

Briefing on employer and employees responsibilities in the wake of coronavirus (COVID-19) No. 3

The coronavirus (COVID-19) job retention scheme

The impact of coronavirus (COVID-19) for workers and the self-employed is developing apace. Following on from our previous briefing, in this issue we attempt to answer some of the key questions on the coronavirus (COVID-19) job retention scheme now that the government has published further [guidance](#).

What is a furloughed worker?

Furlough is not a legal term and it's not defined. However, the latest guidance indicates a furloughed worker is a worker who will remain on his or her employer's payroll but will not be provided with work as a consequence of the coronavirus (COVID-19) outbreak as opposed to a worker who has his or her contract terminated.

What is the coronavirus (COVID-19) job retention scheme?

The coronavirus (COVID-19) job retention scheme provides a grant to reimburse employers for 80 per cent of an employee's wage of up to £2,500 per month for those designated as "furloughed". Employees will have to pay income tax and national insurance contributions on the amount paid. The guidance states that an employer can then choose to top-up that pay for its employees who earn more than this amount although there is no obligation to do this to access the scheme. The Chancellor has stated any employer will be eligible to access the scheme on behalf of its employees who are paid through PAYE. The scheme is intended to apply to employers who cannot cover staff costs due to coronavirus (COVID-19). We do not yet know whether there will be any further eligibility criteria to determine whether a decision to furlough an employee has been taken because they were unable to continue to employ them as a consequence of coronavirus (COVID-19), although employers will not need to show they were suffering a specific financial hardship. The scheme is initially open for a three-month period. The latest government guidance also states that where employers receive public funding for staff costs and that funding is continuing, they expect employers to use that money in the normal way to meet staffing costs.

How will the coronavirus (COVID-19) job retention scheme work in practice?

There are still unanswered questions around this. In short, as described above, employers who access the scheme will be provided with a government grant to reimburse them for 80 per cent of the furloughed employee's wage costs, plus the

associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers will claim this money back through an online portal. An employer could choose to fund the differences between this payment and the full salary but does not have to. The scheme is not intended to override the contract of employment and therefore basic contractual principles still apply. Furthermore, there will be no statutory right to require that an individual must be “furloughed”.

It is not common for employment contracts to contain a lay off clause and therefore, in the majority of cases where the furloughing of workers would require a variation of terms and conditions of employment, the furloughing of workers should be done by agreement between the employer and affected staff. The alternative would be that workers might be laid off or made redundant, so our advice would be to reach agreement, where possible, taking all relevant factors into account, including long-term job security.

In those circumstances where a collective agreement is required where employers are seeking a reduction in pay, contractual paid hours or in other terms and conditions, the following considerations apply:

- In workplaces where an employer is unable to provide all of its employees with work as a result of coronavirus (COVID-19) and a trade union is recognised, employers should agree a collective agreement with that union where variations to contracts are needed to furlough employees, with a view to that agreement being incorporated into their individual contracts of employment.
- A collective agreement negotiated with the recognised trade union in these circumstances should also set out the factors to be taken into account in the selection process when determining which employees should be furloughed, if it is envisaged that some employees will remain in work. It may in some cases be appropriate in the first instance to invite volunteers in the workforce who are willing to be designated as “furloughed” and only revert to a further selection process if there are not enough volunteers or indeed too many.
- In the absence of a recognised trade union, employers should consult with employees to seek their agreement to any necessary variations to their contract to provide an employer with the ability to furlough them if the employer is unable to provide them with work as a result of coronavirus (COVID-19). The employer should set out the factors to be taken into account in the selection process.
- If contracts of employment already provide provisions that entitle an employer to lay off an employee without pay or on reduced pay, it will be important for unions and workers to persuade employers to use the scheme rather than lay

employees off. Although there is no legal mechanism to force an employer to do this, the provisions on furlough leave have been specifically introduced in order to deter employers to lay-off staff without pay or make redundancies.

What about workers who have already agreed with an employer to reduce hours or pay in response to the crisis?

Unfortunately the latest guidance makes clear that the scheme does not provide assistance with regard to arrangements of this nature which have already been made.

Does the coronavirus (COVID-19) job retention scheme apply to those who are off sick?

The latest government guidance makes clear furlough leave will not apply to those who are sick or self-isolating. Those individuals may be entitled to contractual sick pay if the contract provides for this or statutory sick pay (SSP) (currently £94.25 per week and £95.85 from 6 April 2020) if it doesn't. These individuals will be eligible for furlough leave once they are fit and able to return to work. Employees who are shielding in line with public health guidance because they are at a very high risk of severe illness from coronavirus (COVID-19) can be placed on furlough leave.

Are workers covered by the coronavirus (COVID-19) job retention scheme?

In the UK there is a distinction between “employees” and “workers”; the latter have fewer rights, which are limited to things such as holiday pay. The government guidance does suggest everyone covered by a PAYE arrangement would be included, the intention being to apply the scheme to as broad a range of individuals as possible. On this basis, workers (including agency workers and those on zero hour contracts) paid through PAYE will be covered. Those however genuinely self-employed or on bogus self-employment engagements will only get assistance through the separate self-employment scheme we address below.

How will earnings be calculated under the coronavirus (COVID-19) job retention scheme?

For full-time and part-time salaried employees, the employee's actual salary before tax, as of 28 February 2020, should be used to calculate the 80 per cent. Fees, bonuses and commissions should not be included.

In respect of employees whose pay varies, an employer can claim 80 per cent of the higher of either the same month's earning from the previous year or average monthly earnings from the 2019-20 year, or if they have been employed less than a year, an average of their monthly earnings since they started work.

What if paying 80 per cent puts workers below the National Minimum Wage?

The latest government guidance states that furloughed workers must be paid the lower of 80 per cent of their salary or £2,500 even if, based on their usual working hours, this would be below the National Living Wage or National Minimum Wage.

However, if workers on furlough leave are required to undergo online training, then they must be paid at least the National Minimum Wage for the time spent training, even if this is more than the 80 per cent of their wage.

What is the position if I have already been laid-off without pay?

The scheme is open to employees who have been made redundant since 28 February 2020 if they are re-hired by their employer. It is therefore worth workers and unions approaching employers about the scheme in respect of decisions to make employees redundant or lay them off in that time frame. Only employees employed on or before 28 February will be covered by the scheme.

Is there a minimum period an employee can be furloughed for?

The minimum period an employee can be furloughed is three weeks. This means employers cannot rotate those on furlough leave over short periods.

I am on maternity leave, can I still be furloughed?

The government's guidance is not clear but it does seem to suggest that women can be on both maternity leave and furloughed at the same time. Employers will need to ensure that they do not discriminate when considering which staff are on furlough leave.

How will maternity pay be calculated for those on furlough leave?

Statutory maternity pay is calculated on the woman's earnings in the eight-week period before the 15th week before the expected week of birth. The level of pay may be affected if a woman starts furlough leave in the eight-week qualifying period before the

15th week before the expected week of birth. If furlough leave starts after the eight-week period, then maternity pay should be based on her normal eight weeks earnings.

If a woman is eligible for contractual maternity pay she should still receive this as an employer can claim this as wages costs under the scheme.

Are the self-employed covered by the coronavirus (COVID-19) job retention scheme?

No they are not, but a separate scheme has been introduced to assist those who are self-employed. They will be entitled to apply for a taxable grant worth 80 per cent of their average monthly income over the last three years. The maximum amount that can be claimed is £2,500 a month for a period of at least three months. The scheme will then be reviewed. The first payments will not however be made until the beginning of June.

What can a self-employed person who currently has no income do until June?

Those who have no income now can apply for Universal Credit but that can take at least five weeks to process. Unfortunately, even although the government has suspended the Minimum Income Floor (an assumed level of income) when working out the Universal Credit Payment for the self-employed, it will nevertheless still be some time before any financial support is forthcoming.

Who is covered by the self-employment scheme?

The scheme is only open to those who have submitted a tax return for 2019, although anyone who did not do this at the end of January 2020 when it was due and who has not done in the intervening period will be given a further four weeks to do so. Individuals who have only just become self-employed and have not filed any returns are therefore excluded. Also excluded are those who have average annual trading profits of more than £50,000, those who earn less than half their total income from self-employment and those who have set themselves up to operate through a limited company.