9(a) and 8.9(b),

(b) whichever sub-paragraph produces the lower of these two amounts shall be the relevant sub-paragraph for the purposes of determining the amount allowable to be paid as a CJRS claimable pension contribution under paragraph 8.1(c), and

(c) the duration of the period used to compare sub-paragraphs 8.9(a) and 8.9(b) is not required to be identical to the period for determining the actual amount allowable that is to be paid under paragraph 8.1(c).

4.45. By 8.12, For the purposes of paragraphs 8.8 to 8.11-

(a) "registered pension scheme" means a pension scheme for the purposes of Part 4 of the Finance Act 2004;

(b) "pay reference period" has the meaning given in section 15 of the Pensions Act 2008 and regulations made thereunder;

(c) "relevant CJRS period" means the period, part-period or periods over which the employer is required or accustomed to pay pension contributions in respect of the employee that fall within the period of the claim for a payment under CJRS.

8.8 A payment by an employer of a pension contribution in respect of an employee to a registered pension scheme is a CJRS claimable pension contribution if it is paid in respect of an amount of gross earnings as described in paragraph 8.1(a).
8.9 The amount allowable as a CJRS claimable pension contribution under paragraph 8.1(c) is the lower of-
(a) the contribution payable by the employer in respect of the employee to the registered pension scheme for the relevant CJRS period, and
(b) 3% of the part of the gross earnings paid to an employee in a pay reference period as applicable to the employee of 12 months that are-
(i) more than the lower limit for qualifying earnings in that pay reference period (as set out in section 13(1)(a) of the Pensions Act 2008), and
(ii) not more than the amount claimable by the employer under CJRS in respect of an amount of gross earnings as described in paragraph 8.1(a) in the same pay reference period.
8.10 In the case of a pay reference period of less or more than 12 months, paragraph 8.9(b) applies as if the amounts described in that paragraph were proportionately less or more as appropriate.
8.11 For the purposes of determining whether sub-paragraph (a) or sub-paragraph (b) is applicable in paragraph 8.9-

(a) the same duration of relevant CJRS period and pay reference period shall be used to compare the lower of the amounts under sub-paragraphs 8.9(a) and 8.9(b),
(b) whichever sub-paragraph produces the lower of these two amounts shall be the relevant sub-paragraph for the purposes of determining the amount allowable to be paid as a CJRS claimable pension contribution under paragraph 8.1(c), and
(c) the duration of the period used to compare sub-paragraphs 8.9(a) and 8.9(b) is not required to be identical to the period for determining the actual amount allowable that is to be paid under paragraph 8.1(c).
8.12 For the purposes of paragraphs 8.8 to 8.11-
(a) "registered pension scheme" means a pension scheme for the purposes of Part 4 of the Finance Act 2004;
(b) "pay reference period" has the meaning given in section 15 of the Pensions Act 2008 and regulations made thereunder;
(c) "relevant CJRS period" means the period, part-period or periods over which the employer is required or accustomed to pay pension contributions in respect of the employee that fall within the period of the claim for a payment under CJRS.

Further definitions - Statutory benefits

4.46. By 8.6 no claim under CJRS may include amounts specified statutory payments in respect of an employee during the employee's period of furlough and the gross amount of earnings falling for reimbursement as described in paragraph 8.2 must be correspondingly reduced. These benefits are set out in and cover Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption, Statutory Paternity. Statutory Shared Parental Pay and Statutory Parental Bereavement Pay.

8.6 No claim under CJRS may include amounts of specified benefits payable or liable to be payable in respect of an employee (whether or not a claim to the relevant specified benefit is actually made) during the employee's period of furlough and the gross amount of earnings falling for reimbursement as described in paragraph 8.2 must be correspondingly reduced.
8.7 The specified benefits for the purposes of paragraph 8.6 are-
(a) ~~Statutory Sick Pay pursuant to section 151 of SSCBA or section 147 of SSCB(NI)A;~~
Statutory Maternity Pay pursuant to section 164 of SSCBA or section 160 of SSCB(NI)A;
(b) Statutory Adoption Pay pursuant to section 171ZL of SSCBA or section 167ZL of SSCB(NI)A;
(c) Statutory Paternity Pay pursuant to sections 171ZA and 171ZB of SSCBA or sections 167ZA and 167ZB of SSCB(NI)A;
(d) Statutory Shared Parental Pay pursuant to sections 171ZU and 171ZV of SSCBA or sections 167ZU and 167 ZW of SSCB(NI)A;
(e) Statutory Parental Bereavement Pay pursuant to section 171ZZ6 of SSCBA or any provision made for Northern Ireland which corresponds to that section.

(6) Succession to a business – new employer has no qualifying PAYE scheme – 9.

4.47. Paragraph 9 provides that a claim may be made by a new employer under a TUPE transfer where there is a change in employer after 19th March and the new employer sets up a scheme if, immediately before the change, the former employer's PAYE scheme having effect in relation to the employee was a qualifying PAYE scheme.

9.1 A new employer may make a claim for a payment under CJRS in respect of a relevant employee as if the new employer had-

(a) a qualifying PAYE scheme, and
(b) made a payment of earnings in respect of a relevant transferred employee the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations made on or before 19 March 2020.

9.2 An employer is a new employer for the purposes of CJRS if the employer's PAYE scheme–
~~(a)~~ is not a qualifying PAYE scheme solely because the employer's PAYE scheme was registered on HMRC's real time information for PAYE after 19 March 2020, ~~and~~
~~(b) has effect in relation to the relevant employee.~~

9.3 An employee is a relevant employee if paragraph 9.4 or 9.6 applies in relation to the employee.

~~(a) on 19 March 2020, the employee was employed by an employer (former employer) who is not the new employer,~~
~~(b) after 19 March 2020, there is a change in the employee's employer from the former employer to the new employer while the employee remains in employment in the same business,~~
~~(c) immediately before the change, the former employer's PAYE scheme having effect in relation to the employee was a qualifying PAYE scheme, and~~

9.4 This paragraph applies in relation to an employee if-
(a) on 28 February 2020, the employee was employed by an employer ("former employer") who is not the new employer,
(b) after 28 February 2020, there is a change in the employee's employer from the former employer to the new employer while the employee remains in employment in the same business,
(c) immediately before the change, the former employer's PAYE scheme having effect in relation to the employee was a qualifying PAYE scheme,
(d) any of the circumstances in paragraph 9.5 apply.

9.5 The circumstances referred to by paragraph 9.4(d) are-
(a) regulation 102 of the PAYE Regulations has effect so that the change of employer from the former employer to the new employer is not to be treated as a cessation of employment for the purposes of regulation 36 of those Regulations (cessation of employment: Form P45);
(b) the transfer of the business or undertaking (or part thereof) resulting in the change in the employee's employer from the former employer to the new employer does not operate so as to terminate the contract of employment of the employee by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE");
(c) the transfer of the trade, business or undertaking resulting in the change in the employee's employer from the former employer to the new employer does not operate so as to break the continuity of the period of employment of the employee by virtue of section 218 of the Employment Rights Act 1996.

9.6 This paragraph applies in relation to an employee if-
(a) on 28 February 2020, the employee was employed by an employer ("former employer") who is not the new employer,
(b) in the period beginning on 1 March 2020 and ending on 30 June 2020, the employee's employment with the former employer is terminated before the time of the relevant transfer,
(c) the sole or principal reason for the termination of the employee's employment is the relevant transfer,
(d) the sole or principal reason for the employee's employment by the new employer is the relevant transfer,
(e) the employee's employment by the new employer begins on the day when the employee's employment with the former employer is terminated,

(f) Immediately before the termination of the employee's employment, the former employer's PAYE scheme having effect in relation to the employee was a qualifying PAYE scheme, and
(g) paragraph 9.7 applies in relation to the employee's former employer.

9.8 For the purposes of paragraphs 9.6 and 9.7, "relevant transfer" means a transfer of a business or undertaking (or part thereof) resulting in the change in the employee's employer from the former employer to the new employer that falls as a "relevant transfer" for the purposes of TUPE.

9.9 In relation to Northern Ireland-
(a) the reference in paragraph 9.5(c) to section 218 of the Employment Rights Act 1996 must be construed as a reference to article 14 of the Employment Rights (Northern Ireland) Order 1996, and
(b) the reference in paragraph 9.7(b) to Chapter 6 of Part 4 of the Insolvency Act 1986 must be construed as a reference to Chapter 6 of Part 5 of the Insolvency (Northern Ireland) Order 1989.

9.10 This paragraph applies where-
(a) a CJRS claim by a former employer in respect of a relevant transferred employee would not be possible only because the relevant transfer made by the former employer occurs before the expiry of the period required by paragraph 6.1(b), and
(b) the new employer makes a CJRS claim in respect of the relevant transferred employee mentioned in paragraph 9.10(a) for a period beginning immediately after the relevant transfer mentioned in that paragraph.

9.11 Where paragraph 9.10 applies, the former employer mentioned in paragraph 9.10(a) may make a CJRS claim in respect of the relevant transferred employee as if the relevant transferred employee had ceased all work for the employer for 21 calendar days or more at the time of the relevant transfer for the purposes of paragraph 6.1(b), but this is subject to-
(a) satisfying all other requirements relating to the making of a CJRS claim, and
(b) the claim not relating to a time before the employee ceased all work for the former employer.

9.12 In paragraphs 9.10 and 9.11, references to-
(a) "new employer" include an employer who makes a CJRS claim by virtue of paragraph 10.2;
(b) "relevant transfer" are references to-
  (i) an event by which an employee's employer changes from a former employer to a new employer in respect of an employee who is a relevant transferred employee because paragraph 9.4 applies in relation to the employee;
  (ii) an event that falls as a relevant transfer described in paragraph 9.8 in respect of an employee who is a relevant transferred employee because paragraph 9.6 applies in relation to the employee.

~~(d) any of the circumstances in paragraph 9.10 apply.~~

~~10. The circumstances referred to by paragraph 9.3(d) are-~~
~~(a) regulation 102 of the PAYE Regulations has effect so that the change of employer from the former employer to the new employer is not to be treated as a cessation of employment for the purposes of regulation 36 of those Regulations (cessation of employment: Form P45);~~
~~(b) the transfer of the business or undertaking (or part thereof) resulting in the change in the employee's employer from the former employer to the new employer does not operate so as to terminate the contract of employment of the employee by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006;~~
~~(c) the transfer of the trade, business or undertaking resulting in the change in the employee's employer from the former employer to the new employer does not operate so as to break the continuity of the period of employment of the employee by virtue of section 218 of the Employment Rights Act 1996.~~

(7) Succession to a business – new employer already has a qualifying PAYE scheme – 10.

4.48. Paragraph 10 deems the new employer to have made payments where the transferee already has a PAYE scheme.

> 10.1 Paragraph 10.2 applies in a case where ~~– (a)~~ an employer is unable to make a claim to CJRS pursuant to paragraphs 9.1 to 9.9 solely because the employer has a qualifying PAYE scheme, ~~and (b) that qualifying PAYE scheme has effect in relation to a relevant employee.~~
>
> 10.2 Where this paragraph applies, (subject to fulfilling all other requirements for making a CJRS claim) ~~entitlement to a claim to~~ a CJRS claim may be made ~~must be determined~~ as if the employer had made a payment of earnings ~~to~~ in respect of the relevant employee in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before 19 March 2020. ~~(as required by paragraph 5.(a)(i)).~~

(8) PAYE scheme reorganisations – 11.

4.49. Paragraph 11 provides for circumstances in which there is a reorganisation to replace two PAYE schemes in consequence of a reorganisation of the employer's business and the new scheme applies to employees who are former members of one of the transferred schemes before the new scheme has effect in relation to any other employee.

> 11.1 A PAYE scheme registered on HMRC's real time information system for PAYE after 19 March 2020 ("new scheme") is a qualifying PAYE scheme if-
>
> (a) the purpose of the new scheme is to replace at least two (but not necessarily all) of the employer's qualifying PAYE schemes ("the transferred schemes") in consequence of a reorganisation of the employer's business, and
>
> (b) the new scheme only has effect in relation to employees who are former members of one of the transferred schemes before the new scheme has effect in relation to any other employee.
>
> 11.2 An employee is a former member of one of the transferred schemes if-
>
> (a) the new scheme has effect in relation to the employee, and
>
> (b) one of the transferred schemes has effect in relation to the employee immediately before the new scheme has effect in relation to the employee.
>
> 11.3 Where a new scheme is a qualifying PAYE scheme by virtue of paragraph 11.1, a payment of earnings to a former member of one of the transferred schemes in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations made on or before 19 March 2020 in respect of one of the transferred schemes must be treated for the purposes of paragraph 5.(a)(i) as if the new scheme had effect in relation to the payment of earnings and had been shown in a return under Schedule A1 to the PAYE Regulations made on or before 19 March 2020 in respect of the new scheme.

(9) Duration of CJRS & Definitions - 12 & 13

4.50. By paragraph 12 the scheme covers the period March to June. Paragraph 13 contains various definitions.

> **12. CJRS has effect only in relation to amounts of earnings paid or payable by employers to furloughed employees in respect of the period beginning on 1 March 2020 and ending on 30th June 2020 and employer national insurance contributions and directed pension payments paid or payable in relation to such earnings.**

Definitions

Definitions etc.

13.1 For the purposes of CJRS-

(a) a day is a relevant CJRS day if that day is-
  (i) 28 February 2020, or
  (ii) 19 March 2020.

(b) "charity" has the same meaning as it does in section 18 of the Small Charitable Donations Act 2012 ("SCDA");

(c) "collective agreement" has the meanings given by section 178(1) and (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to England and Wales and Scotland and Article 2(2) of the Industrial Relations (Northern Ireland) Order 1992 in relation to Northern Ireland;

(d) "company" has the same meaning as it does for the purposes of the Corporation Tax Acts set out in section 1121 of the Corporation Tax Act 2010 ("CTA");

(e) "earnings" has the same meaning as it does in the employment income Parts of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") by virtue of section 62 of that Act;

(f) "employment" and corresponding references to "employed", "employer" and "employee" have the same meanings as they do in section 4 of ITEPA as extended by-
  (i) section 5 of that Act,
  (ii) regulation 10 of the PAYE Regulations (application to agencies and agency workers), and
  (iii) paragraphs 13.2 and 13.3 of this Direction;
  (f) "HMRC" means Her Majesty's Revenue and Customs

(g) HMRC means Her Majesty's Revenue and Customs.

(h) PAYE means pay as you earn.

(i) "PAYE Regulations" means the Income Tax (Pay As You Earn) Regulations 2003.

(j) "SSCBA" means the Social Security Contributions and Benefits Act 1992;

(k) "SSCB(NI)A" means the Social Security Contributions and Benefits (Northern Ireland) Act 1992;

(l) "Statutory Sick Pay" means statutory sick pay payable pursuant to section 151 of the SSCBA or section 147 of the SSCB(NI)A;

(m) "trade union" has the meanings given by section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to England and Wales and Scotland and Article 3(1) of the Industrial Relations (Northern Ireland) Order 1992 in relation to Northern Ireland.

4.51. Section 4 of the ITEPA provides that:

"Employment" for the purposes of the employment income Parts
(1) In the employment income Parts "employment" includes in particular—
  (a) any employment under a contract of service,
  (b) any employment under a contract of apprenticeship, and
  (c) any employment in the service of the Crown.
(2) In those Parts "employed", "employee" and "employer" have corresponding meanings.

4.52. The definition refers only to contracts of service and employment. It does not expand to workers.

13.2 Where, by virtue of section 61R of ITEPA (workers services provided to the public sector through intermediaries), the Income Tax Acts apply as if a worker were employed by an employer, the worker is treated for the purposes of the CJRS as an employee (and, in particular, amounts treated as earnings are treated as earnings for those purposes).

13.3 Where, by virtue of section 863A of the Income Tax (Trading and Other Income) Act 2005 (limited liability partnerships: salaried members), a person ("P") is treated for the purposes of the Income Tax Acts as being employed by a limited liability partnership ("E") under a contract of service instead of being a member of the partnership-

(a) P is treated as an employee for the purposes of the CJRS, and

(b) E is treated as P's employer for the purposes of the CRS.

Other directions under section 76 of the Coronavirus Act 2020

14.1 HMRC must take account of any amendment made to CJRS by any other direction under section 76 of the Coronavirus Act 2020.

14.2 Entitlement to a payment under CJRS is without prejudice to any entitlement to a payment under any similar scheme arising from a direction under section 76 of the Coronavirus Act 2020.

HMRC's accounts

15. CJRS payments made by HMRC must be shown in HMRC's consolidated accounts produced for the purposes of Section 6(4) of the Government Resources and Accounts Act 2000 and Section 2 of the Exchequer and Audit Departments Act 1921 for the year ending on 31 March 2021.

PART FIVE: HOMEWORKING

5.1. We have already noted under Part 1 the circumstances in which employees must stay at home under the Stay at Home Guidance or are strongly advised to stay at home under the Social Distancing Guidance. The announcement by the Prime Minister at 8.30 pm on 23rd March 2020 that employees should stay at home and not use public transport unless it is absolutely essential to the job envisages a much wider 'lockdown' in which the British workforce will be expected to stay at home and work from home unless that is simply not possible because of the job (obviously key workers, such as NHS staff would be an exception and there are many other obvious exceptions such as transport staff, shopworkers in food shops and other essential workers to keep the infrastructure going). The announcement envisages a "Nation of Homeworkers" for a limited time whilst the crisis continues. The rationale for this is obvious, acceptable and necessary if lives are to be saved. Homeworking throws up a number of difficult issues which have always existed, but which may need to be taken on board in an expedited or amended way.

Facilities to be able to work from home

5.2. Normally, where homeworking is envisaged, the employer will want to ensure that the work can be properly carried out from home, the employee will work the necessary hours, there will not be 'distractions' such as childcare during working time and there will be proper facilities at home for the employee to be able to do the work. Where the employee has be at home under the Stay at Home Guidance and it is agreed that the individual will work from home, it may not be feasible for any of these checks and balances to be carried out. It may be that some 'short form' guidance would assist the employee as to what duties are expected and how they are to be carried out. Duggan QC on Contracts of Employment at Chapter 5.7. contains very detailed guidance on Homeworking and suggested policies. The HFW employment team can assist in providing advice about the appropriate steps to take.

Homeworking terms

5.3. Further, it would normally be the position that there will be specific agreed terms for homeworking. Given the urgency of the measures that are being put into place it may simply not be feasible to agree and negotiate detailed terms and conditions and our experience so far is that the basis on which homeworking is being instilled is much more ad hoc. Nevertheless, employers may wish to give consideration to the ACAS checklist "Homeworking- a guide for employers and employees" which is replicated in **Duggan QC on Contracts of Employment** at 5.7.42.

Health and Safety

5.4. Further, health and safety may be a real issue. The employee may need specific arrangements, which in cases of disability may include reasonable adjustments to enable the job to be carried out. A first-rate example of this which we have recently experienced relates to an employee with a bad back who had a special chair at work. When the office went into temporary closure with the employees to work from home, she commented that she would have difficulty in carrying out her duties at home as she did not have a suitable chair. The employer had the chair couriered from work to home.

5.5. Other points to consider include:

- The Provision and Use of Work Equipment Regulations 1998 (SI 1998/22306) apply to the use of equipment at home.
- There would be reporting requirements if there is an accident.
- A risk assessment would normally be expected; it may be that employees should have a pro forma check off list for employees to complete and HFW can assist in providing such documents.
- The data protection requirements of the GDPR and Data Protection Act 2018 will continue to apply as will confidentiality provisions.
- Some form of performance monitoring may be needed.

5.6. It would be sensible to have a policy to cover all relevant issues (See **Duggan QC on Contracts of Employment** at chapter 5.7.).

PART SIX: THE WORKPLACE

6.1. Given that we are now at a stage where there are calls for the lockdown to end or at least to be ameliorated, the focus has turned to how this is to be achieved and how the workplace can be made as safe as possible for employees. It is said that an announcement will be made by the PM on 10th May as to the steps that will be taken. The Guardian has reported that there are seven draft plans being discussed with unions and other interested parties. The Government is required to review the restrictions by 7th May but it has been stated that no announcement will be made until Sunday. In this Part we consider the issues that arise in the workplace and that are likely to arise once the lockdown is ameliorated. The Government has circulated draft Guidance to unions and interested parties but the TUC have stated that it cannot be accepted in its present form and there are huge gaps over protective kits and testing. This Part will be updated when the Guidance becomes public.

6.2. There is existing Guidance about work, which is considered in this Part. A number of issues of concern are set out at the end of the Chapter. The earlier Guidance on Going to Work provides as follows. This was superseded by the Staying Alert Guidance set out earlier.

> 4. **Going to work**
> **As set out in the section on staying at home, you can travel for work purposes, but only where you cannot work from home.**
> **With the exception of the organisations covered above in the section on closing certain businesses and venues, the government has not required any other businesses to close – indeed it is important for business to carry on.**
> **Employers and employees should discuss their working arrangements, and employers should take every possible step to facilitate their employees working from home, including providing suitable IT and equipment to enable remote working.**
> **Sometimes this will not be possible, as not everyone can work from home. Certain jobs require people to travel to, from and for their work – for instance if they operate machinery, work in construction or manufacturing, or are delivering front line services.**
> **If you cannot work from home then you can still travel for work purposes, provided you are not showing coronavirus symptoms and neither you nor any of your household are self-isolating. This is consistent with advice from the Chief Medical Officer.**
> **Employers who have people in their offices or onsite should ensure that employees are able to follow Public Health England guidelines including, where possible, maintaining a 2 metre distance from others, and washing their hands with soap and water often for at least 20 seconds (or using hand sanitiser gel if soap and water is not available).**
> **Work carried out in people's homes, for example by tradespeople carrying out repairs and maintenance, can continue, provided that the tradesperson is well and has no symptoms. Again, it will be important to ensure that Public Health England guidelines, including maintaining a 2 metre distance from any household occupants, are followed to ensure everyone's safety.**
> **No work should be carried out in any household which is isolating or where an individual is being shielded, unless it is to remedy a direct risk to the safety of the household, such as emergency plumbing or repairs, and where the tradesperson is willing to do so. In such cases, Public Health England can provide advice to tradespeople and households.**
> **No work should be carried out by a tradesperson who has coronavirus symptoms, however mild.**
> **As set out in the section on closing certain businesses and venues, the Government has published guidance on which organisations are covered by this requirement. Advice for employees of these organisations on employment and financial support is available at gov.uk/coronavirus.**

At all times, workers should follow the guidance on self-isolation if they or anyone in their household shows symptoms.

The stay at Home Guidance is at:

https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance/stay-at-home-guidance-for-households-with-possible-coronavirus-covid-19-infection

Guidance, Guidance for employers and businesses on coronavirus (COVID-19), Updated 25th May 2020

(https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19).

Detailed Guidance has been provided for each sector and will be the subject of a separate report.

6..3. The Guidance contains a useful structure for consideration of how to safeguard employees in the workplace during the crisis and as what should be taken into account once the lockdown is ended and business starts to reopen. In this section we shall consider the provision of a safe environment, the provisions of PPE and other procedures and matters that the employer will need to take into account. It should also be noted that there will be specific requirements in certain circumstances (for example, risk assessment for pregnant workers). It may also be that the employer will not require the whole workforce to immediately return so that there may remain an ongoing requirement that some employees are furloughed. The Guidance states:

> **This guidance will assist employers, businesses and their staff in staying open safely during coronavirus (COVID-19).**
> **During this time of unprecedented disruption, the UK Government is not asking all businesses to shut – indeed it is important for business to carry on. Only some non-essential shops and public venues have been asked to close – see more detailed information on the businesses and venues that must close, and those that are exempt.**
> **The government understands that employers and businesses may have concerns about how they can remain open for business safely, and so play their part in preventing the spread of the virus. All employees should be encouraged to work from home unless it is impossible for them to do so. Not everyone can work from home: certain jobs require people to travel to, from and for their work – for instance to operate machinery, work in construction or manufacturing, or to deliver front line services. For specific settings please refer to sector specific guidance.**
> **Below is a summary of advice for employers and businesses in England to follow to protect their workforce and customers, whilst continuing to trade. It includes social distancing, hygiene, cleanliness, staff sickness advice and staying at home. For advice to businesses in other nations of the UK please see guidance set by the Northern Ireland Executive, the Scottish Government and the Welsh Government.**

6.4. It is to be noted that the sentiments above were overtaken by the more general lockdown and the Regulations need to be kept in mind at the present time. However, in respect of workplaces that are open at present or that will open in due course, the Guidance remains apposite.

More advice on social distancing is available. Some people are extremely vulnerable to severe illness from coronavirus (COVID-19) and need to be shielded. See more advice on shielding. View general FAQs on the coronavirus (COVID-19) outbreak, and what you can and cannot do.
This guidance may be updated in line with the changing situation.

What you need to know

- businesses and workplaces should make every possible effort to enable working from home as a first option. Where working from home is not possible, workplaces should make every effort to comply with the social distancing guidelines set out by the government
- members of staff who are vulnerable or extremely vulnerable, as well as individuals whom they live with, should be supported as they follow the recommendations set out in guidance on social distancing and shielding respectively
- where the social distancing guidelines cannot be followed in full in relation to a particular activity, businesses should consider whether that activity needs to continue for the business to operate, and, if so, take all the mitigating actions possible to reduce the risk of transmission between their staff. Potential mitigating actions are set out in these illustrative industry examples
- staff who are unwell with symptoms of coronavirus (COVID-19) should not travel to or attend the workplace.
- staff may be feeling anxious about coming to work and also about impacts on livelihood. Workplaces should ensure staff are fully briefed and appropriately supported at this time
- any member of staff who develops symptoms of coronavirus (COVID-19) (a new, continuous cough and/or a high temperature) should be sent home and stay at home for 7 days from onset of symptoms. If the member of staff lives in a household where someone else is unwell with symptoms of coronavirus (COVID-19) then they must stay at home in line with the stay at home guidance
- employees will need your support to adhere to the recommendation to stay at home to reduce the spread of coronavirus (COVID-19) to others
- employees should be reminded to wash their hands for 20 seconds more frequently and catch coughs and sneezes in tissues
- frequently clean and disinfect objects and surfaces that are touched regularly, using your standard cleaning products
- those who follow advice to stay at home will be eligible for statutory sick pay (SSP) from the first day of their absence from work
- employers should use their discretion concerning the need for medical evidence for certification for employees who are unwell. This will allow GPs to focus on their patients
- if evidence is required by an employer, those with symptoms of coronavirus (COVID-19) can get an isolation note from NHS 111 online, and those who live with someone that has symptoms can get a note from the NHS website

Symptoms

The most common symptoms of coronavirus (COVID-19) are a new, continuous cough or a high temperature.
For most people, coronavirus (COVID-19) will be a mild infection.

Good practice for employers

It's good practice for employers to:

- keep everyone updated on actions being taken to reduce risks of exposure to coronavirus (COVID-19) in the workplace
- ensure employees who are in a vulnerable group are strongly advised to follow social distancing guidance
- ensure employees who are in an extremely vulnerable group and should be shielded are supported to stay at home
- make sure everyone's contact numbers and emergency contact details are up to date

- make sure managers know how to spot symptoms of coronavirus (COVID-19) and are clear on any relevant processes, for example sickness reporting and sick pay, and procedures in case someone in the workplace is potentially infected and needs to take the appropriate action
- make sure there are places to wash hands for 20 seconds with soap and water, and encourage everyone to do so regularly
- provide hand sanitiser and tissues for staff, and encourage them to use them

Social distancing in the workplace - principles

Social distancing involves reducing day-to-day contact with other people as much as possible, in order to reduce the spread of coronavirus (COVID-19). Businesses and workplaces should encourage their employees to work at home, wherever possible.

If you cannot work from home then you can still travel to work. This is consistent with the Chief Medical Officer for England's advice.

The advice on social distancing measures applies to everyone and should be followed wherever possible. Workplaces need to avoid crowding and minimise opportunities for the virus to spread by maintaining a distance of at least 2 metres (3 steps) between individuals wherever possible. This advice applies both to inside the workplace, and to where staff may need to interact with customers. Staff should be reminded to wash their hands regularly using soap and water for 20 seconds and particularly after blowing their nose, sneezing or coughing. Where facilities to wash hands are not available, hand sanitiser should be used. Workers should cover any coughs or sneezes with a tissue, then dispose of the tissue in a bin and immediately wash their hands.

The practical implementation of this advice will depend on the local circumstances; see examples for various industries.

A few general indicators will be relevant to the majority of business settings:

- make regular announcements to remind staff and/or customers to follow social distancing advice and wash their hands regularly
- encourage the use of digital and remote transfers of material where possible rather than paper format, such as using e-forms, emails and e-banking
- provide additional pop-up handwashing stations or facilities if possible, providing soap, water, hand sanitiser and tissues and encourage staff to use them
- where it is possible to remain 2 metres apart, use floor markings to mark the distance, particularly in the most crowded areas (for example, where queues form)
- where it is not possible to remain 2 metres apart, staff should work side by side, or facing away from each other, rather than face to face if possible
- where face-to-face contact is essential, this should be kept to 15 minutes or less wherever possible
- as much as possible, keep teams of workers together (cohorting), and keep teams as small as possible
- **Additionally, for customer-facing businesses:**
- use signage to direct movement into lanes, if feasible, while maintaining a 2 metre distance
- regulate entry so that the premises do not become overcrowded
- use additional signage to ask customers not to enter the premises if they have symptoms
- if feasible, place plexiglass barriers at points of regular interaction as an additional element of protection for workers and customers (where customers might touch or lean against these, ensure they are cleaned and disinfected as often as is feasible in line with standard cleaning procedures)

See further information on social distancing and adults who are at increased risk of coronavirus (COVID-19).

Shift-working and staggering processes

Where it is not possible for work to be completed at home, businesses should consider shift working or the staggering of processes which would enable staff to continue to operate both effectively and where possible at a safe distance (more than 2 metres) from one another. Staggering on-premises hours to reduce public transport use during peak periods will provide benefit to employees, businesses and the wider public effort.

Practically, a business could consider:

- splitting staff into teams with alternate days working from home, or splitting across a day and night shift
- as far as possible, where staff are split into teams, fixing these splits (cohorting), so that where contact is unavoidable, this happens between the same individuals
- spreading out standard processes, so that only one team needs to be on the premises to complete a task at a given time
- where it is possible to remain 2 metres apart, using signage such as floor markings to facilitate compliance, particularly in the most crowded areas. This includes entry points to buildings, toilets and communal break areas where queues may form

Businesses working on shift patterns should:

- ensure that the business's social distancing measures are effectively communicated to all staff
- ensure frequent cleaning and disinfecting of objects and surfaces that are touched regularly, using your standard cleaning products and particularly at the end and beginning of shifts

Staff canteens and rest areas

Where possible, staff should be encouraged to bring their own food, and staff canteens and distributors should move to takeaway.

Where there are no practical alternatives, workplace canteens may remain open to provide food to staff with appropriate adjustments for social distancing. The following principles should be applied:

- canteen staff who are unwell should not be at work
- canteen staff should wash their hands often with soap and water for at least 20 seconds before and after handling food
- staff should be reminded to wash their hands regularly using soap and water for 20 seconds and before and after eating. If possible, increase the number of hand washing stations available
- a distance of 2 metres should be maintained between users, wherever possible
- staff can continue to use rest areas if they apply the same social distancing measures
- notices promoting hand hygiene and social distancing should be placed visibly in these areas
- frequently clean and disinfect surfaces that are touched regularly, using your standard cleaning products
- consider extending and staggering meal times to avoid crowding

Staying at home if you, or someone in your household, has symptoms of coronavirus (COVID-19) on site

If anyone becomes unwell with a new, continuous cough or a high temperature in the business or workplace they should be advised to follow the stay at home guidance for households with possible coronavirus (COVID-19) infection. If these symptoms develop whilst at work they should be sent home, they should return home quickly and directly. If they have to use public transport, they should try to keep away from other people and catch coughs and sneezes in a tissue.

If a member of staff has helped someone who was taken unwell with a new, continuous cough or a high temperature, they do not need to go home unless they develop symptoms themselves. They should wash their hands thoroughly for 20 seconds after any contact with someone who is unwell with symptoms consistent with coronavirus (COVID-19) infection.

It is not necessary to close the business or workplace or send any staff home, unless government policy changes. Keep monitoring the government response page for the latest details.

If you, or an employee, need clinical advice, they should go to NHS 111 online, or call 111 if they don't have internet access. In an emergency, call 999 if they are seriously ill or injured or their life is at risk. Do not visit the GP, pharmacy, urgent care centre or a hospital.
If the member of staff lives in a household where someone else is unwell with symptoms of coronavirus (COVID-19) then they must stay at home in line with the stay at home guidance.

Sick pay

Those who are self-isolating because they or someone in their household is displaying symptoms of coronavirus will be eligible for Statutory Sick pay (SSP).
SSP is also available to those who are staying at home because they're at high risk of severe illness from coronavirus (shielding).
Employers should use their discretion and respect the medical need to self-isolate in making decisions about sick pay.
Anyone not eligible to receive sick pay, including those earning less than an average of £118 per week, some of those working in the gig economy, or self-employed people, is able to claim Universal Credit and/or contributory Employment and Support Allowance.
For those on a low income and already claiming Universal Credit, it is designed to automatically adjust depending on people's earnings or other income. However, if someone needs money urgently they can apply for an advance through the journal in their Universal Credit account.
See the Statutory Sick Pay (SSP) guidance for more information.

Certifying absence from work

By law, medical evidence is not required for the first 7 days of sickness. After 7 days, employers may use their discretion around the need for medical evidence if an employee is staying at home.
We strongly suggest that employers use their discretion around the need for medical evidence for a period of absence where an employee is advised to stay at home either as they are unwell themselves, or live with someone who is, in accordance with the public health advice issued by the government.

What to do if an employee needs time off work to look after someone

Employees are entitled to time off work to help someone who depends on them (a 'dependant') in an unexpected event or emergency. This would apply to situations related to coronavirus (COVID-19). For example:

- if they have children they need to look after or arrange childcare for because their school has closed
- to help their child or another dependant if they're sick, or need to go into isolation or hospital

There's no statutory right to pay for this time off, but some employers might offer pay depending on the contract or workplace policy.
ACAS have more information online and can help with specific queries by phone.

Limiting spread of coronavirus (COVID-19) in business and workplaces

Businesses and employers can help reduce the spread of coronavirus (COVID-19) by reminding everyone of the public health advice. See posters, leaflets and other materials.
Employees and customers should be reminded to wash their hands for 20 seconds more frequently than normal.
Employers should frequently clean and disinfect objects and surfaces that are touched regularly, using your standard cleaning products.
See further advice on individual sectors.

Use of face masks in the community

There is very little evidence of widespread benefit from the use of face masks outside of the clinical or care settings, where they play a very important role. To be effective, face masks must be worn correctly, changed frequently, removed properly, disposed of safely and used in combination with good universal hygiene behaviour.

Research shows that compliance with these recommended behaviours reduces over time when wearing face masks for prolonged periods, such as in the community. Therefore, PHE does not advise masks in public places and for those working in supermarkets, waste collection, schools and similar settings.

PHE recommends that employers should ensure that:

- **spaces in the workplace are optimised to allow social distancing to occur, wherever possible**
- **signs are visible in the workplace reminding employees not to attend work if they have a fever or cough and to avoid touching their eyes, nose and mouth with unwashed hands**
- **employees are provided with hand sanitiser for frequent use and regular breaks to allow them to wash their hands for 20 seconds**

The UK does not currently advise use of face masks outside of care settings, in line with PPE guidance.

PHE will continually review guidance in line with emerging evidence and World Health Organization (WHO) guidance, and update our guidance whenever new evidence suggests that we should do so.

6.5. The use of personal protective equipment (PPE) continues to receive much daily publicity in relation to key workers. Concerns about the lack of equipment dominate the news and raise issues about key workers having to work in an unsafe environment. Health careworkers employed by the state, in particular via NHS Trusts may differ from private company workers (in relation to public law rights) but private law, human rights law and EU law principles should be considered. **A useful comparison of the Who Guidance and HHS Guidelines has been can be found in the article by** James Robottom**.**

6.6. There is express legislation in the UK in the form of the Personal Protective Equipment at Work Regulations 1992 (SI1992/2966) (http://www.legislation.gov.uk/uksi/1992/2966/contents/made).

6.7. Under Regulation 2 ""personal protective equipment" means all equipment (including clothing affording protection against the weather) which is intended to be worn or held by a person at work and which protects him against one or more risks to his health or safety, and any addition or accessory designed to meet that objective. ". Regulation 4 provides that:

> **4.**—(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.
>
> (2) Every self-employed person shall ensure that he is provided with suitable personal protective equipment where he may be exposed to a risk to his health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.
>
> (3) Without prejudice to the generality of paragraphs (1) and (2), personal protective equipment shall not be suitable unless—
>
> (a) it is appropriate for the risk or risks involved and the conditions at the place where exposure to the risk may occur;
>
> (b) it takes account of ergonomic requirements and the state of health of the person or persons who may wear it;
>
> (c) it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;
>
> (d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk;

(e) it complies with any enactment (whether in an Act or instrument) which implements in Great Britain any provision on design or manufacture with respect to health or safety in any relevant Community directive listed in Schedule 1 which is applicable to that item of personal protective equipment.

6.8. There is a common law duty to provide a safe workplace and safe system of work. The Court will consider the common law duty in the context of the body of knowledge that has arisen, including such regulations (***Cockerill v CXX Ltd*** [2018] EWHC 1155 (QB). The employee may have a claim where PPE is not provided but causation and actionable damage would have to be shown. A breach of a duty to provide protection which exposes the employee to the virus may give rise to a claim (cf ***Brown v Corus (UK) Ltd*** [2004] PIQR P30).

6.9. The application of human rights law with state employees is considered in the article by **James Robottom**.

Moving goods

The World Health Organization (WHO) advises that the likelihood of an infected person contaminating commercial goods is low. The risk of catching the virus that causes COVID-19 from a physical package is also very low.

Cleaning and waste disposal

The government has provided guidance on cleaning and waste disposal to help businesses reduce the spread of coronavirus (COVID-19).

Handling post or packages

Staff should continue to follow existing risk assessments and safe systems of working; there are no additional precautions needed for handling post or packages.

Food safety

See the government guidance on food safety. This includes guidance on food hygiene, managing employee sickness and social distancing in the workplace, including for food processing plants, supermarkets and outdoor food markets.

Concerns

6.10. The Unions, employers and other interested parties have expressed concern about the lack of clear guidance with regard to the workplace and this becomes more acute as the Lockdown is lifted. The Employment Lawyers Association have set out a number of issues in its paper dated 1st May "Issues in respect of which guidance is required to assist employers and employees/workers coming out of lockdown, relating to health and safety concerns and data privacy". (https://www.elaweb.org.uk/content/issues-respect-which-guidance-required-assist-employers-and-employeesworkers-coming-out) This paper is important and deserves a wider circulation.

6.11. Amongst issues to be considered are the following.

Health data about workers.

6.12. The Data Protection Act and GDPR contains stringent requirements about the use of sensitive data, which will, in particular, include data about the employee's health and the position with regard to Covid 19. When an employer reopens he workplace there will be concerns about whether colleagues are infectious or have had the virus. Clearly

the employer has a duty to provide a safe environment, but this may entail checking the medical conditions of employees.

Requests for health information

6.13. An employer may wish employees to self-declare whether they have had their virus or whether those they share a home with have been in that position. There may be an ongoing requirement to declare if the employee has symptoms. However, unless the contract of employment already contains some provision it will be difficult to insist that such medical details are provided. ELA note that Guidance is needed to set out what steps an employer can reasonably take.

Health checks and tests relating to Covid-19

6.14. Many employers already have provisions as to when an employee can be required to submit to a medical examination or for drug and alcohol testing. WHO have recommended that temperature tests be taken in the workplace? Without express legislation or Guidance the employer may be at risk. It would be necessary to argue that the instruction was lawful and reasonable given the current pandemic, in order to safeguard the workforce. In ***Bliss v South East Thames Regional Health Authority*** [1987] ICR 700 there was a constructive dismissal where the employer attempted to compel a medical examination.

Travelling

6..15. This may be a major concern for individuals, in particular those with an underlying health condition. The employer will need to manage the position to avoid risk - perhaps by staggered working – but the employee may still feel that he or she is at risk by using public transport.

Health and safety issues for those with underlying health conditions or living vulnerable people

6.16. This issue was considered in the various scenarios in Part 1. The employer will need to consider how these people can be protected at work or whether they should remain at home, on homeworking if that is possible.

Interacting with the public

6.17. Where the job involves interacting with the public the employer will need to consider the provision of PPE and the issues of social distancing.

Interacting with people who have contracted or are more likely to have coronavirus and close contact with others and/or sharing of facilities in the workplace.

6.18. Unfortunately, any employee who goes into a workplace may find that they are interacting with someone who is infectious. The employer is going to have to weigh up how to best protect the workforce in such circumstances. There is a need for Government Guidance as to what arrangements and practices will be regarded as meeting minimum standards of safety.

Sanctions being imposed by employers, including disciplinary measures, deductions from wages and dismissal, in the event the worker either raised concerns or decided not to attend work

6.19. We dealt with the position where the employee does not wish to attend work because he or she takes the view that the workplace is unsafe. If an employee was dismissed because of refusal to attend the employer would have to show that all reasonable steps were taken to make the workplace a safe environment, which may be onerous in the present circumstances.

6.20. The employer who raises concerns about safety at work may come within the 'whistleblowing' legislation if subjected to a detriment or dismissed because of making a protected disclosure. The potential inadequacies of thee legislation in the current circumstances are well set out in "Whistleblowing in a coronavirus (COVID-19) world" (https://www.devereuxchambers.co.uk/resources/blog/employment/view/whistleblowing-in-a-coronavirus-covid-19-world)

ELA Questions

6.21. The list of issues on which Guidance is sought, set out by ELA, encapsulates the various work issues and read as a checklist to be considered when deciding what steps should be taken.

Where Government guidance is required is in four main areas:

1. For employers to make the legal position clear, i.e. that they must not subject employees and workers to detriment or dismissal for raising genuine health and safety concerns
2. For workers to be provided a clear and easy path to raise concerns, and so that they know what concerns they can and should be raising and the process to do this.
3. What arrangements, behaviours and practices are considered safe and unsafe in different sectors and workplace environments, based on science backed Government advice, so that both employers and workers have a framework within which to assess the safety of their own situation.
4. The external agencies and bodies to whom workers can raise concerns about health and safety or seek advice if they believe their employer is undertaking unsafe practices and exposing workers to unnecessary risk and/or unlawful detriment.

Specific issues on which employers require clear guidance relating to health and safety

1. Which employees, and in which sectors can be required to physically attend a workplace
2. Which employees, and in which sectors, and in which circumstances can refuse to attend work and why;
3. Which employees, and in which sectors, should continue to work at home wherever possible, or continue not to work;
4. If an employee should not be attending work, and cannot work from home, in which circumstances are they entitled to statutory sick pay;
5. What constitutes a reasonable concern relating to health and safety which could, for example, justify an employee refusing to come to work;
6. Can an employee refuse to attend work and in which circumstances will this be considered reasonable i.e. when, if ever, can an employer consider disciplining an employee for a refusal to attend work in circumstances where that employee might consider they have a valid health and safety concern relating to coronavirus
7. Are there are safety measures employers must put in place, on a mandatory basis, before requiring employees to attend work

8. What is the position on the wearing of PPE in the workplace, in different sectors, including whether an employer can and should require an employee to wear PPE in the workplace, and what PPE can be considered mandatory
9. What must employers put in place relating to social distancing
10. Do employers have a mandatory duty to provide other safety equipment or facilities such as screens, hand sanitiser, food so employees can avoid going in and out of the workplace during the day
11. Is there a limit on the number of employees in a workplace at any time
12. To whom should an employee report concerns relating to health and safety in circumstances where their employer is not listening to their concerns and insisting they attend work/participate in unsafe practices; and
13. The data privacy issues…"

This Part will be updated by way of a separate report about returning to work.

PART SEVEN: TERMINATION

Redundancy?

7.1. The worst-case scenario is that the employer has no choice but to make redundancies as the business no longer requires all of the workforce and does not have the financial strength to keep the workforce on the books. Where the business has had to temporarily close under the Regulations there is simply no business to be run and there may be no need for staff or only for a skeleton staff. One of the alternatives that the employer may have sought, rather than dismissal, is to get the employees to agree to the furlough scheme. If this has not been accepted the Nuclear option (as described by **Bogg & Ford**) is to dismiss and offer new terms. This may not be that practicable where there is a long notice period. In addition, it brings into play be collective consultation provisions because of section 195 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The notice period and the effect of giving notice

7.2. The employer may decide that the time has come when notice may be given. There are two issues that arise here with regard to notice:

(1) Can the employer who has furloughed employees use the grant monies in payment or as a contribution to the notice period monies?

(2) What sums have to be paid during notice?

Can the employer who has furloughed employees use the grant monies in payment or as a contribution to the notice period monies?

7.3. The position here is that the employer has furloughed employees then given them notice to terminate the employment contract. The employer is paying full notice pay or 80% up to £2500 per month during the notice period. Can the furlough grant be used for this purpose?

7.4. The author sought clarification on this point from the HMRC but the letter (appended) unfortunately does not really assist. When the scheme first came into being it was stated that it was so the employer could avoid redundancies; the implication being that the grant money was to keep the employer's business afloat and not for the purpose of paying notice money to terminate the employee.

7.5. The Guidance and Directions do not really assist us here.
The Furlough Guidance states that

- " If you cannot maintain your current workforce because your operations have been severely affected by coronavirus..."a claim can be made.
- "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"

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

The Directions state:

- "2.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease".
- "2.5 No CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purpose of CJRS."
- By 6(1) the employee is furloughed and "the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease"

7.6. It is clear from the above that the grant cannot be used to make a redundancy payment. However, the Guidance and Directions do not state that the 80% cannot be used towards the notice pay. It would seem to be contrary to the basis of the scheme to decide to dismiss an employee then use the grant to pay the notice pay (could this be regarded as an abuse or contrary to the exceptional purposes of the scheme?) but there is nothing in the express wording of the above which states that this cannot be done.

What sums have to be paid during notice?

7.7. This would appear to be a more contentious issue. The employee has been furloughed and put on 80% up to £2500 per month as per the scheme. Can the employer argue that the contract has been amended so that the notice pay that must now be paid is only the equivalent of the grant where the employee remains on furlough during the notice period (once the furlough ends the pay must revert back to the contractual sum). It is extremely unfortunate that the Government did not deal with this issue when it introduced the scheme. The Guidance notes that this is an employment issue so that employers would have to get the consent of the employee to go on furlough and to accept the reduced grant sum instead of pay.

7.8. It must surely be the case that if one asked any employee whether they would expect the grant sum as the notice pay amount, they would respond that they accepted to go on furlough and the grant to save their job and did not accept that their notice pay was to be reduced down to the grant amount. They would say that the scope of the agreement was to agree to go on furlough and to accept the reduced sum *only whilst they were on furlough with a view to going back to work.* The moment they were given notice, they would argue, the right to full contractual notice pay should arise.

7.9. The issue may be regarded as a contractual one but is subject to some unusual wrinkles because of the provisions of the Employment Rights Act 1996. The relevant provisions work as follows:

- By section 86(1)(2), statutory notice applies of one week, after one month up to 2 years, then one week for each year worked up to 12 years. The maximum statutory period is 12 weeks.

- By section 87(1), if an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).
- By section 87(4), the section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

7.10. Section 88(1) contains the following provision:

> (1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—
>
> (*a*) the employee is ready and willing to work but no work is provided for him by his employer,
>
> (*b*) the employee is incapable of work because of sickness or injury,
>
> (*c*) the employee is absent from work wholly or partly because of pregnancy or childbirth [or on adoption leave, [shared parental leave,] [parental bereavement leave,] parental leave or paternity leave], or
>
> (*d*) the employee is absent from work in accordance with the terms of his employment relating to holidays,
>
> the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (*a*), (*b*), (*c*) and (*d*) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

7.11. Where the employee has been furloughed and is fit and able it may be argued that the employee comes within 88(1)(a) as being ready and willing to work. Where the employee has symptoms so is self isolated or is shielding it may be argued that 88(1)()b) applies. 7.12. The above provision means that where there are *normal working hours* and notice is given, the employee's right during statutory notice must be calculated based on the normal working hours. The provision *does not apply* where the notice period is one week more than the statutory notice period. These unusual provisions were considered in the case of ***Scotts Co (UK) Ltd v Budd*** [2003] IRLR 145, EAT in which the author acted for the successful party. The employee was contractually entitled to 13 weeks' notice and was given notice during an extended period of sick leave having already exhausted sick pay entitlement. Since the contractual period of notice was at least one week longer than the statutory minimum period of notice to which he was entitled, the EAT held that he could not claim his remuneration for the notice period by virtue of s 87(4). The period of notice to be given by the employer, which effectively exclude the statutory rights, must be stipulated in the contract; an employer cannot simply decide to give one week's extra notice to avoid liability. Had the contract in *Budd* been for contractual notice in line with the statutory minimum, then the employee would have had a right to claim pay during that period covered by the statutory minimum entitlement notwithstanding his exhaustion of contractual sick pay. The position is the same where "the employee is ready and willing to work but no work is provided for him by his employer".

7.12. Where there are not normal working hours then section 89(1) of the ERA applies. This provides that If an employee does not have normal working hours under the contract of employment in force in the period of notice, the employer is liable to pay the employee for each week of the period of notice a sum not less than a week's pay.

7.13. However, by 80(2) the employer's liability under this section is conditional on the employee being ready and willing to do work of a reasonable nature and amount to earn a week's pay unless the employee is *inter alia* sick (89(3)). This will be the average weekly pay as worked out by section 222 of the ERA 1996.

7.14. The provisions of sections 224 and 226 will apply where the statutory notice period and therefore statutory provisions apply. By section 226:

> (1) Where the calculation is for the purposes of section 88 or 89, the calculation date is the day immediately preceding the first day of the period of notice required by section 86(1) or (2).
> (2) Where the calculation is for the purposes of section 93, 117 or 125, the calculation date is—
> (*a*) if the dismissal was with notice, the date on which the employer's notice was given, and
> (*b*) otherwise, the effective date of termination.
> (3) Where the calculation is for the purposes of section [112, 119, 120, 121 or 124] the calculation date is—
> (*a*) …
> (*b*) if by virtue of subsection (2) or (4) of section 97 a date later than the effective date of termination as defined in subsection (1) of that section is to be treated for certain purposes as the effective date of termination, the effective date of termination as so defined, and
> (*c*) otherwise, the date specified in subsection (6).

7.15. Given that the calculation date is the day before notice is given, this would, on the face of it mean that the furlough calculation is the appropriate pay. Thus, if it can be argued that the entitlement is based on the furlough pay and giving notice did not mean that contractual pay was the default position, the pay that is due would only be calculated based on the 80% furlough pay.

7.16. Where there is a contractual notice of more than one week over the minimum notice period the it will be the contractual agreement that applies. As noted, this may or not mean that the pay is calculated based on the furlough grant dependent upon what has been agreed. The author has again written to HMRC seeking further clarification.

Changing terms and conditions and collective consultation for redundancy: the section 195 pitfall.

7.17. Where the employer seeks to impose change by terminating and offering new terms and conditions, even if they are only intended to be for the period of the crisis, it must be remembered that section 195 of TULR(C)A 1992 will apply. This provides that:

"(1) In this Chapter, references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related."

7.18. It was held in **G*MB v Man Truck & Bus UK Ltd*** [2000] IRLR 636, EAT that section 195 is satisfied where employers collectively dismissed the workforce in order to take them all back on new terms of employment, with no actual job losses. This would mean that where the employer adopts the approach of changing terms and conditions by dismissing and offering new terms, the requirements for collective consultation will apply.

7.19. 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*."

Collective consultation will be needed in such circumstances.

Collective Consultation

7.20. Depending upon the number of employees that are going to be selected, the collective consultation process under sections 188- 189 of TULR(C)A 1992 will apply.

7.21. To summarise, 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.

7.22. 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.

7.23. 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.

7.24. 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?

7.25. 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."

7.26. By section 189(6):

> "If on a complaint under this section a question arises—
> (a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or
> (b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances,
> it is for the employer to show that there were and that he did."

7.27. The position is well set out in **Harvey on Industrial Relations** as follows, which notes that most cases deal with insolvency and:

> "…if it is a sudden disaster, then it may constitute special circumstances but if there is a gradual deterioration, so that the employer could see the writing on the wall, then it is open to the tribunal to find that the circumstances are not special (*Clarks of Hove Ltd v Bakers' Union [1978] IRLR 366, CA*). See, to similar effect: *Association of Patternmakers v Kirvin Ltd [1978] IRLR 318, EAT; USDAW v Leancut Bacon [1981] IRLR 295, EAT; Angus Jowett & Co Ltd v National Union of Tailors and Garment Workers [1985] IRLR 326, EAT; GMB v Rankin and Harrison [1992] IRLR 514, EAT; Re Hartlebury Printers Ltd [1992] IRLR 516, Morritt J.*
> In a case where it is in issue whether the insolvency was a sudden disaster (so constituting special circumstances) or was merely a disaster waiting to happen, the tribunal is not entitled (with the advantage of hindsight) to substitute its own commercial judgment for that of the employer. The question is whether the employer genuinely and reasonably failed to foresee the impending disaster (*Hamish Armour v Association of Scientific, Technical and Managerial Staffs [1979] IRLR 24, EAT*). In *Keeping Kids Company (in compulsory liquidation) v Smith [2018] IRLR 484, EAT*, the charity had been struggling financially for some time and had drawn up detailed costcutting and redundancy plans. These were superseded when, unexpectedly, the police began investigating various criminal allegations against the charity. This investigation precipitated a withdrawal of funding which led very quickly to the collapse of the charity. HHJ Eady QC concluded that this was a special circumstance for the purposes of TULR(C)A 1992 s 188(7), describing it as 'an unexpected and sudden disaster […] which entirely derailed its plans and meant that the operation had to close down pretty much immediately' (at [70]). The police investigation had become public on 30 July, the Cabinet Office demanded immediate repayment of an unspent grant of £2.1m on 3 August, all employees were dismissed on 5 August and an order was made for compulsory winding up of the company on
> 20 August (at [3])."

7.28. We query whether the suddenness of this pandemic and the crisis that it has caused may be regarded as a sudden disaster, which makes it impractical to consult. Given the suddenness of the crisis, the requirements to self-isolate and the sudden difficulties that this crisis is causing employers, it may be at least arguable that the special circumstances defence can apply, though we would suggest that some form of consultation is likely to be necessary even if it is abbreviated. The longer that the pandemic goes on and business are affected may mean that the employer will have greater difficulty in relying on this defence since the circumstances have been known for some time. There is also the fact that the grant period for furlough is due to case at the ends of June so that employers may be thinking about consultation 45 days or 30 days before the end of June.

7.29. The reader is also referred to ***Shanahan Engineering Ltd v UNITE*** UKEAT/0411/09, [2010] All ER (D) 108 (Mar), in which the author acted for one of the parties. it is clear from this case that the employer needs to consider whether some consultation is possible, even in an abbreviated form because of the crisis. 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."

7.30. 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."

7.31. 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

> "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."
> `

7.32. 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.**

Unfair Dismissal and redundancy

7.33. In the present climate there are various stages at which dismissal may take place and the statutory unfair dismissal and redundancy provisions be taken into account. Whilst it is hoped that the disruption to business will be temporary the enormity of the effect on business has led to urgent decisions having to be taken.

- When the decision is being taken as to furlough, the employer may have to make a decision about who to furlough (with the view that they will be retained after the business opens up again), who to retain at work and who to dismiss.
- The employer may decide that *some* redundancies are necessary and have to make a decision about who to select.

Selection criteria for redundancy

7.34. The employer will wish to consider alternatives to redundancy dismissals. The CJRS is one such alternative. It may be that employees who are dismissed can argue that the selection was unfair because the alternative could have been to furlough the employee and to pay the grant at no expense to the employer.

7.35. The criteria for redundancy selection will also need to be tailored dependent upon whether it is at the furlough stage or where the employer has decided that redundancies are necessary to save the business.

Consultation

7.36. The requirements for consultation about the potential selection and dismissal will be essential. This will need to be modified where employees are at home. The danger of discriminatory treatment must also be kept in mind (see).

The selection process#

7.37. The employer will need to follow the usual fair procedure including considering any alternative employment, the reasons for selection and appeals.

Lay off and Redundancy

7.38. **Bogg & Ford** have referred to the complexities of sections 147 to 154 of the ERA 1996 under which an employee who is not provided with work or whose pay is reduced to less than half by reason of diminution on the work provided may claim redundancy because of lay off or short time. Where the employee has been paid off or kept on short time for four or more consecutive weeks or for six or more weeks within a 13 week period (of which not more than three were consecutive) notice may be given in writing to claim a redundancy payment (section 148). A counter notice may be given in 7 days (section 149) and the employee must then give notice to resign under section 150. Where there is a counter notice and an expectation of full employment within the meaning of section 15, but this shall not apply where the employee remains laid off or on short term work. These slightly convoluted provisions may become relevant where employees continue to have not work and are not paid.

PART EIGHT: THE SELF EMPLOYED

8.1. 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 provides that there must be regulations to cover freelances 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.

8.2. The Government then 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.
- In fact the amount that can be claimed is £7500 80% of the taxable profits calculated according to the formula in the directions, whichever is the lower.

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.

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 in the UK and have lost income due to coronavirus (COVID-19).

8.4. HMRC announced that it was going to contact customers from 4th May. The "Check if you can claim a grant through the Self-Employment Income Support Scheme" updated on 13th May 2020 (but only to state when the scheme will be available) provides:

HM Revenue & Customs
Contents

1. **Who can claim**
2. Check if you're eligible to claim
3. **How much you'll get**
4. **How to claim**
5. **Other help you can get**

The scheme will allow you to claim a taxable grant of 80% of your average monthly trading profits, paid out in a single instalment covering 3 months, and capped at £7,500 altogether. This is a temporary scheme, but it may be extended.
If you receive the grant you can continue to work, start a new trade or take on other employment including voluntary work, or duties as an armed forces reservist.
Who can claim
You can claim if you're a self-employed individual or a member of a partnership and:

- **you carry on a trade which has been adversely affected by coronavirus**
- **you traded in the tax year 2018 to 2019 and submitted your Self Assessment tax return on or before 23 April 2020 for that year**
- **you traded in the tax year 2019 to 2020**

- you intend to continue to trade in the tax year 2020 to 2021

Your business could be adversely affected by coronavirus, for example if:

- you're unable to work because you:
- are shielding
- are self-isolating
- are on sick leave because of coronavirus
- have caring responsibilities because of coronavirus
- you've had to scale down or temporarily stop trading because:
- your supply chain has been interrupted
- you have fewer or no customers or clients
- your staff are unable to come in to work

You should not claim the grant if you're above the state aid limits or operating a trade through a trust.

To work out your eligibility we will first look at your 2018 to 2019 Self Assessment tax return. Your trading profits must be no more than £50,000 and at least equal to your non-trading income.

If you're not eligible based on the 2018 to 2019 Self Assessment tax return, we will then look at the tax years 2016 to 2017, 2017 to 2018, and 2018 to 2019.

Find out how we will work out your eligibility including if we have to use other years.

Grants under the Self-Employment Income Support Scheme are not counted as 'access to public funds', and you can claim the grant on all categories of work visa.

Your tax agent or adviser cannot make the claim for you. You must make the claim yourself. If you use an agent you should contact them if you need any help or support.

How different circumstances affect the scheme

Check if your circumstances affect your eligibility, for the following:

- if your return is late, amended or under enquiry
- if you're a member of a partnership
- if you're on or took parental leave
- if you have loans covered by the loan charge
- if you claim averaging relief
- if you're non-resident or chose the remittance basis
- if you're above the state aid limits

How much you'll get

You'll get a taxable grant based on your average trading profit over the 3 tax years:

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

We will work out your average trading profit by adding together your total trading profits or losses for the 3 tax years, then we will divide by 3.

The grant will be 80% of your average monthly trading profits, paid out in a single instalment covering 3 months, and capped at £7,500 altogether.

The grant amount we work out for you will be paid directly into your bank account, in one instalment.

Find out how we will work out your average trading profits including if you have not traded for all 3 years.

How to claim

The online service you'll use to claim is not available yet. HMRC will aim to contact you by mid May 2020 if you're eligible, to invite you to claim using the GOV.UK online service. Payment will be made by early June 2020 if your claim is approved.

If you're unable to claim online an alternative way to claim will be available. We will update this page with more information soon.

You do not need to contact HMRC now, as this will only delay the urgent work being undertaken to introduce the scheme.

If you receive texts, calls or emails claiming to be from HMRC, offering financial help or a tax refund and asking you to click on a link or to give personal information, it is a scam. You should email it to phishing@hmrc.gov.uk and then delete it.

When you make your claim
You'll only need your:

- **Self Assessment Unique Taxpayer Reference (UTR) number, if you do not have this find out how to get your lost UTR number**
- **National Insurance number, if you do not have this find out how to get your lost National Insurance number**
- **Government Gateway user ID and password**
- **bank account number and sort code you want us to pay the grant into (only provide bank account details where a Bacs payment can be accepted)**

You'll have to confirm to HMRC that your business has been adversely affected by coronavirus.
If you claim the grant HMRC will treat this as confirmation you're below the state aid limits.
HMRC will check claims and take appropriate action to withhold or recover payments found to be
dishonest or inaccurate.
After you've claimed
Once you've submitted your claim, you will be told straight away if your grant is approved. We will pay the grant into your bank account within 6 working days.
You must keep a copy of all records in line with normal self-employment record keeping requirements, including:

- **the amount claimed**
- **the claim reference number for your records**
- **evidence that your business has been adversely affected by coronavirus**

You will need to report the grant:

- **on your Self Assessment tax return**
- **as self-employed income for any Universal Credit claims**
- **as self-employed income and that you're working 16 hours a week for any tax credits claims**

The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Self-Employment Income Support Scheme) Direction

8.5. At long last the Directions were produced on 1st May 2020.

Introduction
1. This Schedule sets out a scheme to be known as the Self-Employment Income Support Scheme ("SEISS").

Purpose of scheme

2. The purpose of SEISS is to provide for payments to be made to persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.

Claims

3.1 A claim for a payment under SEISS must be made in such form and manner and contain such information as HMRC may require at any time (whether before or after payment of the claim) to establish entitlement to payment under SEISS.
3.2 A claim must be made by a qualifying person.
3.3 A claim may only be made in relation to a trade the business of which has been adversely affected by coronavirus or coronavirus disease.
3.4 No claim may be made if it is abusive or is otherwise contrary to the exceptional purpose of SEISS.

8.6. A claim can only be made where there has been an adverse effect on the business.

Qualifying person

4.1 A person is a qualifying person if the following conditions are met.

4.2 The person must-

(a) carry on a trade the business of which has been adversely affected by reason of circumstances arising as a result of coronavirus or coronavirus disease,

(b) have delivered a tax return for a relevant tax year on or before 23 April 2020,

(c) have carried on a trade in the tax years 2018-19 and 2019-20,

(d) intend to continue to carry on a trade in the tax year 2020-21,

(e) if that person is a non-UK resident or has made a claim under section 809B of ITA 2007 (claim for remittance basis to apply), certify that the person's trading profits are equal to or more than the person's relevant income for any relevant tax year or years,

(f) be an individual, and

(g) meet the profits condition.

4.3 In paragraph 4.2, "relevant tax year" means all or any of the tax years 2016-17, 2017-18 and 2018-19, as the case may be, for which a person's trading profit and relevant income must be determined for the purposes of SEISS.

The profits condition

5.1 The profits condition is met if-

(a) where the person is not subject to the loan charge, the person meets condition A, B or C, or

(b) where the person is subject to the loan charge, the person meets condition D or E.

5.2 Condition A is met if-

(a) the person's trading profits of the tax year 2018-19 were £50,000 or less but were more than nil, and

(b) those profits are equal to or more than the person's relevant income in that tax year.

5.3 Condition B is met if-

(a) the person carried on a trade in the tax years 2016-17, 2017-18 and 2018-19,

(b) the average amount of the person's trading profits of those tax years was £50,000 or less but was more than nil, and

(c) the sum of those profits is equal to or more than the sum of the person's relevant income for those tax years.

5.4 Condition C is met if-

(a) the person carried on a trade in the tax years 2017-18 and 2018-19 but did not carry on a trade in the tax year 2016-17,

(b) the average amount of the person's trading profits of the tax years 2017-18 and 2018-19 was £50,000 or less but was more than nil, and

(c) the sum of those profits is equal to or more than the sum of the person's relevant income for those tax years.

5.5 Condition D is met if-

(a) the person carried on a trade in the tax years 2016-17 and 2017-18,

(b) the average amount of the person's trading profits of those tax years was £50,000 or less but was more than nil, and

(c) the sum of those profits is equal to or more than the sum of the person's relevant income for those tax years.

5.6 Condition E is met if-

(a) the person did not carry on a trade in the tax year 2016-17,

(b) the person's trading profits of the tax year 2017-18 were £50,000 or less but were more than nil, and

(c) those profits are equal to or more than the person's relevant income for that tax year.

SEISS payment

The Payment

6.1 The amount of the SEISS payment is the lower of-

(a) £7,500, and

(b) 3 × TP/ 12 × 80%).

6.2 In paragraph 6.1, TP is–

(a) except where the person is subject to the loan charge, determined by the first to apply of the following paragraphs-

- **(i) If the person carried on a trade in the tax years 2016-17, 2017-18 and 201819, the average trading profits of those tax years,**
- **(ii) if the person did not carry on a trade in the tax year 2016-17, the average trading profits of the tax years 2017-18 and 2018-19, and**
- **(iii) if the person did not carry on a trade in the tax year 2017-18, the trading profits of the tax year 2018-19, or**

(b) where the person is subject to the loan charge, the average trading profits of the tax years 2016-17 and 2017-18 or, if the person did not carry on a trade in the tax year 2016-17, the trading profits of the tax year 2017-18.

Trading profits

7.1 For the purposes of SEISS, the amount of trading profits for a tax year is equal to-

TIC – TL

where-

TIC is, subject to paragraph 7.2, the amount of the trading income component of total income at Step 1 of section 23 of ITA 2007 (the calculation of income tax liability) for that year, and

TL is the amount of any trading loss in that year.

7.2 Where an averaging claim has been made under Chapter 16 of Part 2 of ITTOIA 2005 (averaging profits of farmers and creative artists), the trading income component of total income of the tax years to which the claim relates is taken as the trading income before any adjustment is made in accordance with section 223 of that Act (adjustment of profits).

Relevant income

8.1 For the purposes of SEISS, the amount of relevant income for a tax year is equal to-

TI + OI – TIC

where-

TI is, subject to paragraph 8.2, the amount of total income for that year,

OI is the amount of overseas income for that year where the person making a claim is a non-UK resident for that year or has made a claim under section 809B of ITA 2007 (claim for remittance basis to apply), and

TIC has the same meaning as in paragraph 7.

8.2 Where an averaging claim has been made under Chapter 16 of Part 2 of ITTOIA 2005 (averaging profits of farmers and creative artists), the total income of the tax years to which the claim relates is taken as the total income before any adjustment is made in accordance with section 223 of that Act.

8.3 For the purposes of paragraph 8.1-

(a) "overseas income" for a tax year is any amount of income which is not charged to income tax in the United Kingdom that is substantially similar to an amount of income that would be chargeable to income tax in the United Kingdom if it arose in the United Kingdom, and

(b) whether overseas income is "for" a tax year must be determined on a just and reasonable basis.

Loan charge cases

9. For the purposes of SEISS, a person is subject to the loan charge if-

(a) on 26 March 2020 the person is chargeable to income tax on any amount by reason of Schedule 11 or 12 to the Finance (No. 2) Act 2017 (loan charge) as enacted as at that date, or

(b) the person would be so chargeable but for entering into a contract settlement on or after 20 December 2019.

Contract settlements and amendments to tax returns

10. For the purposes of SEISS, amounts of trading profits and relevant income are determined by reference to a person's tax returns as at 23 April 2020 but no account will be taken of any amendment made to a tax return on or after 6pm on 26 March 2020 or any contract settlement.

Entitlement under other schemes

11. Entitlement to a payment under SEISS is without prejudice to any entitlement to a payment under any similar scheme arising from a direction under section 76 of the Coronavirus Act 2020.

HMRC's accounts

12. SEISS payments made by HMRC must be shown in HMRC's consolidated accounts produced for the purposes of section 6(4) of the Government Resources and Accounts Act 2000 and section 2 of the Exchequer and Audit Departments Act 1921 for the year ending on 31 March 2021.

Interpretation

13. In this scheme-

"contract settlement" has the meaning given by paragraph 8(7) of Schedule 1AB to TMA 1970;

"HMRC" means Her Majesty's Revenue and Customs;

"ITA 2007" means the Income Tax Act 2007;

"ITTOIA 2005" means the Income Tax (Trading and Other Income) Act 2005;

"non-UK resident" has the meaning given in section 989 of ITA 2007;

"overseas income" has the meaning given by paragraph 8.3;

"relevant income" has the meaning given by paragraph 8;

"SEISS" means the Self-Employment Income Support Scheme;

"TMA 1970" means the Taxes Management Act 1970;

"tax return" means a return of income and capital delivered to HMRC under section 8 of TMA 1970 (personal return);

"tax year" has the meaning given by section 4(2) of ITA 2007 (income tax an annual tax);

"the tax year 2018-19" (and any corresponding expression in which two years are similarly mentioned) has the meaning given by section 4(4) of ITA 2007;

"total income" has the meaning given by section 989 of ITA 2007;

"trade" means a trade, profession or vocation the profits of which are chargeable to income tax under Part 2 of ITTOIA 2005 (trading income) and in this definition "trade" has the same meaning as in section 989 of ITA 2007;

"trading profits" means the profits of a trade and are calculated in accordance with paragraph 7.

APPENDIX LETTER FROM HMRC

From: …on behalf of perm.secs@hmrc.gov.uk
Sent: 23 April 2020 13:09
To: michael@dugganqc.com; perm.secs@hmrc.gov.uk
Cc:
Subject: RE: FOR THE URGENT ATTENTION OF MR JOSHUA FLEW

Dear Mr Duggan,

Thank you for your email about the Job Retention Scheme. I have picked this up through the policy team and the response is set out below.

The Job Retention Scheme was introduced in extraordinary circumstances and at unprecedented pace to provide vital support to employers and their employees, protecting jobs. The scheme was announced by the Chancellor on 20 March and launched on 20 April. In its first day of operation, applications were received from over 140,000 employers, in respect of over 1,000,000 jobs.

HMRC will act at all times in accordance with the Direction. HMRC's interpretation of the Direction is set out in our published guidance. It is our expectation that customers should consider the guidance in the first instance when seeking to understand the operation of the scheme and HMRC's interpretation of the Direction.

You have asked for clarification about the requirement for employers and employees to agree to commence furlough. I can confirm that we stand by the interpretation that we have articulated in our guidance which is consistent with the Direction.

Employers should discuss with their staff and make any changes to the employment contract by agreement. To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response. A record of this communication must be kept for five years.

Put simply, the employer and the employee must reach an agreement and an auditable written record of this agreement must be retained. It does not necessarily follow that the employee will have provided written confirmation that such an agreement was reached in all cases.

You also asked about giving notice of termination, and whether employers can require employees to take leave. The Job Retention Scheme provides for a grant to be made to cover certain employment costs incurred by employers in respect of furloughed employees. It does not alter employment or contract law and employers must continue to consider contractual commitments with their employees in the usual way.

We have published detailed guidance and a calculator to help employers to calculate the value of their claims correctly.

We're grateful for the feedback we have received on both the HM Treasury Direction and HMRC's guidance. We will continue to consider these comments and will provide appropriate clarification if necessary.

I hope that you find this clarification helpful.

Yours sincerely
xxxx

Private Secretary to Jim Harra, HMRC Chief Executive and First Permanent Secretary | Permanent Secretaries' Group | HM Revenue & Customs, Room 2/75, 100 Parliament Street, London SW1A 2BQ | MS Teams

Please direct enquiries to: the Permanent Secretaries or their Private Office (perm.secs@hmrc.gov.uk); Corporate Governance/ExCom Secretariat (secretariat.excom@hmrc.gov.uk); Non-Executives (hmrc.nonexecutives@hmrc.gov.uk) Parliamentary Scrutiny / Briefing (parliamentaryscrutiny.team@hmrc.gov.uk)

From: michael@dugganqc.com <michael@dugganqc.com>
Sent: 21 April 2020 10:48
To: Secs, Perm (HMRC) <perm.secs@hmrc.gov.uk>
Cc: michael@dugganqc.com
Subject: FOR THE URGENT ATTENTION OF MR JOSHUA FLEW

Dear Mr xxxx,
I am being asked about three issues that are unclear from the Furlough Guidance and the HMRC Directions and would be most grateful if you were able to assist.

1. Concern is being expressed that the Guidance refers to employees being notified in writing that they have agreed to take furlough whereas the Directions at 6.7. appear to require written agreement (ie. a signed document from both parties). Can you confirm that it is the position that if the employer has sent written confirmation that the employee has agreed to furlough this is sufficient? This is very important as this is what most employees have done based on the Guidance.
2. Where employees have been put on furlough but the employer has had to give notice, is the position that the notice monies are to be the 80% or £2500, whatever is the greater, or is it the position that their notice reverts back to the contractual sums?
3. Can an employer give notice to the employee to take holiday? The Employee Guidance states that an employee can take holiday but the Employer Guidance is silent on whether the employer can give notice to the employee to take holiday.

These are all quite urgent issues that have been raised by a considerable number of people in the media and it would be of great assistance if they could be clarified.

Your sincerely,

Michael Duggan QC

APPENDIX 2: ACAS TEMPLATE FURLOUGH AGREEMENT

Letter confirming an agreement to temporary furlough

An employer can adapt this template to confirm temporary furlough with employees and workers. See more about coronavirus and workplace closures on the Acas website.

Instructions or options to fill in this template are in [square brackets].

Dear [name of employee/worker]

As discussed with [name of HR/manager] on [date when furlough was discussed with employee/worker], we will place you 'on furlough'.

This means that you will still be employed by us [although at a lower rate of pay]. You will not do any work for us during the furlough period. We can then use the Government's Coronavirus Job Retention Scheme, which covers 80% of your normal pay [for employees earning more than £2,500 per month, add 'up to a maximum of £2,500 per month'].

[In this way, we hope to keep the business going and avoid redundancies if possible until matters get back to normal.]

If you agree to be placed on furlough, your contract of employment will be temporarily varied. You will need to sign to confirm your agreement to the variation in the section at the end of this letter headed "confirmation of agreement" and return a copy to us. We are sending two copies of this letter so that you can keep one for your records. Unless we agree otherwise and unless your contract of employment is terminated by you or by us before that date, the temporary variation will come to an end on the date when you return to normal work.

Your period of furlough will begin on [date]. It will last for at least three weeks and may last up to three months. After three weeks, we will keep the situation under review. The three months may need to be extended and, if so, we will discuss this with you. As soon as we think we can get you back to work as normal, we will give you notice and will expect you to return to work immediately unless agreed otherwise.

Please confirm your contact details in the section at the bottom of this letter so that we can keep in touch.

To summarise, this is how furlough will work:

1. Based on your [monthly/weekly] [wage/salary], while on furlough we will pay you [amount per week]. This amounts to [80%/the maximum amount that can be claimed under the Job Retention Scheme/if you are topping up pay provide relevant details here] of your [wage/salary].
   This amount is subject to deductions for tax and national insurance in the usual way.
2. In addition to that [wage/salary], we will pay employer national insurance contributions and minimum automatic enrolment employer pension contributions on that [wage/salary].
3. Your contract of employment will continue with [name of employer], but the terms of the Job Retention Scheme require that you do not do any work for us during the furlough period.

4. While your statutory rights are unaffected by this variation to your contract of employment, your contractual entitlements to pay and other financial benefits during the furlough period are limited to [[those in points 1 and 2] [plus the following additional benefits, if any: please list]].

If you agree to this temporary variation, please sign and date below and return a signed copy of the letter to [HR/Manager] by [insert date].

If you have any questions about your entitlement to annual leave or any other of your rights or entitlements during the period of furlough, please direct those questions to [HR/Manager].

Yours sincerely

[name of employer]

Confirmation of agreement

We agree that the contract of employment between [name of employee/worker and name of employer] will be temporarily varied and that [name of employee/worker] will be placed on furlough on the terms set out in this letter.

Signed: _____ Date: _____ (Employee/Worker)

Signed: _____ Date: _____ (Employer)

Employee/worker contact details:

Tel: _____

Email: _____

Address: _____