

## JUST EMPLOYMENT LAW

### COVID 19 – GENERAL Q&A FOR EMPLOYERS

RELEASE 8 – 21 APRIL 2020

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#### Purpose of Document

This document is intended for *employers*. It would be inadvisable to share this document with your employees.

This document will be updated periodically as government advice changes and emergency legislation comes into effect.

If you need any support from Just Employment Law arising from this memo, please contact Brian Todd on 0141 331 5150 or 07484 150533 or by email on [briantodd@justemploymentlaw.co.uk](mailto:briantodd@justemploymentlaw.co.uk) to find out more about how we can help you.

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## Section A – Absence and sick pay

### 1. Where can I get information on the latest public health advice in relation to COVID-19?

Public Health England

<https://www.gov.uk/government/collections/coronavirus-covid-19-list-of-guidance>

Health Protection Scotland

<https://www.hps.scot.nhs.uk/a-to-z-of-topics/wuhan-novel-coronavirus/>

Public Health Wales

<https://phw.nhs.wales/topics/latest-information-on-novel-coronavirus-covid-19/>

Public Health Agency in Northern Ireland

<https://www.publichealth.hscni.net/news/covid-19-coronavirus>

### 2. Is an employee required to self-isolate and what do I pay them if they are absent from work?

**Employee with symptoms:** An employee who develops coronavirus symptoms is required to self-isolate for 7 days if they live alone, or 14 days if they live with other people. This employee would be entitled to sick pay, in accordance with their contract of employment (company sick pay, if applicable, and/or statutory sick pay, where eligible).

**Employee living with someone with symptoms:** An employee who lives in the same household as someone who develops coronavirus symptoms is required to self-isolate for 14 days. This employee would also be entitled to sick pay, in accordance with their contract of employment (company sick pay, if applicable, and/or statutory sick pay, where eligible).

**Employee falling into “extremely vulnerable” category:** An employee who is considered to be “extremely vulnerable” (ie who has a specific cancer, severe respiratory condition, or other particular conditions) is strongly advised to adhere to guidance on shielding (ie staying at home for 12 weeks and minimising non-essential contact with members of their household). If this employee has received a letter from the government or NHS informing them that they must not leave their home and therefore should be self-isolating, this employee would be entitled to sick pay, in accordance with their contract of employment (company sick pay, if applicable, and/or statutory sick pay, where eligible). If this employee has not received such a letter, the employee would not qualify for sick pay and any payments made would be at your discretion, although please see Section D re furlough and shielding employees.

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**Employee falling into “vulnerable” category:** An employee who is considered “vulnerable” (ie those over 70 or pregnant, and who have other particular health conditions – typically those which entitle them to a free flu vaccination each year) is strongly advised to adhere to guidance on social distancing. This employee would not qualify for statutory sick pay and any payments made would be at your discretion. Should you choose not to exercise discretion, the time off would be unpaid, unless you furlough the employee – see section D.

**Employee living with someone in the “extremely vulnerable” or “vulnerable” categories:** An employee who lives with an “extremely vulnerable” or “vulnerable” person should follow guidance on social distancing, reducing their contact outside the home. This employee would not qualify for statutory sick pay and any payments made would be at your discretion. Should you choose not to exercise discretion, the time off would be unpaid, unless you furlough the employee – see section D.

### 3. What do I pay an employee who is entitled to Statutory Sick Pay?

The current rate of SSP is £95.85 per week.

Statutory sick pay, where an employee is incapable, or deemed to be incapable, of doing work by reason of coronavirus, is payable from day 1 of absence and, for employers with up to 250 employees, will be reimbursed by the government for a period of 14 days (although some employees may be absent for longer).

### 4. Can an employee who is self-isolating, shielding or following guidance on social distancing work from home?

Yes, and in those circumstances they would be entitled to be paid as per the terms of their contract of employment.

### 5. What if an employee presents with symptoms consistent with COVID-19 in the workplace?

If someone becomes unwell in the workplace with coronavirus symptoms, they should tell you immediately, avoid touching anything and go home. More advice or help is available on the NHS 111 coronavirus service website or by calling 111. If someone is seriously ill or their life is at risk, you should call 999.

If an employee refuses to go home in these circumstances, please contact us for advice on the options available to you.

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**6. Do I need to see a medical certificate from a GP, or other documentary evidence, before I pay SSP or company sick pay?**

Those self-isolating due to coronavirus for more than 7 days can now get an online self-isolation note from the NHS website (<https://111.nhs.uk/isolation-note/>) or the NHS mobile phone app. This note would be adequate evidence of an individual's inability to work for the purposes of paying sick pay.

**7. If our workplace remains open, what if an employee, not falling into any of the categories set out at question 2 above refuses to come to work?**

A sympathetic response is recommended in the first instance, although where an employee is non-symptomatic, is not living with someone who has symptoms, and has not received a letter informing them that they must self-isolate, you could ultimately decide that if they choose not to come to work, they will not be paid.

Working from home where this is practicable is an obvious compromise. You may also wish to consider whether you will furlough that employee (see section D).

Disciplining or dismissing an employee who refused to attend work in these circumstances may not be reasonable and could potentially lead to Employment Tribunal claims. We can advise further if this becomes an issue in your workplace.

**8. What about people who can't come to work as a result of school closures?**

Employees who can't come to work as a result of caring responsibilities (which includes looking after children) can be furloughed, if they are eligible for furlough (see section D).

Assuming the employee is eligible for furlough, it would not necessarily be reasonable to require the employee to take unpaid parental leave or time off for care of dependents in these circumstances. If the employee is not eligible for furlough, other options may be available.

In all cases, homeworking could be permitted, if practicable, and you might consider relaxing any rules you normally have about homeworkers not having caring responsibilities while they are working.

**9. What types of industry are covered by the "Key Workers" provisions, which enable such individuals to continue to send their children to school?**

You can access a list of key workers via this link:

<https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision>

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## Section B – Annual leave

### 1. Should employees be allowed to cancel pre-approved annual leave?

If an employee is too unwell to enjoy the benefit of their annual leave, the law allows them to have the period of annual leave converted to sick leave and for the annual leave to be taken at a later date. The employee must tell you right away if this situation applies to them and they want to cancel their annual leave.

For an employee who wishes to cancel pre-approved holiday, you can respond to this in the manner that best suits the business. If you are short of staff, you can agree and let them take their holiday another time. On the other hand, if you are short of work, you can insist that the pre-booked holidays are taken.

### 2. Can we require employees to take annual leave?

Subject to what we say in the final paragraph of this answer, yes. You need to give the employee double the amount of notice for the length of holiday they are required to take, so if you want to require an employee to take one week's paid holiday, you will need to give them two weeks' advance notice in writing.

If you can reach agreement with employees to take holidays, this can be done at very short notice. The need to give double the notice for the length of holiday only applies when you are imposing the requirement without agreement.

Now that the government has announced that untaken annual leave due to the coronavirus outbreak can be carried over (see question 3 below), some commentators are suggesting it may be considered an abuse of the annual leave laws for an employer to force employees on furlough to use up their annual leave entitlement by giving notice requiring them to take holidays during furlough. We would advise employers to try to strike a balance between not having too much annual leave stored up in the system when furlough ends on one hand, and giving employees the chance to "enjoy" a reasonable proportion of their annual leave later this year, once lockdown has hopefully ended.

### 3. If an employee has been unable to use their annual leave by the end of our holiday year as a result of coronavirus, what should we do?

In these circumstances, i.e., where it is not reasonably practicable for the employee to take some or all of the holiday they are entitled to due to coronavirus, the employee can carry over four weeks of their annual leave entitlement into the next two leave years. Whether the employer will permit the employee to carry forward any additional annual leave would be a matter for contractual agreement.

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**4. Can an employee take holidays whilst on furlough?**

Please see section D for information regarding furlough.

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## Section C – Shortage of work

### 1. What financial support is the government providing to businesses who cannot afford to pay their employees as normal?

Beyond the reimbursement of SSP mentioned above, at present, the government has announced three main support packages for employers:

- Very small businesses (typically, those which qualify for Small Business Rates Relief) will be eligible for non-repayable cash grants of £10,000.
- The Coronavirus Business Interruption Loan Scheme which offers loans of up to £5 million for SMEs through the British Business Bank.
- The Coronavirus Job Retention Scheme (referred to as the Furlough Scheme). This is covered in detail at section D below.

There are also industry-specific support schemes for sectors which are particularly hard-hit. This takes the form of a mixture of grants and rates exemptions.

### 2. Broadly, what options does an employer have to deal with the financial impact of not having enough work for its staff, as a result of COVID-19?

The Furlough Scheme is intended to be the main measure to allow employers to avoid dismissing employees as redundant, but if government support is insufficient to address the issue in your business, there are a number of options an employer can consider, including:

- Temporary lay-off
- Short-time working
- Redundancies
- Varying contractual hours
- Paid/unpaid leave (including annual leave)
- Wage reductions

### 3. What is temporary lay-off?

This is where employees are sent home without pay (subject to the right to receive a statutory guarantee payment) due to a shortage of work, generally because of circumstances beyond the employer's control. Employees remain in your employment in these circumstances.

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#### **4. What is short-time working?**

Colloquially, short-time working is where the employee's weekly working hours are reduced by the employer due to a shortage of work. However, in the context of claiming a redundancy payment (discussed below), short-time working has a very specific meaning of working so many fewer hours than normal that the employee's pay drops below half of their normal week's pay.

#### **5. Can I temporarily lay staff off or place them on short-time working?**

To compulsorily lay people off on a temporary basis or reduce their weekly working hours, you must have the right in the employee's contract of employment to do so. If you don't have a contractual right to do so, there may be other options open to you, which are discussed below.

Assuming you have the contractual right, the first thing to do is to decide which employees you are going to lay off or place on short-time working. Where short-time working is contemplated, it would normally be fairest to apply this to all employees of a particular type. Where temporary lay-off is contemplated, and you don't need to lay off all of your employees, it would normally be fairest to require all employees to take turns at having periods of lay-off.

Once you have decided who is to be temporarily laid off or placed on short-time working, you will need to write to the affected employees, informing them of your decision and the dates on which the period of temporary lay-off and/or short-time working will apply. We can support you with this.

#### **6. What do I need to pay someone who is temporarily laid off or on short-time working?**

Unless they have a contractual right to a higher payment or a collective agreement provides for a higher rate, someone who is temporarily laid off or placed on short-time working will be entitled to a statutory guarantee payment of £30 per day for the first five "workless days". (If the employee is normally employed to work less than five days a week, then that figure will be pro-rated to the number of days per week they are contracted to work.) Thereafter, lay-off and any workless days on short-time working will be unpaid.

#### **7. How long can I lay someone off or place them on short-time working for?**

In theory there is no limit to how long these arrangements can last if you have the contractual right to impose them, but in practice there is a significant limitation. That is that if an employee is temporarily laid off or placed on short-time working for four consecutive weeks or six weeks in any 13 week period, then they have the right to resign and claim a statutory redundancy payment from you.

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**8. If an employee resigns and claims a statutory redundancy payment for having reached the trigger period of lay-off or short-time working, is there anything I can do to avoid having to pay the redundancy payment?**

Yes, if you now have work available for them. You can issue a counter-notice, saying that within the next four weeks, it is reasonably expected that you will be able to give them work for a period of at least 13 weeks without a further period of lay-off or short-time working being required.

**9. Can I make employees redundant due to a shortage of work due to COVID-19?**

Yes, you can make redundancies just as you would at any other time due to a shortage of work. However, all of the normal employment rights people have in a redundancy situation will continue to apply (see below). It may be considered unreasonable by an Employment Tribunal to make a compulsory redundancy without having good reasons not to place the employee on the Furlough Scheme.

**10. Will I have to carry out collective consultation before I make anyone redundant?**

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a 90-day period, the employer requires to carry out a collective consultation process with elected workforce representatives for 30 days before the first dismissal takes effect. This period increases to 45 days if it is proposed to dismiss as redundant 100 or more employees at the same establishment.

The Furlough Scheme currently ends on 30 June 2020. If you anticipate having to make 20 or more redundancies thereafter (including any redundancies made since 1 April 2020), please contact us no later than 31 May 2020 in order that we can advise on collective consultation in good time. If you anticipate having to make 100 or more redundancies thereafter (including any redundancies made since 1 April 2020), please contact us no later than 15 May 2020 in order that we can advise on collective consultation in good time.

If you are not proposing to dismiss as many as 20 employees at any establishment, then you won't have to carry out collective consultation, but you will still need to have a fair method of selection for redundancy and carry out individual consultation, particularly with anyone who has the right not to be unfairly dismissed. You should expect this process to take a number of weeks, so please contact us at the start of June 2020 in order that we may advise further.

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**11. What are the risks of dismissing 20 or more employees at one establishment without going through the collective consultation process?**

The two main risks are a “protective award” and unfair dismissal.

Any employee who is dismissed as redundant without collective consultation, where it should have taken place, can claim an award of up to 13 weeks’ pay (uncapped). If one employee successfully raises the claim, all other employees who should have been consulted can “piggy-back” on the successful claim.

Employers can raise a “special circumstances” defence, saying it was not possible to collectively consult in the circumstances. We suspect it will not be enough simply to point to the coronavirus outbreak as a special circumstance – rather, the employer will have to show that in the particular circumstances of their business, it was impossible to wait 30/45 days before dismissing anyone as redundant.

Also, there is clear case law that where an employee with two years’ service or more is dismissed as redundant without collective consultation when it should have taken place, that will make the dismissal unfair.

**12. Can I just dismiss as redundant any employees with under two years’ service, without following a consultation process?**

You might be able to do this, but there could be risks in relation to ‘automatically’ unfair dismissal and/or discrimination and you are strongly advised to discuss this with us to assess these risks before taking action. It’s also important to understand that dismissing an employee with under two years’ service will still count towards the figure of 20, to determine whether collective consultation is required.

**13. What if I need to make people with over two years’ service redundant?**

You will need to follow a fair process in selecting staff for redundancy and consult individually with them before terminating their employment. We can assist you with the necessary advice and documentation, but you should expect that it could take upwards of two weeks to complete such a process.

**14. Can we agree with staff to reduce their hours of work?**

Yes. Ideally, you would try to spread this out across your workforce (or the affected part) as fairly as possible. Once any changes have been agreed, they will need to be put in writing and the employee will need to sign their agreement to the changes.

Employers will certainly want to consider if the Furlough Scheme is a better option before seeking to reduce employees’ contractual hours, albeit noting that whilst on furlough, an employee cannot carry out any work for the employer.

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**15. Can I ask employees to take unpaid leave to cover periods of shortage of work?**

Yes, if for any reason the Furlough Scheme does not work in a particular situation, this can be done by agreement. The employee will be entitled to a statutory guarantee payment for the first five (or pro-rata) days of unpaid leave.

During a period of unpaid leave, the norm would be that all benefits other than pay would continue as normal, such as pension, life assurance etc. If this is not to be the case, there will need to be a specific agreement in writing to that effect.

**16. Can I agree with my workforce that they will take temporary pay cuts?**

Yes. If employees will agree to pay cuts, this can be done as long as the employees are still paid the minimum wage for the hours they actually work.

Any agreement to a pay cut should be put in writing and should specify how long the agreement will last for. Ideally, the agreement will also specify what will happen with benefits such as pension, life assurance etc during the temporary pay cut.

You may find there is serious resistance to pay cuts if you are furloughing other employees, who will be getting paid 80% of their wages for doing no work. We can help you work out how best to combine furloughing some employees and asking others to take pay cuts, if both steps will be necessary in your business.

**17. What is the position with employees on zero-hours contracts?**

Where a worker is on a genuine zero-hours contract (under which it is clearly stated there is no obligation on the employer to offer any work), then there will be no need to consider terminating the contract or agreeing reduced hours. You would simply advise the worker that you have no shifts to offer them for the time being. It would be advisable to give people in this position reasonably regular updates (perhaps fortnightly) on the availability of work.

Zero-hour workers will be entitled to be placed on the Furlough Scheme if they are paid through PAYE, so this may be an option too.

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## Section D – The Coronavirus Job Retention Scheme (Furlough)

Official guidance about this scheme has been updated a number of times since it was released on 26 March 2020, most recently on 20 April 2020. HM Treasury also published a Direction to HMRC on 15 April 2020 regarding this scheme. There is conflicting information in the guidance and the Direction and, until any conflicts are resolved, we recommend following the Direction. There also remains some unanswered questions regarding the scheme at the time of this release. We will make further information available to our clients as and when it becomes available.

### 1. What is the Coronavirus Job Retention Scheme?

The scheme enables employers who “cannot maintain their current workforce because their operations have been severely affected by coronavirus” to furlough employees and apply to HMRC to be reimbursed in respect of 80% of the employee’s usual monthly wage costs, up to a maximum of £2,500 per month. The scheme applies to any employees who are furloughed “by reason of circumstances as a result of coronavirus or coronavirus disease”.

The official guidance is available at:

[www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme](http://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme)

The Direction is available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/879484/200414\\_CJRS\\_DIRECTION\\_-\\_33\\_FINAL\\_Signed.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf)

### 2. Who can claim?

Any UK organisation with employees can apply, providing they have created and started a PAYE payroll scheme on or before 19 March 2020 and have a UK bank account. The organisation must have placed employees on furlough in order to be able to claim.

### 3. How long does the scheme run for?

The scheme was initially running for three months from 1 March 2020 to 31 May 2020. It has now been extended for a further one month, and therefore runs to 30 June 2020. It is possible that the scheme could be extended further.

Where you furloughed employees prior to the extension of the scheme and where the employee understood their period of furlough to be until the end of May 2020, it would be prudent to notify the employee that their period of furlough will now be until the end of June 2020 (assuming you intend to keep them on furlough for that period). If you have issued a Furlough Agreement drafted by JEL, this will allow you to keep the employee on furlough until the end of June. If you have amended

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the Furlough Agreement prior to issue and would like us to check this point for you, please get in touch.

#### **4. How can we access payments?**

Employers should seek reimbursement via the HMRC portal at <https://www.access.service.gov.uk/login/signin/creds>

The portal opened on 20 April 2020 and we are informed that HMRC will seek to make payments within 6 working days.

You can only submit one claim every three weeks. You should keep a copy of particular information relating to the claim, as set out on the government website. Records should be kept for five years.

#### **5. What do we need to do to be eligible for the scheme?**

You must agree in writing with the employee that they are being furloughed and that they will do no work during the furlough period. JEL has provided Furlough Agreements for all retained clients. If you have not received this or require assistance completing this, please get in touch.

#### **6. How do we claim reimbursement from HMRC?**

You will need to provide particular information when making the claim as set out at <https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme>.

HMRC will retain the right to retrospectively audit all aspects of your claim. You may wish to speak to your accountant to confirm whether they can process the claim for you.

#### **7. Which employees are eligible to be furloughed?**

To be furloughed (to the extent that you can then claim reimbursement from HMRC), the employee must have been on your PAYE payroll on or before 19 March 2020 and have been notified to HMRC on an RTI submission on or before that date.

Employees who were employed as of 28 February 2020 and notified to HMRC on an RTI submission on or before 28 February and who were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough.

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## 8. Do we have to furlough all employees?

No. It is for you to determine which employees you will furlough. If you are not furloughing all employees, you should ensure that in selecting employees for furlough you do so fairly and free from discrimination.

## 9. Can I rotate staff on furlough?

Yes, this is permissible, subject to employees being furloughed for the minimum period of three weeks at a time.

## 10. How much exactly can we claim?

The guidance indicates that employers should choose the calculation they think best fits the way their employee is paid and states that HMRC will not decline or seek repayment of any grant based solely on the particular choice of pay calculation, as long as a reasonable choice of approach is made.

You will need to calculate the amount you are claiming in respect of each furloughed employee. Guidance available at <https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme> will assist you in calculating this.

You can claim 80% of an employee's gross pay up to a maximum reimbursement of £2,500 per month per employee.

For full time and part time salaried employees, the employee's actual salary before tax, from the last pay period before 19 March 2020, should be used to calculate the 80%. The previous guidance referred to the calculation being made based on the salary as of 28 February 2020, and therefore HMRC have confirmed that if you have already calculated your claim based on the employee's wages as of 28 February 2020, and this differs from their wages in their last pay period prior to 19 March 2020, you can choose to still use this calculation for your first claim.

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

If the employee has been employed for a full twelve months prior to the claim, you can claim for the higher of either:

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

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If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work.

You can also claim back your employer's national insurance contributions and the minimum employer auto-enrolment pension contributions based on the furlough pay.

You should normally pay the employee on their normal pay date (unless agreed to the contrary), and then submit your claim to HMRC for reimbursement. If you are not in a financial position to pay employees their furlough pay on their normal pay date, you should agree with the furloughed employees that you will pay them when you receive funds from HMRC. We can help you document any such agreement.

## **11. What can we claim in respect of employees returning from particular types of leave?**

The guidance discusses employees returning from family-related statutory leave (such as maternity leave, paternity leave, shared parental leave, adoption leave, parental bereavement leave and unpaid parental leave) and employees returning from sick leave.

The guidance indicates that, in line with other employees, claims for full or part time employees furloughed on return from family-related statutory leave or sick 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 or sick leave should be calculated using either the:

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

Clearly those on variable pay returning from statutory leave or sick leave that has lasted 12 months or longer may be adversely affected. In those circumstances, whilst an employer will only be able to recover payments in accordance with the calculation given by HMRC, the employer may decide (but is not obliged to) top up the pay the employee receives.

## **12. What should we pay a furloughed employee?**

You may agree to pay them only the sums reimbursed by HMRC or you may agree to top up their payments. It does not matter if furlough pay takes an employee below the minimum wage, since the employee is not carrying out work (although see below regarding time spent training).

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**13. Can we claim for reimbursement of salary sacrifice benefits or benefits in kind during furlough?**

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

Where the employer provides benefits to furloughed employees, including through a salary sacrifice scheme, these benefits must 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 has confirmed that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly.

So, it may be possible to reverse a salary sacrifice agreement during furlough with the agreement of both employer and employee. However, it is unclear if this would be able to take retrospective effect from 19 March 2020, which is the date on which the salary of the employee should be used for the purposes of your claim.

**14. What if an employee left my employment on or after 28 February 2020, but prior to the announcement of the scheme on 20 March 2020?**

If you made an employee 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 through the scheme.

This applies to employees that were made redundant or stopped working for you after 28 February, even if you do not re-employ them until after 19 March.

This applies as long as the employee was on your payroll as at 28 February and had been notified to HMRC on an RTI submission on or before 28 February 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 28 February 2020.

**15. Can I reinstate an employee who has been dismissed before 28 February 2020 and place them on furlough?**

No. The employee must have been on payroll on 28 February, and dismissed after that date, for you now to re-employ them and place them on furlough.

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**16. Do I have to reinstate an employee who has been dismissed on or after 28 February 2020 and place them on furlough?**

No, it is entirely at your discretion whether to do so. If you did agree to reinstate an employee, they would have continuous employment and would have continued to accrue annual leave.

**17. If an employee is working their notice period, can they be furloughed?**

Yes, subject always to the employee being paid in full for their statutory minimum notice period.

**18. If an employee has resigned and is working out their notice at present, should I permit them to withdraw their resignation in order to be furloughed?**

This is entirely at your discretion. Please contact us if this query arises.

**19. What if an employee started on or after 29 February 2020?**

The scheme initially provided that an employee could be furloughed if they were employed on or before 28 February 2020. The scheme now confirms that an employee can be furloughed if they were on your PAYE payroll on or before 19 March 2020 and have been notified to HMRC on an RTI submission on or before that date.

Therefore, an employee who started on or after 29 February 2020 can be furloughed if they were on your PAYE payroll on or before 19 March 2020 and had been notified to HMRC on an RTI submission on or before that date.

**20. What if an employee started before 20 March 2020, but who was not on the RTI submission on or before that date?**

They would not be eligible to funded on furlough by HMRC. If you have previously furloughed such an employee believing the scheme would permit this, you would now need to consider other options for that individual.

There is one exception to this rule. Where an employee has transferred to your employment under the TUPE regulations on or after 1 March 2020, you will still be able to furlough them, even though they were not on your payroll on 20 March 2020.

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**21. What if an employee is furloughed during their probationary period? Should I extend their probation?**

You are not obliged to do so, but this would be sensible. This should be communicated to the employee prior to the date on which their probationary period is due to end.

**22. Can someone who is off sick be furloughed?**

The guidance clearly says yes, but the Direction is more ambiguous on this point. What is clear is that you should not furlough an employee to give them extra pay for a short-term sickness absence, and remember the minimum period of furlough is three weeks.

Despite the ambiguity in the Direction, we believe it would be difficult for HMRC to refuse reimbursement if you furlough a longer-term absentee, given how clearly it is stated in the guidance that those absent due to sickness are eligible for the scheme. However, you cannot retrospectively put someone on furlough for a period in respect of which they have already been paid SSP.

You should therefore agree with a longer-term absentee who you wish to furlough, that their sick leave should end and their furlough should begin on an agreed date (not retrospective). It would be best to agree this in writing.

**23. What if an employee becomes sick whilst on furlough?**

An employee who has a contractual entitlement to company sick pay and who becomes sick whilst on furlough may prefer to be placed onto sick leave, so to receive company sick pay, if this is more generous than furlough pay. This would require them to report their sickness to you. However, as the minimum period of furlough is three weeks, you would probably be entitled to say that any period of sick leave would only commence after the initial three weeks of furlough.

The government has now confirmed that while on furlough, an employee is not eligible for SSP. On that basis, there is no legal reason why an employee would have to make you aware that they are unfit for work during furlough. Therefore, if an employee does not have an enhanced sick pay entitlement and becomes sick whilst on furlough, it is probably not in their interests to tell you they are sick. If this happens before the minimum three-week furlough period has lapsed, this could affect your ability to seek reimbursement under the scheme. Employers may therefore wish to take a view on whether furloughed employees require to notify them if they become sick whilst on furlough.

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**24. Can someone who is on maternity, paternity or other family friendly leave be furloughed?**

Only if they are in receipt of enhanced company maternity or paternity pay. During this period, they may be furloughed and you may claim 80% of the amount you are topping up their statutory payments by.

In all other circumstances, an employee must be ready and able to work. At the end of their maternity or paternity leave, they may be furloughed with their agreement. An employee who is in receipt of statutory maternity pay, for example, may also wish to return from maternity leave early in order to be furloughed, notwithstanding the fact there is no guarantee as to how long the period of furlough would last beyond the minimum three-week period. They would not be able to resume maternity leave at the end of furlough.

**25. Can I furlough an employee who is “shielding” in line with government advice?**

The guidance very clearly says yes, although the Direction, combined with the revised SSP regulations, might suggest otherwise. This is another situation where we think it will be difficult for the government to refuse claims for reimbursement, given that it has now been stated in three consecutive versions of the guidance, without equivocation, that shielding employees can be furloughed, even if their jobs would not otherwise be at risk of redundancy.

You are entitled to ask for a copy of the letter the employee has received from the NHS, advising them not to leave home for 12 weeks.

You can furlough an employee who is shielding, or who is staying at home to look after someone who is shielding.

**26. Does the scheme apply to fixed-term workers?**

Yes, employees on fixed-term contracts can be furloughed. Their contracts can also be renewed or extended during the furlough period without breaking the terms of the scheme.

The updated guidance makes it clear that to continue furloughing an employee whose fixed-term contract is expiring, you must agree an extension to the contract before it expires. It is therefore important not to leave to the last minute any discussions about extending a contract which is due to expire.

**27. Does the scheme apply to zero-hours workers?**

Yes, providing they are paid through PAYE.

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**28. Does the scheme apply to agency workers?**

Yes, providing they are paid through the PAYE system of the agency. A business engaging staff via an agency may wish, subject to any terms in place between the business and the agency, to terminate the assignments of any agency workers, after which the agency could place the worker on furlough.

**29. Do I need to consult with staff prior to placing them on furlough?**

You should consult with staff, insofar as this involves informing them of the proposal and seeking their consent. We believe verbal consultation in this regard would be sufficient.

Where an employer proposes to dismiss 20 or more employees as redundant at one establishment within 90 days, the employer needs to carry out a collective consultation process before doing so. The updated guidance states:

*“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.”*

This implies that if you are proposing to dismiss any employees who won't agree to be furloughed, you will need to carry out collective consultation before reaching agreement with staff to go on furlough. Therefore, communications about what the consequences might be of refusing to go on furlough should be carefully drafted.

**30. Can I impose furloughed status on an employee? If not, what if an employee refuses to agree to be furloughed?**

An employee must agree to be furloughed, as we explain more fully below. If you don't have enough work for an employee who refuses to be furloughed, you may be able to use some of the other options set out in section B above.

There is some conflict between the Direction (which suggests the employee must have agreed in writing to do no work during furlough) and the guidance, which says as follows:

*“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.”*

Our overall view is that there will need to be some evidence of the employee agreeing to be furloughed in almost all cases, as placing an employee on furlough without their agreement is unlikely to be “consistent with employment law”. Evidence of that agreement could conceivably come from a very broad lay-off

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power in an employment contract, but is much more likely to come from a furlough agreement or an exchange of emails in which the employee actively agrees to be furloughed.

**31. Can I reduce someone's hours and place them on furlough at the same time?**

No. Only employees who are doing no work at all for you can be furloughed. You could not have someone working, for example, three days a week and claim a furlough payment for the other two days per week.

**32. Does a furloughed employee still pay tax on their earnings?**

Yes, and deductions should therefore continue to be made as normal.

**33. Can a furloughed employee continue to carry out some of their duties from home?**

No. A furloughed employee must not carry out any work, even from home. They can take part in volunteer work or training, if that work does not provide services to, or generate revenue for, your organisation.

**34. Can a furloughed employee work elsewhere?**

Yes, this is permitted, regardless of whether it is a new second job, or a job they already had prior to the start of the furlough scheme (although we should confirm that the employee could not work for an associated employer in these circumstances). You should clarify to employees if you want them to get permission from you before starting another job while furloughed, and it would be reasonable to reserve the power to say no if the job would conflict with the interests of your own business.

**35. Can I employ an individual who has been furloughed?**

Yes, this is permitted, however you should ensure that you complete the PAYE starter checklist form correctly. If an employee is furloughed from another employment, you should complete Statement C:

<https://www.gov.uk/government/publications/pay-starter-checklist>

**36. For how long do I have to furlough an employee?**

The minimum period is three weeks. There is no maximum period and this will be subject to updates from the government in relation to when the scheme ends.

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**37. Can I bring a furloughed employee back to work and then 're-furlough' them?**

Yes, employees may be furloughed multiple times. However, any one period of furlough will have to last at least three weeks for you to be able to claim reimbursement from HMRC.

**38. Can an employee request to be furloughed?**

Yes, however they cannot insist on this. It is for the employer and employee to agree if the employee will be furloughed.

**39. Can a furloughed employee take annual leave during their furlough period?**

Yes, this is possible. However, whether you are topping up the furlough payments to the employee or not, they should receive full pay (as they normally would) for any period of annual leave.

Because it is possible to take annual leave during furlough, we believe HMRC will reimburse you in respect of furlough pay for periods of annual leave taken during furlough.

**40. Can I require an employee to take annual leave during furlough?**

This is a question that will ultimately have to be settled by the employment tribunals and appeal courts, and will likely remain beyond the scope of HMRC guidance.

The crux of the question is whether an employee who is required to take holidays during furlough when they do not wish to do so, is getting the "benefit" of annual leave. It is possible that employees may successfully persuade a tribunal that this situation is akin to being sick, and therefore being unable to enjoy the benefit of annual leave. There is well-established case law that periods of annual leave cannot be imposed on employees in these circumstances. There may be some force in the argument that during "lockdown", there is very little an employee can do to differentiate a period of holiday from the remainder of their time on furlough, particularly when going on holiday somewhere is not an option.

Employers do have a legitimate interest in ensuring that excessive amounts of annual leave do not have to be taken in a short time by all employees towards the end of the holiday year, but the amendment to the law to allow holidays to be carried over for up to two holiday years addresses this point.

We therefore recommend that a cautious approach is taken, and if you do impose a period of holiday on your furloughed staff, you try to ensure that during the current holiday year, there is still a reasonable amount of annual leave available to each employee, to be taken at times of their choosing once "lockdown" is over.

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#### **41. What if I can't afford to furlough an employee pending reimbursement from HMRC?**

There are business loans available that may assist, however if this is not appropriate for your business, we suggest that you seek to agree with employees that they will be paid upon reimbursement being provided by HMRC. We can help you document any agreement to this effect.

The guidance confirms that conditional payments for the purpose of determining the reference salary cannot be taken into account when calculating furlough pay. We are comfortable, based on current guidance, that deferring payment to employees pending reimbursement from HMRC does not amount to a conditional payment for the purpose of determining the reference salary.

#### **42. Can a Company Director be furloughed?**

Yes, subject to a number of conditions contained in the updated guidance.

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.

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## Section E – Working from home

### 1. Can we require staff to work from home?

The government guidance is that employees should work from home, where possible. If there is an established requirement to work from home where appropriate or where instructed to do so, then there is unlikely to be an issue applying this. If not, imposing home working would constitute a variation of the contract requiring employee consent, however we anticipate most employees would be likely to agree to this. Employers should ensure that the health and safety implications of homeworking have been considered and that the necessary infrastructure is in place.

### 2. Can we refuse an employee to work from home if they will be looking after children who have been sent home from school or nursery?

In normal circumstances, it would not be appropriate for an employee to work from home while also providing childcare. However, as schools and nurseries close, employers may be prepared to take a more relaxed and flexible approach to homeworking and allow employees to work around their childcare responsibilities. If an employee cannot work around their childcare responsibilities, you should consider furloughing the employee.

### 3. An employee has asked to work from home. Can I refuse this?

Unless an employee is self-isolating in accordance with government guidance, and where the employee is ordinarily required to work from the employer's premises, then it is permissible to refuse a request to work from home.

Doing so, however, may then see an employee reporting that they have developed symptoms and require to self-isolate, which could lead to the employee not carrying out any of their duties. Employers may therefore wish to consider individual requests to work from home on a case by case basis.

### 4. Our business cannot accommodate home working. What should we do?

If the nature of the business is such that home working cannot be accommodated, the employer may wish to consider agreeing with the employee to be placed on furlough. If that is not practicable for any reason, the steps detailed above (under section B) regarding options in case of a shortage of work may be applicable.

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## Section F – Miscellaneous

- 1. An employee asks to attend a pre-arranged formal meeting (e.g., a disciplinary or grievance meeting) with their trade union representative, however we are not permitting external visitors. What should we do?**

In these circumstances, we would recommend that you postpone the formal meeting until such time as the company will permit external visitors to its premises again, unless the meeting can take place via conference/video call.

- 2. An employee has asked to take Emergency Volunteering Leave. Do I have to allow this?**

Subject to certain conditions, employees have the statutory right to unpaid Emergency Volunteering Leave of one, two, three or four weeks within a block of 16 weeks. An employee must provide three working days' notice of their intention to take the leave, in a specified form. Where an employee gives such notice, this cannot be refused. An employee has the right not to suffer a detriment for taking (or requesting to take) the leave and a dismissal for this reason would be automatically unfair.

If your business has fewer than ten members of staff, employees cannot take this type of leave.

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