

JUST EMPLOYMENT LAW

COVID 19 – GENERAL Q&A FOR EMPLOYERS

RELEASE 6 – 6 APRIL 2020

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 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. Following that period, providing they do not continue to have a temperature, and do not feel worse, they can return to work. 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. This involves 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 a letter from the government or NHS, the employee would not qualify for statutory sick pay. Any payments made to an employee would be at your

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discretion. Should you choose not to exercise discretion and make a payment, the time off would be unpaid (unless you furlough the employee – see section D).

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. Any payments made to an employee would be at your discretion. Should you choose not to exercise discretion and make a payment, 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. Any payments made to an employee would be at your discretion. Should you choose not to exercise discretion and make a payment, 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. This was previously £94.25 per week until 6 April 2020.

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.

If an employee refuses to go home, you can require them to do so as the government guidance is that such an individual should be self-isolating.

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Homeworking could be offered if practicable and if the employee is fit to do so. If the employee has no entitlement to company sick pay, they would be entitled to SSP only, upon sending them home (providing they aren't going home to work). However, the burden would be on you as the employer to show that the employee should be self-isolating in accordance with government advice. If you are considering this course of action, you will want to take notes of the symptoms the employee was presenting with, and ideally have that corroborated by a second person.

More advice or help is available on the NHS 111 coronavirus service website or by calling 111 if the website is unavailable. If someone is seriously ill or their life is at risk, you should call 999.

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

Normally, employees should self-certify for the first week of absence and then a medical certificate is required from the second week onwards. 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 from the government/NHS informing them that they must self-isolate, you could ultimately take the position that if they choose not to come to work, they will not be paid.

Offering working from home where this is practicable is an obvious compromise. You may also wish to consider whether you will furlough that employee, if there is reduced work available (see section D).

While it would be theoretically possible to consider disciplining or dismissing an employee who persistently refused to attend work in these circumstances, this may not be reasonable in the circumstances.

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

Employees are entitled to reasonable unpaid time off to *make arrangements* for the care of their children where there is an “unexpected disruption or termination” of their care arrangements. We think this might well cover the closure of schools due to coronavirus.

This is a situation where 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.

As a result of updated government guidance released on 4 April 2020, it now also seems possible to furlough an employee who cannot come to work because of caring responsibilities. Employees that need to look after children are given in the updated guidance as an example of employees with caring responsibilities who can be furloughed.

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 (ie because they have coronavirus), 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 because they are unable to travel / their destination is locked down, you can respond to this in the manner that best suits the business. If you are short of staff and it would help to have the employee cancel their period of annual leave, you can agree and let them take their holiday another time. On the other hand, if you are short of work and you want to insist the employee takes the pre-approved period of annual leave, you are very likely to be entitled to insist that the existing 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 of this requirement.

You might not be able to do this where the employee has already booked all or most of their holidays for the current holiday year, if the effect of your requirement would be that the employee would be unable to take a paid holiday at another time that you had already approved. In that circumstance, it may be prudent to ask the employee to agree to change their holiday dates.

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

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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 government has announced that an 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.

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), which will reimburse employers covering up to 80% of employees' wages if they are sent home due to a lack of work. 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

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3. What is temporary lay-off?

People often mistakenly think being “laid off” means being dismissed by reason of redundancy. That is not the case. What we mean here by being “laid off” is that 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. They remain in your employment in these circumstances.

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, generally because of circumstances beyond the employer’s control. 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?

This is a question of contract, first and foremost. 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.

You should firstly check your contracts of employment and establish whether you have the right to temporarily lay staff off or place them on short-time working. If you don’t have a contractual right to do so, there may be other options open to you, which are discussed below.

The first thing to do is to decide which employees you are going to lay off or place on short-time working. We recommend that you try to be as fair as possible to all affected employees. 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.

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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, 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.

Often, a collective agreement will provide for higher rates of pay during periods of short-time working or temporary lay-off. Generally, if you don't have the contractual right to put someone on short-time working or temporarily lay them off, but you do so anyway without their agreement, they will be entitled to full pay if they are willing and able to work, but you are unable to provide them with work.

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.

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.

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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.

If you are not proposing to dismiss as many as 20 employees at any establishment, then you won't have to carry out a collective consultation process, but you will still need to have a fair method of selection for redundancy and carry out individual consultation, particularly with anyone who has two years' service and therefore the right not to be unfairly dismissed.

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). There is no minimum period of service for bringing this claim. If one employee successfully raises the claim, all other employees who should have been consulted can "piggy back" on the successful claim, so the risk is significant.

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 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 might be some 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.

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It's also very 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 consulting with them over avoiding the redundancy and/or offering them alternative 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, this can be done. 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. If it is known how long the reduced hours will apply for, this should be included in the document to be signed.

Employers will certainly want to consider if the Furlough Scheme is a better option before seeking to reduce employees' contractual hours.

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 do 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.

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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)

Please note that while official guidance about this scheme was released on 26 March 2020 with updated information being made available on 4 April 2020, there are still many unanswered questions about how the scheme will operate 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 was announced by the Chancellor of the Exchequer on Friday 20 March 2020. It enables employers of workers whom they have sent home due to lack of work (ie furloughed) to apply to HMRC to be reimbursed in respect 80% of the employee's usual monthly wage costs, up to a maximum of £2,500 per month.

The official guidance is available at www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

2. Who can claim?

Any UK organisation with employees can apply, providing they have created and started a PAYE payroll scheme on or before 28 February 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 runs initially from 1 March 2020 for three months. The Chancellor has indicated a willingness to extend the scheme for a longer period if necessary.

4. How can we access payments?

HMRC are going to administer the scheme and are in the process of setting up a system to facilitate the payments. We are informed that HMRC envisages having the online portal available by the end of April 2020. It is unclear how long it will take for HMRC to reimburse an employer who submits a claim via the portal.

You can only submit one claim every three weeks.

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

HMRC advises that you will need to:

- designate affected employees as 'furloughed workers,' and notify your employees of this change - changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation; and
- submit particular information to HMRC about the employees that have been furloughed and their earnings through a new online portal.

You will also need:

- your ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- your bank account number and sort code
- your contact name
- your phone number

You will need to calculate the amount you are claiming. HMRC will retain the right to retrospectively audit all aspects of your claim.

6. Can we impose furloughed status on an employee?

It will be a breach of contract to furlough an employee without their agreement, unless you have a clear contractual right to do so. JEL has provided Furlough Agreements for all retained clients. If you have not received this or require assistance completing this, please get in touch.

7. Do we have to furlough all employees?

No. It is for you to determine which employees you will furlough and this should be the employees for whom there is no work and who would otherwise have been temporarily laid off or made redundant. You can therefore furlough some staff, but not others if there is work available for some of your employees.

If you are not furloughing all employees, you should ensure that in selecting employees for furlough you do so fairly and free from discrimination (although see question 21).

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8. Can I rotate staff on furlough?

Yes, this is permissible, subject to employees being furloughed for the minimum period of three weeks (see question 31).

9. How much exactly can we claim?

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, as of 28 February should be used to calculate the 80%. The previous guidance that fees, commission and bonuses should not be included in the claim has been removed.

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 (or engaged by an employment business) 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

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 employer's national insurance contributions and the minimum employer auto-enrolment pension contributions.

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

10. 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 for some or all of their furlough.

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It does not matter if furlough pay takes an employee below the minimum wage, since the employee is not carrying out work (although see question 29).

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

According to the updated guidance, the reference salary for a claim should not include the cost of non-monetary benefits provided to employees, 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.

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 leave with the agreement of both employer and employee.

12. What if an employee left my employment on or after 1 March 2020, but prior to the announcement of the scheme?

You will be able to retrospectively claim on behalf of anyone who has been sent home due to lack of work since 1 March 2020, as long as you keep them in your employment.

You can also retrospectively change the status of someone you have dismissed for lack of work since 1 March 2020 to that of a furloughed employee, with their agreement.

You can also reinstate someone who left by reason of resignation on or after 1 March 2020, and then furlough them. We would recommend that you discuss the legal risks of this course of action with us before doing so.

13. Do I have to reinstate an employee who has been dismissed after 1 March 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.

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14. 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.

15. 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 (although if the employee resigned in the 'heat of the moment' particular consideration will need to be given). Please contact us if this query arises.

16. What if an employee started after 1 March 2020?

They would not be eligible to be furloughed, insofar as you would expect to be reimbursed 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 appears to be one exception to this rule. We have heard unofficially that 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 28 February 2020 (the normal condition for the scheme).

17. 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 would need to be communicated to the employee prior to the date on which their probationary period is due to end.

18. Can someone who is off sick be furloughed?

No. An employee must be ready and able to work.

19. 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 wish to be placed onto sick leave, so to receive company sick pay, if this is more generous than furlough pay. The guidance is not clear on whether this should be done, especially if the employee has not had their minimum furlough of three weeks. We await further clarity on this point.

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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 the employer's 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.

20. 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 if there is no work available for them. An employee who is in receipt of statutory maternity pay, for example, may 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 leave.

21. Can I furlough an employee who is "shielding" in line with government advice?

An employee who is "shielding" will almost certainly have received a letter from the NHS, advising them not to leave home under any circumstances for 12 weeks. This will be because of a particularly serious medical condition.

Under the furlough scheme, you can furlough an employee who is shielding, or who is staying at home to look after someone who is shielding, "if they are unable to work from home **and** you would otherwise have to make them redundant". This appears to imply that you may not be reimbursed for an employee who you place on furlough simply to enable them to be in a financial position to stay at home. It seems necessary that their job would also have to be at risk of redundancy if they were not furloughed.

This contrasts with the position of carers (see question 8 at section A above), where the guidance contains no such additional conditions.

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22. Does the scheme apply to fixed-term workers?

Yes. The updated guidance confirms that employees on fixed-term contracts can be furloughed. Their contracts can even be renewed or extended during the furlough period without breaking the terms of the scheme.

23. Does the scheme apply to zero-hours workers?

Yes, providing they are paid through PAYE.

24. 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.

25. 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 covers the question of collective consultation as follows:

“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 leave. Therefore, communications about what the consequences might be of refusing to go on furlough leave will have to be carefully drafted – we can assist with this.

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26. What if an employee refuses to agree to be furloughed?

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.

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

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

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

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

29. 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, as long as it does not provide services to or generate revenue for, or on behalf of your organisation. In relation to any time training, you must ensure the minimum wage is paid.

30. Can a furloughed employee work elsewhere?

Yes, the updated guidance permits this, regardless of whether it is a new second job, or a job they already had prior to the start of the furlough scheme. 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.

31. 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.

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

Yes, the updated guidance confirms that 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.

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33. Can an employee request to be furloughed?

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

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

We think this is possible but await further clarity on this point. ACAS guidance indicates that an employee can take a holiday during furlough leave, but the scheme guidance itself does not address this issue, even after the recent update.

In the meantime, in case HMRC does not permit furlough and annual leave to be taken at the same time (and might therefore refuse reimbursement on this basis), we recommend that an employee does not take annual leave (including any public holidays) during the first three weeks of furlough leave.

If an employee takes a holiday after having at least three consecutive weeks of furlough leave, we recommend that they are not given any more holidays until they have been back on furlough leave for a further three weeks.

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.

We do not yet know if HMRC will reimburse you at all for periods of annual leave taken during furlough leave. Nor do we know for sure (despite the ACAS guidance) if taking annual leave will be treated as breaking a continuous period of furlough leave, hence the recommendation in the first and second paragraphs of this question.

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

There are business loans available that may assist with short term cash flow issues. If this is not appropriate for your business, we would suggest in those circumstances 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.

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36. 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, childcare is likely to be unavailable for parents other than 'key workers', therefore employers may be prepared to take a more relaxed and flexible approach to homeworking and allow employees to work around their childcare responsibilities. Employees may be able to split the childcare with the other parent, so that both parents are able to, at least, continue working part-time.

Employees in these circumstances may assert their right to time off to care for a dependant, rather than agreeing to work from home. Time off in these circumstances is unpaid, unless there is a contractual right to pay.

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 at the moment.

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, pending any further government guidance.

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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. What if an employee asks to attend a pre-arranged formal meeting (i.e., a disciplinary or grievance meeting) with their trade union representative, however we are not permitting external visitors to our premises. 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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