Understanding the COVID-19 Job Retention Scheme – an updated guide for employers

This is the latest updated version of our guide to the COVID-19 Job Retention Scheme (Scheme), which has been designed to assist employers to retain employees in the face of the challenges presented by the global coronavirus crisis. In this briefing, we consider what the latest guidance means for employers who wish to "furlough" employees and apply for funding under the Scheme. This briefing covers the whole Scheme but was updated on 15 May 2020.

A. BACKGROUND:

What is the Scheme and how long will it be available?

The coronavirus crisis has had a drastic impact on businesses across many sectors, causing closures, lost custom, lower revenue and cash flow problems. The Scheme has been introduced to encourage employers to retain their workforce throughout this difficult time.

Under the Scheme, the Government will pay 80% of the wage costs of employees who are placed on temporary leave by their employer (up to a maximum of £2,500 per month). This type of leave is known as "furlough". Initially, the Scheme was intended to run for a three-month period between 1 March 2020 and 31 May 2020. On 17 April 2020, it was announced that it would be extended to 30 June 2020. On 12 May 2020, it was announced that the Scheme would be extended again, this time to 31 October 2020. This guide explains how the Scheme will operate until 31 July 2020.

From 1 August 2020 changes will be made to the Scheme which will:

- allow *"employers who are currently using the scheme"* to bring furloughed employees back to work on a part-time basis; and
- require such employers to *"pay a percentage towards the salaries of their furloughed staff".*

Further details of how the revised Scheme will operate will be published at the end of May 2020.

The Scheme covers employees and those with other employment statuses. For ease of reference, in this guide the term "employees" is used to cover all eligible individuals. We highlight any special rules applying to those with particular employment statuses.

What is the legal framework of the Scheme?

The Scheme is governed by a Treasury Direction (**Direction**) published on 15 April 2020, which sets out the legal framework, and the following seven pieces of non-binding HMRC guidance (together, the **Guidance**):

1. Employer Guidance on how to check if you can claim (10th version dated 14th May 2020)
2. Employer Guidance on which employees can be put on furlough (1st version dated 14th May 2020)

3. Employer Guidance on how to work out 80% of your employees' wages (6th version dated 14th May 2020)
4. Employer Guidance on claiming for wages (6th version dated 14th May 2020)
5. Employer Guidance on reporting payments in PAYE Real Time Information from the Coronavirus Job Retention Scheme (1st version dated 23 April 2020)
6. Employer Step-by-Step Guide to making a claim (4th version dated 11th May 2020)
7. Employee Guidance (10th version dated 14th May 2020)

In addition, separate guidance has been published on holiday entitlement and pay and discipline and grievance procedures. Whilst not forming part of the framework governing the Scheme, they will be relevant and should be consulted where appropriate.

B. ELIGIBILITY FOR FUNDING:

Which employers can apply for funding under the Scheme?

The Scheme is open to any UK employer, regardless of their size or sector. This includes individual employers, who are able to furlough employees such as nannies, provided they meet the other eligibility criteria.

To qualify, the employer must have:

- created and started a PAYE payroll scheme on, or before, 19 March 2020 (this has changed from the original cut-off date of 28 February 2020);
- enrolled for PAYE online; and
- a UK bank account.

In addition, where a company has gone into administration, the administrator may be able to access the Scheme.

Employers who receive public funding for staff costs, or to provide services necessary to the response to coronavirus, are not usually expected to apply for funding under the Scheme.

Which members of the workforce are covered by the Scheme?

Not all members of the workforce are covered by the Scheme. Four criteria must be met in order for a claim to be made:

- the employee must have been on the PAYE payroll on, or before, 19 March 2020 (this has changed from the original cut-off date of 28 February 2020);
- a Real Time Information (**RTI**) submission notifying payment in respect of the employee must have been made to HMRC on, or before, 19 March 2020;
- the employee must not undertake any work for the employer (or any linked or associated organisation) once furloughed. If the employee is to carry out any work, even on reduced hours, they will not be eligible; and
- the employee must have one of the eligible statuses listed in Table A below.

Employees who have more than one employer can be furloughed by one employer and continue to work for their other employer. Each job is treated separately, and the cap applies to each separately.

Foreign nationals and employees on all categories of visa are eligible to be furloughed.

TABLE A		
EMPLOYMENT STATUS		**ELIGIBLE?**
1.	Employees engaged under any type of employment contract (e.g. full-time, part-time, permanent, fixed-term, flexible or zero hours)	✓
2.	Apprentices (who may continue to undertake training whilst furloughed)	✓
3.	Workers	✓
4.	Office holders, including company directors (this includes salaried individuals who are directors of their own personal service company)	✓
5.	Salaried members of LLPs (i.e. those who are designated as employees for tax purposes under the Income Tax (Trading and Other Income) Act 2005)	✓
6.	Agency workers (including those employed by umbrella companies)	✓
7.	Contractors with public sector engagements who fall within the scope of the IR35 off-payroll working rules	✓
8.	Self-employed contractors (a separate support scheme is available for them)	×

What happens if an employee's fixed-term contract is close to expiry?

Where a fixed-term contract would expire during the proposed furlough period, the employer is allowed to renew or extend the contract without breaching the terms of the Scheme (provided this is done **before** the contract expires and an RTI payment submission is notified to HMRC on or before 19 March 2020). If this is not done, then the employer will only be able to make a claim for that employee up to the date the contract expired. However, the employer may be able to rehire the employee and furlough them.

Employees who started work after 28 February 2020 and who left before 19 March 2020 will not be eligible for funding under the Scheme.

Are absent and former members of the workforce able to be furloughed?

Only some absent and former members of the workforce are eligible for funding under the Scheme.

The following groups **are** able to be furloughed under the Scheme:

- those absent from work on unpaid leave which started after 28 February 2020;
- those absent from work because they have caring responsibilities resulting from coronavirus (e.g. looking after children or caring for a vulnerable person);
- those absent from work because they are shielding in line with Public Health Guidance or need to stay at home with someone who is shielding (however, see the section *"Are sick and self-isolating employees able to be furloughed?"* below);
- those who have left employment but who were on the PAYE payroll on 28 February 2020 (i.e. notified to HMRC on an RTI submission on or before 28 February 2020) and who stopped work

after 28 February 2020 and who are then re-hired (save that if an employee has already been furloughed by their current employer then they will not be eligible to be furloughed by a former employer); and

- those who have left employment but who were on the PAYE payroll on 19 March 2020 (i.e. notified to HMRC on an RTI submission on or before 19 March 2020) and who stopped work and who are then re-hired (save that if an employee has already been furloughed by their current employer then they will not be eligible to be furloughed by a former employer).

The following groups **are not** able to be furloughed under the Scheme:

- those absent on unpaid leave which started on, or prior to, 28 February 2020 (they may be covered once they have returned to work, however, the employer cannot agree to bring the original return date forward in order to allow them access to the Scheme); and
- those who have left employment and who do not fall into one of the two exceptions listed above.

Are sick and self-isolating employees able to be furloughed?

The position for sick and self-isolating employees is complex. Unhelpfully, the employee facing version of the HMRC guidance over-simplifies the issue when it says such employees can be furloughed *"at any time".* Employers will need to make sure that sick and self-isolating (and shielding) employees understand that there are, in fact, significant constraints on their ability to furlough them.

First, the Direction stipulates that where Statutory Sick Pay (**SSP**) is payable, or liable to be payable, to an employee (regardless of whether it is ever claimed) at the time the employer wishes to furlough, the furlough cannot begin until that original SSP period has ended. For example, if an employee contracts coronavirus and is signed off sick for 2 weeks, that employee becomes entitled to be paid SSP. The employer will only be able to furlough this employee once that 2-week SSP period is over. Once it is over, the employer is potentially able to furlough the employee regardless of whether they subsequently fall ill or need to self-isolate.

On the face of it, this rule appears to restrict the ability of employers to furlough shielding employees. Shielding employees are entitled to SSP. Therefore, if an employee is advised to shield for 12 weeks, they will be entitled to SSP for that initial 12-week period. Under the wording of the Direction, this initial SSP period would have to lapse before the furlough period could begin. We think this must be an unintended consequence of the Direction, since it is directly contrary to the Guidance. We hope this will be rectified soon. In the meantime, we recommend that employers take specific legal advice on the subject of furloughing a shielding employee.

Second, the question of whether an employer is entitled to furlough a sick employee depends on the length of the sickness absence and the reason for wanting to furlough them. The Guidance differentiates between "short-term" and "long-term" sickness absence. Short-term sickness absence is not defined but is usually understood to mean absences lasting up to 4 weeks (for example, on the Government's Fit for Work website).

Short-term sickness / self-isolation

An employee who is absent due to short-term sickness, or because they are self-isolating, should not be furloughed simply because of that absence (e.g. as a means of covering their wages). Instead, they should be treated as absent on sick leave and be paid SSP, plus any contractual sick pay which is due. The downside for the employer is that it will have to cover the wage costs itself, save that it may be entitled to a rebate of SSP if it meets certain qualifying criteria.

However, an employee who is absent due to short-term sickness, or because they are self-isolating, may be furloughed *"for business reasons".* In other words, if the sickness or self-isolation is incidental to a wider business decision to furlough then it is permissible to furlough the employee (once the original SSP period has ended). If the employer decides to furlough, then they should cease to pay sick pay and reclassify the employee as a furloughed employee and pay furlough pay. Where the employee is entitled to full contractual sick pay, they may well be reluctant to agree to be furloughed if this would result in a shortfall in their pay.

Long-term sickness

An employee who is absent due to long-term sickness may be furloughed. The Guidance simply says, *"it is up to the employer to decide whether to furlough these employees".* There appears to be no requirement that the decision be motivated by business reasons. If the employer decides to furlough, then they should cease to pay sick pay and reclassify the employee as a furloughed employee and pay furlough pay.

What happens if a furloughed employee becomes sick whilst furloughed?

The Guidance says that it is *"up to employers"* to decide whether to keep such an employee on furlough or regard them as absent on sick leave. If the employer decides to treat a furloughed employee as absent on sick leave, then it must cease paying furlough pay and begin paying SSP (and any contractual sick pay which is due). Usually, it will make sense to keep such an employee on furlough. However, if the employee is entitled to full contractual sick pay, they may prefer to be treated as sick rather than receive the reduced furlough rate of pay.

What happens to employees absent on some form of paid family leave?

Employees taking, or planning to take, a form of paid family leave during the proposed furlough period are entitled to take their leave in the normal way. This covers maternity, paternity, adoption, shared parental leave and parental bereavement leave.

Employees are also entitled to be paid their statutory payment (e.g. statutory maternity pay) in the normal way. However, if the employee was furloughed and then started their family leave on, or after, 25 April 2020, the employer may need to calculate the employee's average weekly earnings differently (in essence, the calculation must be based on the pay the employee would have received had they not been furloughed). If the employer offers enhanced pay, then this will count as "wage costs" for the purposes of the Scheme and can be reclaimed, subject to the upper limit of £2,500 per month.

However, if the employee is receiving maternity allowance payments directly from Jobcentre Plus (instead of statutory maternity pay from the employer), she cannot be furloughed. An employee in

this position who wishes to be furloughed is able to give 8 weeks' notice to end her maternity leave. Once those 8 weeks have lapsed, she can be furloughed and paid furlough pay.

Are employees who transfer to a new employer under TUPE able to be furloughed?

All employees transferring to a new employer under TUPE are eligible to be furloughed, even where the transfer date falls after 28 February 2020. There was a concern that if the transfer took place after the cut-off date, the transferring employees could not be furloughed as they would not have been on the new employer's payroll on that date. However, the latest Guidance makes it clear that such employees can still be furloughed.

What happens if a group of companies consolidates separate PAYE schemes?

Where a group of companies has multiple PAYE schemes and consolidates them into a single PAYE scheme after 28 February 2020, it will still be possible to furlough the employees and claim funding under the Scheme.

Can an employer only furlough employees it would otherwise have made redundant?

When the Chancellor of the Exchequer announced the Scheme on 20 March 2020, he said it was intended to cover the wages of *"people who are not working but are furloughed and kept on payroll, rather than being laid off".* It was widely agreed that the Chancellor was using the term "laid off" in a colloquial sense to mean "made redundant", rather than laid off pursuant to a contractual right to lay off without pay. In other words, in order to access the funding, it appeared that it was necessary for the employer to be choosing furlough instead of redundancies.

However, the first iteration of the Guidance did not stipulate any such requirement. Instead, it said that the Scheme was designed to support employers *"whose operations have been severely affected by coronavirus"*. It appeared that the Scheme was, in fact, open to employers facing difficulties, but who had not yet considered making staff redundant.

In our view, the later iterations of the Guidance make it even clearer that the Scheme is available to all employers, regardless of whether they are considering redundancies. The latest Guidance says that the Scheme is designed to help employers whose operations have been severely affected by coronavirus to retain their employees. It goes on to say *"However, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus".* Further, the Direction says that a furloughed employee is one who has been told to cease all work for 3 weeks or more *"by reason of circumstances arising as a result of coronavirus or coronavirus disease".* We interpret this to mean that all employers who have been negatively affected by coronavirus can seek funding under the Scheme, regardless of whether they are at the stage of considering redundancies.

C. WHAT DOES THE SCHEME COVER?

What can employers claim under the Scheme?

If eligible, employers can apply for a grant from HMRC to cover the wage costs of furloughed employees. "Wage costs" covers the following:

- the lower of 80% of the employee's gross monthly pay in the last pay period prior to 19 March 2020 (the **reference salary**) or £2,500 per month;
- the associated employer National Insurance Contributions (**NICs**); and
- if the employee has a pension, the minimum automatic enrolment employer pension contributions (currently 3% of income above the lower limit of qualifying earnings) on the subsidised wage only (the pension scheme does not have to be an auto-enrolment pension scheme).

For these purposes, the reference salary includes only regular payments which the employer is legally obliged to pay to the employee. "Regular" excludes any payments which are conditional and/or variable according to the:

- performance of the business or employee;
- contribution made by the employee to the performance of the business; and/or
- discretion of the employer,

unless the variable payment arises from a legally binding agreement or similar.

Therefore, the reference salary will include basic pay and any other non-discretionary payments such as overtime, fees and contractual commission payments. However, many types of pay are excluded from the Scheme, as are non-cash benefits (see below).

For a salaried LLP member, the reference salary should only include payments that are either: fixed; variable without reference to the overall profit and loss of the LLP; and/or not affected by the overall profit and loss of the LLP.

Which payments and benefits are excluded from the Scheme?

Certain types of payments and benefits **cannot** be recovered under the Scheme. These include:

- conditional payments;
- some performance-related payments;
- some discretionary bonus payments;
- some discretionary commission payments;
- non-cash payments;
- tips, including those distributed through troncs;
- the cost of non-cash benefits (including taxable benefits in kind e.g. company car);
- the cost of benefits provided through salary sacrifice schemes (including pension contributions); and
- employer pension contributions relating to the 80% of salary (or £2,500 if lower) which are over and above the minimum automatic enrolment employer pension contributions.

If an employer wishes to continue providing excluded payments or benefits, then it will bear the cost of doing so itself. It is not permitted to set off any part of the grant made under the Scheme towards the cost of providing any such payments or benefits.

If the employer wishes to suspend such payments or benefits, then it should obtain the employee's agreement to do so. As far as benefits by way of salary sacrifice are concerned, the Guidance confirms that HMRC agrees that coronavirus counts as a "life event" which could warrant changes to a salary sacrifice arrangement.

Employers must continue to make Apprenticeship Levy and Student Loan payments. Grants under the Scheme do not cover these payments.

What happens where employees have variable pay?

Where pay varies, employers should take the following approach:

- **If the employee has been employed for a full 12 months prior to the claim**: use the higher of either the same month's earnings from the previous year or the average monthly earnings from the 2019/20 tax year.
- **If the employee has been employed for under 12 months**: use an average of their monthly earnings since they started work until the date they are furloughed.
- **If the employee has been employed for less than a month**: use a pro-rata of their earnings so far.

Once the employer has worked out the amount of salary to be claimed, it will also need to work out the amount of employer NICs and the minimum automatic enrolment employer pension contributions to be claimed.

What is the reference salary for an employee who has returned (or will return) from statutory leave or unpaid leave?

Where an employer wishes to furlough an employee who has returned to work from statutory leave, the correct reference salary is their normal gross salary, not the pay they received whilst on statutory leave. In this context, "statutory leave" means: sick leave; maternity leave; paternity leave; adoption leave; shared parental leave; unpaid parental leave and parental bereavement leave.

If an employee returning from statutory leave has variable pay, then the reference salary should be calculated using either the same month's earnings from the previous year or the average monthly earnings for the 2019/2020 tax year.

Where an employer wishes to furlough an employee who has returned to work from any other unpaid leave the correct reference salary is *"the amount they would have been paid if they were on paid leave".* Our view is that this probably means the amount they would have been paid if they had been on paid annual leave (i.e. their normal pay).

What will the furloughed employee receive?

The maximum funding that can be recovered under the Scheme is £2,500 per month or 80% of pay if lower. The employer should deduct income tax and employee NICs and other deductions in the normal way and then pay the whole of the net amount to the employee. No monies should be deducted to cover the costs of continuing to provide benefits or for any other reason (e.g. an administration charge).

What this means in practice is that a furloughed employee earning up to £37,500 per annum (gross) would receive 80% of their actual pay. Anyone earning over £37,500 per annum (gross) will experience a shortfall over and above the 20% due to the application of the cap.

Worked example 1: Employee earning £24,000 per annum	**Worked example 2: Employee earning £60,000 gross per annum**
Annual salary is £24,000 per annum (gross). Monthly salary is £2,000 per annum (gross). £2,000 x 0.80 = £1,600 paid to the employer (plus additional sum for employer NICs and pension contributions if applicable). Employer deducts income tax and employee NICs (and any other deductions) from £1,600. Employee receives net amount of approximately £1,428 (compared to usual net amount of approximately £1,655).	Annual salary is £60,000 per annum (gross). Monthly salary is £5,000 per annum (gross). £5,000 x 0.80 = £4,000 meaning the cap of £2,500 is applied. £2,500 is paid to the employer (plus additional sum for employer NICs and pension contributions if applicable). Employer deducts income tax and employee NICs (and any other deductions) from £2,500. Employee receives net amount of approximately £1,995 (compared to usual net amount of approximately £3,611).

In addition, if the employer has claimed for employer pension contributions under the Scheme, then the whole amount claimed must be paid into the employee's pension scheme as an employer pension contribution.

Do employers have to cover the shortfall in pay?

Ordinarily, unless the employer has a contractual right to lay an employee off without pay, it must maintain normal pay for employees who are laid off temporarily. This would mean that the employer would be obliged to cover the shortfall in pay, namely the 20% not covered by the Scheme and any shortfall in the 80% suffered by those earning in excess of £37,500 per annum.

The Guidance states that employers may choose to pay any shortfall, but they are not obliged to under this Scheme. Although employers are not obliged to top up any shortfall under the rules governing the Scheme, they will often be under a contractual obligation to top up to normal pay.

However, before placing an employee on furlough, the Guidance provides that the employer should discuss the Scheme with their staff and make any changes to the employment contract by agreement. In practice, therefore, an employer who does not wish to top up the shortfall should obtain the agreement of employees to receive only the reduced pay under the Scheme. This agreement should be documented in writing. Where an employee refuses to agree to this change, the employer may decide not to furlough the employee and, instead, make them redundant.

Some employers may be in a position to top up the shortfall. Where an employer does this, it will **not** be able to claim under the Scheme for either employer NICs or automatic enrolment employer pension contributions on the additional amount of pay.

D. PLACING AN EMPLOYEE ON FURLOUGH:

How should employers select who to furlough?

If an employer needs to furlough all staff, the decision-making process will be straightforward. However, if the employer needs to furlough only some staff then it will have to decide which staff to furlough and which staff will remain working. The Guidance is not prescriptive about the process that employers should adopt when making such decisions, save that it states that equality and discrimination laws will apply in the usual way. Employers also need to be mindful of the duty of mutual trust and confidence. The safest course of action would be to apply objective selection criteria when selecting who to furlough from a pool of candidates.

Are there any special considerations for company directors?

Provided it is acting in compliance with its statutory duties, the board of directors of a company may decide to furlough a salaried company director. This includes directors who are paid annually, provided they meet the other eligibility criteria (including being notified to HMRC on an RTI submission on or before 19 March 2020 in respect of the 2019/2020 tax year).

Where a board decides to furlough a director, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director concerned.

Where a company director has been furloughed, he or she is allowed to carry out particular duties to fulfil the statutory obligations they owe to the company, to the extent that it is reasonable and necessary to do so. The Direction provides that this has a narrow meaning and only covers work undertaken to fulfil a duty or other obligation arising under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the company. They are not allowed to carry out normal duties designed to generate revenue or provide services to, or on behalf of, the company.

Are there any special considerations for members of LLPs?

To furlough a salaried member of an LLP, it may be necessary to vary the terms of the LLP agreement (and any agreement between the LLP and the member) to reflect the fact that the LLP member will not be working whilst furloughed and what this means for their remuneration.

Are there any special considerations for agency workers?

Where the agency worker is employed by the agency, the agency will be responsible for taking the decision to furlough. Where the agency supplies workers who are employed by an umbrella company that operates the PAYE, the umbrella company will be responsible for taking the decision to furlough.

The Guidance advises that the agency should discuss the need to furlough with the relevant end user client. Once furloughed, an agency worker is not allowed to perform any work for, through, or on behalf of, the agency, including for the agency's clients.

Do employees need to consent to being furloughed?

The Guidance provides that employers should discuss and agree the furlough arrangement with their employees. This means that employers will need to discuss the proposal to furlough with employees and seek their agreement. However, the Guidance does not dictate any particular form of consultation process. We suggest a letter explaining the proposal and a follow-up conversation (or vice versa). Alternatively, where the employer recognises a trade union, it may be possible to reach collective agreement.

An employer who does not wish to top up the shortfall in pay will also need the agreement of employees to receive only the reduced pay under the Scheme. Once agreed, the new terms should be set out in writing (see below).

Where an employee refuses to agree to be furloughed at all, or to be furloughed on reduced pay, then their wages cannot be claimed under the Scheme and the employer may decide, instead, to make them redundant.

Will employers need to engage in collective consultation with employees before placing them on furlough?

Employers may be subject to other, more onerous, obligations to consult with employees and/or elected representatives or trade union representatives.

Where 20 or more employees are to be furloughed, the duty to notify the Secretary of State using the HR1 form and to collectively consult the workforce may be engaged. This could be triggered where the proposed furloughing arises in the context of a wider proposal to make 20 or more employees redundant within a 90-day period. It could also be triggered where the employer proposes changes to terms and conditions of employment (e.g. as to pay), which, if not accepted, would lead to the dismissal of 20 or more employees (or, possibly, dismissal and an offer to be re-engaged on new terms).

A key question will be whether there is a sufficiently well-advanced proposal to make 20+ employees redundant at a single establishment within a 90-day period. Arguably, an employer who is asking employees to agree to be furloughed is at the stage of merely contemplating redundancies and won't have a proposal sufficient to trigger collective consultation at that stage. However, each case will be slightly different, and employers should seek legal advice on whether the duty is triggered in their case.

Even where collective consultation is triggered, it is possible that employers will be able to rely on the "special circumstances" defence to justify significant streamlining of the process. Employers within the collective consultation regime should take legal advice on how to approach the consultation process in their specific circumstances.

In addition, employers may be subject to consultation obligations arising under:

- a European Works Council Agreement;
- an Information and Consultation Agreement; and/or
- a Collective Agreement between the employer and a trade union.

Employers will need to consider which, if any, consultation obligations apply and the extent to which it will be able to comply with them.

How should employers record the furlough agreement?

The Direction states that an employee will only qualify as a furloughed employee if he or she has **agreed in writing** that they will cease to carry out any work in relation to their employment (and this is satisfied where it is done electronically e.g. by email). However, the Guidance (issued after the Direction) says that whilst employers must notify the employee in writing that they have been furloughed, there is no need to obtain a response in writing from employees confirming their agreement (provided that they have consented).

This disparity between the Direction and the Guidance is unsatisfactory for employers. In response to a request for clarification on this point, HMRC disagreed that there is any tension between the two documents. On 23 April 2020, HMRC said (in an email to employment barrister Daniel Barnett) that *"…we stand by the interpretation that we have articulated in our guidance which is consistent with the Direction"* and *"…the employer and 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".*

This should provide employers with some comfort that written agreement from employees is not a pre-requisite to making a claim under the Scheme. However, in many cases, changes to the employment contract will be required such that the employee's written agreement will be needed in any event (and there is a suggestion in the Guidance that if such changes are imposed unlawfully this could affect eligibility for the Scheme).

Employers should prepare an appropriate letter or agreement for the employee to agree (either by signing and returning a scanned copy or by email confirmation). As a minimum, the employee should be asked to confirm their agreement to:

- cease all work in relation to their employment;
- change their status to a furloughed employee;
- any changes in respect of their pay and benefits;
- undertake any training required by the employer; and
- return to work upon reasonable notice.

Employers should keep a record of these communications for 6 years.

Do employers have to furlough employees instead of making them redundant?

As part of a fair process, employers are obliged to consider ways to avoid redundancy. A potentially redundant employee might reasonably argue that a failure to consider furloughing means the process is unfair (since the employer's position may have improved by the end of the furlough period meaning redundancy is not needed). Therefore, it's probably necessary for employers to at least consider furloughing as an alternative. However, if the employer concludes that redundancy will still be the ultimate outcome, then it should be able to proceed with a fair redundancy dismissal.

E. HOW TO MAKE A CLAIM:

What help is available for employers when preparing their claims?

The Coronavirus Job Retention Scheme calculator is available to help employers work out how much to claim. Further, the Employer Guidance on how to work out 80% of your employees' wages and the Employer Step-by-Step Guide to making a claim contain worked examples of how to calculate claims for different types of employees. HMRC also offers advice in the form of pre-recorded webinars on their YouTube channel.

What information is needed to make a claim?

To make a claim, the employer will need to submit the following information to HMRC's online portal:

- the employer's PAYE scheme reference number;
- the employer's Self-Assessment Unique Taxpayer Reference or Corporation Tax Unique Taxpayer Reference or Company Registration Number or Employer Name (as appropriate);
- the number of employees being furloughed;
- the National Insurance Numbers for all the employees being furloughed (in the event that an employee does not have a National Insurance Number the employer should contact HMRC);
- the payroll/employee numbers for all the employees being furloughed (optional);
- the claim period (start and end date);
- the full amount claimed, including employer NICs and employer pension contributions);
- the employer's bank account number and sort code; and
- a contact name and phone number.

Where fewer than 100 employees are to be furloughed, the employer must input this information directly onto the online portal for each individual employee. Where 100+ employees are to be furloughed, the employer should compile a file containing this information and upload that to the online portal (and there are strict rules around how the information should be organised within that file).

Can an agent make the claim on the employer's behalf?

Only certain types of agents are able to make claims on behalf of the employer. Agents who are authorised to act for PAYE purposes are able to make claims under the Scheme. However, file-only agents are not authorised to submit claims and the employer will need to make the claim itself. Where an agent does make a claim on behalf of an employer, the employer must tell the agent which bank account they would like the grant to be paid into.

How long can furlough last?

The Scheme will run from 1 March 2020 until 31 October 2020, but only until 31 July 2020 in its current format. The minimum period of furlough is 3 consecutive weeks. An employee could be furloughed for several months (and claims may be backdated to the date the employee commenced furlough, up to 1 March 2020). Alternatively, employers could choose to furlough employees for a shorter initial period (e.g. 6 weeks), which is then extended as required, or they could furlough on a rolling 3-weekly basis. The last date that can be claimed for under the Scheme will be 31 October 2020.

When the employee returns to work, they must be taken off furlough. It's not clear what happens if an employer wishes to recall an employee part way through a period of furlough for which funding has been received. However, the Direction provides that payments must be returned to HMRC immediately if the employer is *"unwilling or unable to use the payment for the purpose of the CJRS".* If an employer recalls an employee part way through a period of furlough for which funding has already been received, then it appears that at least some of the funding for that pay period would need to be returned (and possibly all of it would need to be returned if a 3-week period of furlough had not elapsed). Given the risk, employers in this situation should seek legal advice before recalling a furloughed employee.

How should claims be submitted?

There are a number of important rules for employers to follow when compiling and submitting claims:

- separate claims must be made for each PAYE scheme;
- claims must reflect the employee's pay period (i.e. weekly claims must be made for employees who are paid weekly and monthly claims must be made for employees who are paid monthly);
- only one claim can be made for each pay period;
- claims for all employees in each pay period must be submitted at the same time;
- claims must be submitted shortly before, during or after the running of payroll;
- claims should follow one after another, with no gaps in between, where employees have been continuously furloughed;
- claims for multiple pay periods can be submitted at the same time (e.g. where staff were furloughed in March, the March and April claims may be submitted at the same time);
- claims can be started and saved in draft, but must be submitted within 7 days of starting; and
- changes cannot be made to claims once they have been submitted.

When submitting claims, employers are asked to rely on online support and avoid contacting HMRC unless more than 10 working days have elapsed since the claim was submitted and funding has not been received. Employers are also asked to tell their employees not to contact HMRC to ask questions about the employer's claim.

Employers must keep copies of all records relating to their claim for 6 years, including

- their calculations of the amount claimed;
- the amount claimed and the claim period for each employee; and
- the claim reference number (this is issued once a claim has been submitted online).

How and when will payments be made?

The online portal opened on 20 April 2020 and the first batch of payments were made on or around 30 April 2020. Going forwards, payments will be made within 6 working days of submission of a claim. However, HMRC says it plans to assess certain "high-risk" claims and stop payments being made before they have been fully checked.

If a claim is accepted, the funding will be paid by via a BACS payment into the employer's UK bank account.

How will employers deal with the lag in receiving the Government funding?

Employers deciding to furlough now (or who have already furloughed) will face the challenge of paying the furloughed employees without having received funds from the Government. Some SME employers in limited sectors may be eligible to apply for a Coronavirus Business Interruption Loan to help provide short-term cash flow. On 3 April 2020, the Chancellor of the Exchequer also announced a new Coronavirus Large Business Interruption Loan scheme which will provide for a Government guarantee of 80% for banks to make loans of up to £25 million to firms with an annual turnover of between £45 million to £500 million.

Employers should either pay the money through the payroll in the usual way and recoup it when they can. If this is too tight from a cash flow point of view, they will need to explain the position to the furloughed employees and seek their agreement to delayed payments.

F. WHAT HAPPENS TO EMPLOYEES ON FURLOUGH?

Do furloughed employees retain all their usual employment rights?

Furloughed employees will still be employed and will retain all their normal employment rights, such as the right to SSP, to take various forms of family leave and to a statutory redundancy payment.

Do furloughed employees accrue annual leave and can they take it during furlough?

In addition to the Guidance, BEIS has also published additional guidance specifically addressing holiday entitlement and pay during coronavirus.

The Guidance provides that employees continue to accrue annual leave in the usual way whilst furloughed. Where an employer offers additional annual leave over and above the statutory minimum 5.6 weeks per year, they could ask the employee to agree to reduce this additional entitlement whilst furloughed.

It also provides that employees can elect to take annual leave whilst furloughed and that employers can require employees to take a day's paid annual leave on a Bank Holiday (provided that appropriate notice is given to the employee). However, the Guidance is silent on whether an employer is able to require a furloughed employee to take annual leave at times other than on Bank Holidays.

Some legal commentators are of the view that employers *cannot* force furloughed employees to take annual leave because they will be unable to enjoy a period of relaxation and leisure in the usual way due to the constraints of the lockdown rules. The BEIS guidance (linked above) suggests that, in principle, employers can require furloughed employees to take annual leave provided appropriate notice is given. However, employers are urged to consider whether the lockdown restrictions would prevent the worker from resting, relaxing and enjoying leisure time *"which is the fundamental purpose of holiday".* We would recommend that employers seek legal advice before requiring furloughed employees to take annual leave.

The Guidance confirms that where annual leave is taken during furlough, the employee is entitled to be paid at their normal pre-furlough rate of pay (or on the basis of a 52-week average). This means that employers will probably have to top up the furlough pay for any days of annual leave. For this

reason, employers may be unwilling to approve holiday requests or require employees to use their annual leave during furlough.

The Government has also passed emergency regulations relaxing the usual rules on the carry-over of unused annual leave. These regulations permit the carry-over of up to 4 weeks' annual leave for 2 years, where it cannot be taken in the leave year for coronavirus-related reasons.

Can furloughed employees do any work or training?

Furloughed employees are not permitted to undertake any work for, or on behalf, of the employer (or any linked or associated organisations). In this context, "work" means providing services or generating revenue. However, furloughed employees may undertake:

- duties and activities for the purpose of individual or collective representation of employees or other workers (whether as a union or non-union representative);
- voluntary work for another employer or organisation (but they cannot carry out volunteer work for the employer); and
- training;

Furloughed company directors are also allowed to carry out particular duties to fulfil certain statutory obligations they owe to the company, to the extent that it is reasonable and necessary to do so (see "*Are there are special considerations for company directors?"* above). Furloughed agency workers are not allowed to perform any work for, through or on behalf of the agency, including for the agency's clients.

Where a furloughed employee is asked to undertake any training (e.g. online courses), then they must be paid at least the applicable National Minimum/Living Wage rate for the time spent training. Usually, the funding delivered under the Scheme will provide sufficient monies to cover payment for any training hours, but, if not, then the employer will need to top up the payment to the applicable rate. This could be a particular issue for apprentices that are continuing their training whilst furloughed. Separate guidance is available for changes in the apprenticeship learning arrangements because of coronavirus.

HMRC has created an online portal for employees and the public to report employers who they suspect are abusing the Scheme, for example, by requiring furloughed employees to carry out work.

Can furloughed employees participate in disciplinary or grievance processes?

The Guidance is silent on whether furloughed employees can participate in such processes. However, Acas has published guidance on disciplinary and grievances procedures during the coronavirus pandemic. The Acas guidance advises that such processes may proceed despite the restrictions imposed by the pandemic, provided they can be operated in a fair and reasonable way. It is said that furloughed employees are able to participate in such processes in various ways including:

- being interviewed as part of an investigation;
- giving evidence as a witness at a hearing;
- acting as a note-taker at an investigation meeting or hearing;
- chairing hearings; and/or

- acting as an employee's companion at a hearing,

provided that in each case, their participation is voluntary and takes place in accordance with public health guidance.

However, employers should remember that the Acas guidance is non-binding and it is possible that HMRC may take the view that at least some of these forms of participation amount to "providing services" to their employer (e.g. chairing a hearing or acting as a notetaker). If so, this could invalidate the claim for that employee under the Scheme. Where possible, employers should try to use non-furloughed employees to run the process.

What happens when the Scheme ends?

Currently, the Scheme is due to close on 31 October 2020. Once the Scheme ends, the employer will need to decide whether the furloughed employees can return to work. If there is no work for them to do, then the employer will probably have no choice but to proceed with redundancies.

Employers should be aware that HMRC will retain the right to retrospectively audit all aspects of an employer's claim/s made under the Scheme. The Guidance provides that payments will need to be repaid in full to HMRC if it is found that a claim was based on dishonest or inaccurate information. Ultimately, HMRC has said that fraudulent claims could result in criminal action.

BDBF is currently advising many employers and employees on the challenges presented by the coronavirus. If you or your business needs advice on furlough or other coronavirus-related matter please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.