

Frequently Asked Questions: COVID-19 (Coronavirus) and employment law

Update on 23rd March 2020 – The Coronavirus Job Retention Scheme and evidence of incapacity for work

This update considers the recent announcement of the Coronavirus Job Retention Scheme (CJRS) announced on 20th March 2020 and developments on the evidence required to establish incapacity for work, for the purposes of claiming Statutory Sick Pay (SSP).

CORONAVIRUS JOB RETENTION SCHEME

What is the Coronavirus Job Retention Scheme?

Under the CJRS, all UK employers will be able to access support to continue paying part of their employees' salaries for those employees that would otherwise have been laid off during the coronavirus outbreak.

Furloughed employee or worker: What does that mean?

'Furlough' is a term more frequently encountered in the USA. There, it is a temporary suspension of employment for a specified period, during which an employee does not receive wages. A furlough can occur as a planned period off work, e.g. an annual factory shutdown.

It is an alternative to redundancy and is broadly similar to the concept of 'lay-off' in the UK. The Government has not referred to the term 'laid-off' employee and therefore, we assume the reason for that is that it intends to use something different to the current statutory definition that exists for lay-off¹.

As it stands, we do not have a specific legal definition of 'furlough' for the purposes of the CJRS. However, the Government guidance states that a furloughed worker means *that the worker is kept on your payroll, rather than being laid off*; confusingly the Government's use of **laid off** means dismissed. It does not appear to be a reference to the statutory definition of lay-off which we have referred to above. Being a furloughed worker does not mean that the person is redundant or that their role is being made redundant. Furthermore, it is not expected to apply to those who are off work due to sickness absence.

What is the CJRS and what does being a furloughed worker mean?

Essentially, the Government intend to create a reimbursement scheme for employers. Pursuant to that scheme the Government intend to create a new definition of a 'furloughed worker', presumably in order to define the eligibility for employers to be reimbursed pursuant to that scheme. It is important

¹ s. 147 Employment Rights Act 1996

to remember that this **does not** involve the worker or employee applying for either a reimbursement or a grant from the Government. Rather, it involves you continuing to pay the worker (pursuant to what-ever contractual terms you have with the worker) and thereafter, for **you** to then seek reimbursement, from HMRC, via a new online platform.

To be clear, the Government scheme is not expected to alter a worker's contractual terms and conditions or change any of the legal protections that employees or workers continue to enjoy; the usual rules will continue to apply. This is essentially a reimbursement scheme for the employer.

Does the Government's new definition of being a furloughed worker change the employment status of a worker?

No. The guidance is clear in that being a furloughed worker will **NOT** involve any kind of statutory change to a worker's status. That will continue to be determined by reference to the existing case-law and legislation. The Government are creating a new definition for the purposes of eligibility to an employer reimbursement scheme. It is not expected that this will affect the terms of any contract of engagement between employer and worker. Therefore, if you wish to reduce an employee or worker's salary, the usual contractual rules will continue to apply.

What is the process for furlough/ What do I have to do to furlough an employee(s)?

The limited information we have available at present is that you will have to:

- designate affected employees as 'furloughed workers,' and
- notify your workers of this change (we suggest this be done in writing); and
- 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)

Thereafter, HMRC will reimburse 80% of furloughed workers' wage costs, up to a cap of £2,500 per month per worker. The use of the term 'reimbursement' indicates that you must make the payments first and then seek reimbursement at a later time. The scheme is expected to run for at least 3 months from 1st March 2020, but it may be extended if necessary and the Government funding available is unlimited. If you do choose to participate in this scheme, the guidance suggests that you do not need to fund the outstanding 20% of your employee's salary that is not paid.

As you can imagine, this is an entirely new scheme, the likes of which could never have been anticipated or prepared for. HMRC are working on the scheme and the process of making payments to employers – funnily enough this facility does not exist right now! There are some points to consider though:

- There is no guidance at present on how long it will take to receive the grants from HMRC. There may be an intervening period where the employer may have to cover the payments. With this in mind, cashflow considerations are a factor.
- The guidance states that in order to furlough an employee, you need to notify your employees and that normal employment law rules apply. As regards you changing the status of an employee's contract it may be that their agreement is necessary. This will not necessarily be difficult in the current circumstances, but it is essential that the change is agreed and documented in writing.

- The scheme, as currently drafted, covers wage costs but not other contractual benefits. Pending clarity, we have taken wage costs to cover its usual meaning. It is worthwhile ensuring that when agreeing this change, with the employee, you also agree what will happen to other contractual benefits during the furlough period and document this in writing.

I employ laid-off staff. Can I refuse to apply for them to be treated as furloughed? Would that mean that they cannot get payment under this scheme?

Yes, there is no legal requirement to apply for a particular employee to be treated as furloughed. It is up to you to determine if you wish to apply for reimbursement under the scheme. However, bear in mind that if you were to pay some employees or workers full pay (because you intend to claim reimbursement for them under the scheme) you may potentially in the future need to justify why you have done this for them and not others in the event that a constructive dismissal or discrimination claim is made.

There are a couple of points to consider if you choose to temporarily lay-off staff and not apply for them to be treated as furloughed. The first is that you can only temporarily lay-off staff in the circumstances described earlier in our previous FAQs of 20th March 2020. After a period on temporary lay-off the individual may have the right to claim a redundancy payment, which the Government at present is not covering (unlike pay for furloughed employees).

The second consideration is that of staff morale. To lay an individual off on the statutory guarantee payment scheme, rather than furlough them, will likely cause damage to the relationship with those staff, given the circumstances and the apparent generosity of the scheme.

In the television interview on Friday (20th March 2020) with the Chief Economist for the CBI (Rain Newton-Smith), it was suggested that the scheme would apply to anyone who has lost their job since 28th February 2020. Is this true? Can I apply on their behalf and would they have to be re-employed?

The initial guidance does suggest that the CJRS will look to support employer's employees who were employed as of 1st March 2020, so some clarity is needed on whether terminated employees can be re-hired and qualify for CJRS.

If a worker is on their notice period, then we expect this could potentially be rescinded (with the agreement from the worker) and the worker furloughed. This is unlikely to cause many issues with workers in the current climate who will likely be grateful to retain their roles and part of their income. However, technically the worker could refuse to return to work and insist on seeing out the notice period.

What forms of engagement will be covered by the CJRS? Will it include everyone on PAYE including PAYE CFS people?

That is unclear. The [guidance](#) currently refers to workers and therefore, we expect the scheme to at the very least cover employees (including those engaged on zero-hours contracts) and workers (including agency workers).

Given Chancellor Rishi Sunak's responses to questions at the recent Government press conference on 20th March 2020, we expect that the scheme will be available to all those currently paid via PAYE (including potentially zero-hours contract workers). Therefore, it is not expected the scheme will cover those who are delivering their services via personal service companies for the payments made to the

PSC. The PSC may have a claim for the PAYE payments it makes to its employees but for the purposes of ensuring the contractual chain is maintained it is important to remember not to treat those delivering services via PSCs in the same way as your employees or workers.

However, at this stage the Government has not released definitive guidance or legislation. Based on the current information we have, and on the assumption that it does not change, then PAYE CFS operatives will also be covered by the scheme on the grounds that they are PAYE. This makes logical sense, on the basis that they are also covered by SSP and that, in all likelihood HMRC will retrieve the required info from RTI returns which will include PAYE CFS operatives.

Is the reference to reimbursing 80% of wage costs (up to a cap of £2,500) based on gross or net pay?

That is unclear, but we expect the scheme to reimburse gross pay. Definitive detail has not yet been provided by the Government, but the details available so far refer to the employer claiming a grant of up to 80% of each worker's wage for all employment costs, up to a cap of £2,500 per month per worker. It is not clear, at this stage, what exactly the Government means by 'wage' or 'employment costs' and what will be covered. However, we anticipate the reference is to gross basic pay.

What about umbrella operatives or those engaged on zero-hours contracts or agency workers? They receive variable pay, subject on occasion to a minimum 336 hours per year.

That is unclear. However, we anticipate that HMRC will use RTI information to assess 80% of gross pay actually paid after the date from which the scheme is deemed to operate (currently considered to be 1st March 2020).

Umbrella operatives frequently receive their pay as two components, namely basic pay (usually national minimum wage) and a discretionary bonus. It is possible that the scheme could be limited to the contractual entitlement, but we consider that administratively the Government will prefer to rely upon HMRC's RTI data. Until we have more detail it is difficult to be definitive.

However, what is clear is that the scheme will not alter the contractual terms between you and the worker. The worker should ideally continue to be paid in accordance with their contract. If you wish to change those terms, then you should consider consulting and agreeing a variation in terms in writing. If you do not, then there is a risk of a claim for constructive dismissal (for employees who have 2 years or more service only) or the risk of a claim for unlawful deduction from wages for others.

Will employer's NIC and pension payments be covered by the scheme?

It would appear as though the CJRS would be a subsidy of income, which would mean the payment would be earnings in the employee's hands and therefore should be liable to PAYE and national insurance, but confirmation of this is needed.

If the CJRS payment is liable to PAYE and national insurance, employers will need to cover the cost for the employer's national insurance cost due on the payments. Employers may be able to manage the employer's national insurance liability by applying for either a time to pay (TTP) arrangement or by using a Coronavirus business disruption loan. The link to the website for loans can be found [here](#).

What does the caveat mean regarding; keeping them employed but not working? What if there are staff that we want to send out to work to try and keep client or to generate new clients, but for whom we might not necessarily have the money to pay?

Our current interpretation of the limited guidance is that sending employees or workers out to work would disqualify an employer from the scheme. The guidance states *'To qualify for this scheme, you should not undertake work for [your employer] while you are furloughed'*. That indicates to us that undertaking any work for you would disqualify a worker from the scheme.

As readers will know, from our earlier advice on 20th March 2020, it is possible (provided there exists the appropriate contractual provision) to place employees on short time working. That avenue remains available regardless of this scheme. However, the current indications are that you will be unable to benefit from any reimbursement, under this scheme, if you place employees on short time working.

We have some reg. 10 AWR 2010 employees, who they have just given notice to terminate their employment: (a) Will these people fall within the furlough provisions? (b) If we rescind the notice and put on furlough will they then get pay between assignments? (c) What if we offer new PAYE agency worker terms and put on furlough?

- a) As employees, those on reg. 10 AWR 2010 contracts will fall within the furlough scheme.
- b) If you rescind the notice period (see notes in this guide on rescinding notice), then their employment will continue under the agreed terms. However, putting them on furlough will mean they are not actively working which will make it impossible to comply with reg. 10 for you and for the employee. For example, if furloughed an employee cannot make themselves available for work (which they need to do to claim pay between assignments) because the employer and employee have effectively agreed for the employment to pause. Therefore, it would be hard to argue that pay between assignments should be paid. Furthermore, the right to pay between assignments will be repealed on 6th April 2020 anyway meaning there will be no statutory right to pay between assignments from this date. For those that have a contractual right to pay between assignments beyond 6th April, then it would be advisable to ensure that subject to the terms of that contract the individual agrees that the right to pay between assignments does not apply during the furlough period.
- c) It would be difficult to offer new terms to someone during a period when their employment was effectively paused. It would also be difficult to claim payments for someone not working at the same time that you are offering them new terms. Given the uncertainty that exists at present and the lack of detail for these rules, adding further complexities to things would potentially be a risk.

Aside from the aforementioned and on the assumption no other payments are made by us to employees are they able to access anything else to make up any shortfall?

Yes, potentially. It will rest on the specific circumstances. More information on those who are eligible for support through the welfare system can be found, including Universal Credit, can be found [here](#).

STATUTORY SICK PAY (UPDATE)

Proof of Sickness

Individuals can now obtain an "isolation note" by visiting NHS 111 online, rather than visiting a doctor. For COVID-19 cases, this replaces the need to obtain a fit note from their Doctor after 7 days. The link to the online form can be found [here](#).

GOVERNMENT AND ACAS GUIDANCE

Some details of the Government's CJRS scheme can be found [here](#).

The COVID-19 pandemic is continually changing and the government and ACAS advice for employers is being updated as the situation develops. We suggest that you should keep track of the guidance for employers from the following sources:

- [Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses](#) (applicable in England).
- [Welsh Government: Coronavirus \(COVID-19\): employers and businesses guidance](#) (applicable in Wales).
- [Health Protection Scotland: COVID-19: Information and Guidance for Non-Healthcare Settings](#) (applicable in Scotland).
- [Acas: Coronavirus: advice for employers and employees](#) (relevant to employers throughout the UK).
- [WHO guidance: Getting your workplace ready for COVID-19](#) (applicable globally).

For information on the circumstances in which individuals should self-isolate see the following sources:

- [Public Health England: COVID-19: stay at home guidance](#) (applicable in England).
- [Public Health Wales: Novel Coronavirus \(COVID-19\) - Self-isolation advice](#) (applicable in Wales).
- [Health Protection Scotland: Coronavirus \(COVID-19\)](#) and [NHS Inform: Coronavirus \(COVID-19\)](#) (applicable in Scotland).

Guidance has also been issued on the steps that vulnerable people should take to minimise their risk of infection:

- [Public Health England: COVID-19: guidance on social distancing and for vulnerable people](#) (applicable in England and Wales).

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