

# COVID-19: government releases initial guidance on their Coronavirus Job Retention Scheme



Late in the evening of Friday 20 March, the government published some very general guidance for employers and employees on the Coronavirus Job Retention Scheme announced by the Chancellor during Friday's press briefing. You can read the full text they've released so far on their website, [here](#).

Under this scheme, the government will pay **up to 80% of wages for those employees who would otherwise be made redundant**. Although the Chancellor referred to the scheme's aim as being to avoid people being 'laid off', it is likely that he was using this as the commonly used term for redundancy rather than 'lay off' in the strict legal sense ( a right not to provide work) as the objective is to avoid people losing their jobs and in a true 'lay off' situation, employment continues.

## Who can access the scheme?

All UK businesses are eligible to use the scheme, regardless of size.

### **How will the scheme operate?**

1. The employer will designate affected employees as ‘furloughed workers’ and notify them of this change. The early guidance suggests that this may require consultation. More on this below.
2. The employer will then submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal. Further guidance will be given by HMRC as to the information the employer will have to provide.
3. HMRC will then give the employer a grant to reimburse 80% of all furloughed workers wage costs, up to a cap of £2500 per month.
4. There is no obligation on the employer to make up the remaining 20% wages “but they may choose to do so”

HMRC are working urgently to set up a system to reimburse these monies as the current systems are not set up to facilitate payments to employers. At the press conference the Chancellor indicated that he hoped the first grants would be paid before the end of April. He also stated that claims could be made for wages lost since 1 March.

The scheme is intended to run for three months but the Chancellor said that he would not hesitate to extend this period if necessary.

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### **What does ‘furloughed worker’ mean?**

In UK employment law, the term ‘furloughed’ has no legal significance and therefore the government will need to give specific guidance on this when further details are released. The strict meaning of the word is a temporary leave of absence from work. Unless the government confirms to the contrary, we should assume that all contractual benefits (e.g. holidays) continue to accrue.

## **Do I have to consult with an employee before making them a furloughed worker?**

From the very basic information we've seen so far, it does appear that, unlike lay off and short time working, which is the exercise of a contractual right, you do have to seek the employee's agreement to becoming a furloughed worker. The employee's guide states that the employer should discuss becoming a furloughed worker with the employee. The employer's guide specifically states, "changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation". It is difficult to make definitive assertions when there is so little information available to, but it's possible the phrase 'depending on the employment contract', probably refers to whether there is a contractual right to lay off.

If the contract contains this right, then an employer already has the right to send an employee home without work and therefore the only 'change' in converting the lay off to a period of furlough, is that the employee will receive 80% of their pay, rather than a week of statutory guarantee pay every 13 weeks.

If you have a right to lay off in your contracts, they should speak to their employee, explain that you need to exercise the right to lay off which would have very limited right to pay (statutory guarantee of up to £29 per day for the first 5 workless days in any 13 week period). As an alternative, they could become a furloughed worker and receive 80% of their wages (subject to the monthly cap of £2500).

If you don't have a right to lay off in your employees' contracts, he could ask the employee to agree to become a furloughed worker as an alternative to redundancy.

## **What if I've already laid people off?**

Many employers took immediate action last week as social distancing severely affected their businesses and many employees have already been laid off. There is no official guidance on what should be done in these circumstances but given that the government has strongly indicated that this scheme is about giving support to workers, and the fact that the Chancellor indicated that claims can be made for wages lost since 1 March, you should contact employees who've been laid off and offer to designate them as furloughed workers.

At the moment it's unclear whether a day which has been treated as lay off and statutory guarantee pay has been paid can now be treated as a period of furlough. Hopefully, this will be clarified shortly.

If an employer did not offer to designate laid-off employees as furloughed workers, this could be viewed as a breach of trust and confidence and could give rise to a claim for constructive dismissal.

## **What if I have work for my employees for part of the week?**

The employee guide to the scheme makes it clear that during a period of furlough, no work must be done for the employer which would seem to rule out short-time working i.e. where the employee is on reduced hours rather than laid off completely.

## **How do I decide who should be designated as furloughed workers?**

Employees' attitudes towards furlough may differ significantly. Some may wish to avoid this given the drop in wages (assuming the employer does not make up the difference) whereas others may be happy to stay at home for 80% of their wages, especially because of the perceived risks of infection if

they can't work from home and the impact of school and nursery closures.

Employers will also want to ensure that they are retaining the skills they will need within the business at this most challenging time. They will, therefore, need to identify those with the specific skills they need to retain in work (with an objective reason behind this).

For the remaining employees, discuss the situation and ask for volunteers. If you don't have sufficient volunteers, or if they have too many, it will be necessary to follow a selection process. It is important to take advice on this as, unlike lay off and short-time working, which can be shared on a rota basis, all the signs seem to be that employees will be designated furloughed workers and remain so until the period of furlough can be brought to an end.

### **Should I just select those employees who have been identified as particularly high risk?**

While it's understandable that you may want to do this with the best of intentions, this would, in effect, be choosing those individuals on the basis of health, age or pregnancy which could easily give rise to discrimination claims.

If an employee has been identified as being in one of these groups, the employer should have carried out a risk assessment on them continuing to work. If this did not flag any issues, then there should not be any reason why they should not be able to work.

They should, therefore, be included in the pool to be offered a period of furlough. However, if the employer receives too many requests to volunteer, selecting those volunteers who would be at the highest risk of continuing to work would seem to be a reasonable approach.

### **Can an employee request to be furloughed?**

An employee can ask for this, but it's entirely up to the business as to whether they wish to designate any employees as furloughed workers. If they decide to do so, they should not agree to this on an 'on request' basis as this may deprive others of the opportunity and it may be that they have additional needs which should have been considered when weighing up the decision.

### **Does the scheme apply to workers as well as employees?**

Technically, there's no need to furlough a worker unless there's an obligation to provide work (and generally this is absent from worker relationships unless it is on a very short-term basis).

However, many individuals classed as casual workers/zero hours workers are actually variable hour employees. The Chancellor was specifically asked about this at the press conference and he said that the scheme was open to anyone on PAYE (therefore just ruling out the self-employed). When asked how their pay would be calculated, he said there would be detailed guidance on who would determine this and how it would be calculated.

Those who are self-employed are not eligible for the scheme and it will be interesting to see how this may affect many people's perception of their true employment status. At the moment it seems that, regardless of what their true employment status may be, they will still not be eligible for the scheme as they are not on PAYE.

### **Keeping you updated on how to protect your business through COVID-19**

These are uncertain times, especially for employers and business owners. Our HR and Employment Law experts are tracking the news and latest government update to help you understand the help available to you to keep your business running throughout the coming weeks of changes.