

Briefing on employer and employees' responsibilities in the wake of coronavirus (COVID-19) No. 6

As part of our ongoing briefings for trade unions and workers we address some further questions arising from the job retention scheme as a result of the updated guidance for [employers](#) and [employees](#) published by HMRC on Saturday 4 April 2020.

What is the position of employees who left their jobs before 28 February 2020?

Employees who were made redundant or stopped working for their employer before 28 February 2020 cannot be re-engaged and furloughed. This is because the employee must have been on the employer's payroll as at 28 February 2020 in order for the employer to claim a grant through the coronavirus job retention scheme in respect of that employee.

What pay are employees entitled to receive when they are on furlough leave?

The scheme provides for employers to be reimbursed for each employee on furlough leave at a rate of 80% of the employees "regular payments" plus employer's NIC's and minimum automatic enrolment employer pension contributions up to a maximum of £2,500. The updated guidance sets out what is covered by regular payments. They include wages overtime, fees and compulsory commission payments. This means that an employee on furlough leave who is salaried should receive 80% of the salary they received on 28 February 2020 including contractual overtime, fees and commission. For employees, who are in receipt of variable pay the grant the employer can claim is 80% of the higher of the same gross month from the previous year or the average gross monthly earnings for the 2019-2020 tax year including overtime, fees and commission payments.

Importantly, the updated guidance states the following payments will not be included as "regular payments" and so not will not form part of the calculation of overall pay:

- Discretionary bonus payments (including tips)
- Discretionary commission payments
- Discretionary non-cash payments
- The cost of non cash benefits
- Benefits provided through salary sacrifice schemes (including pension benefits) which reduce an employee's taxable pay.

In general, a failure to make a discretionary payment will not usually amount to an unlawful deduction from pay. However, where the employer has notified an employee of its intention to

grant a discretionary bonus to an employee (or employees) in specified terms and then fails to do so a claim could be brought.

Employers should still continue with the salary sacrifice arrangements. However, while an employee cannot ordinarily opt out of a salary sacrifice arrangement unless there is a “life event”, HMRC have confirmed that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, and the employment contract can be updated accordingly.

For some employees, staff tips make up a significant proportion of their pay. It is not always clear that all tips are discretionary in nature. This will depend for example, on the extent of the discretion the employer has to distribute them amongst employees and whether an employer is exercising their discretion in relation to payment of tips via a tronc system. Clarification from HMRC would be helpful as any tips that are not discretionary in nature may arguably be regular payments which should be included in the calculation of pay.

Can employees be put on furlough leave if the employer is insolvent?

Where a company goes into administration (whereby administrators are appointed to either keep the company going or with a view to selling the business to another buyer) the administrators can access the job retention scheme. The updated guidance makes clear that the administrator would only be expected to access the scheme if there was a “reasonable likelihood of rehiring workers”. While it is accepted seeking a new buyer in the current climate is likely to be difficult it should at least provide some incentive on administrators to keep the business as a going concern until the current lockdown is relaxed. However, this is likely to provide little comfort to those employees dismissed as a result of a company becoming insolvent before 28 February 2020 since they cannot be furloughed if they were not on the payroll as at 28 February 2020.

What is the position of those individuals who work through a personal service company?

The updated employer’s guidance for employers and employees confirms that individuals who work for someone else through a PSC arrangement can be furloughed provided they are not in business on their own account and are paid via PAYE. If, however, they are paid by submitting an invoice via their personal service company they cannot be furloughed. Instead they may be able to claim a grant through the government’s [self-employment income support scheme](#). Under that scheme, those who are self-employed and meet the qualifying criteria can claim a taxable

grant worth 80% of their trading profits up to a maximum of £2,500 per month for the next three months. The qualifying criteria are that the individual must:

- have submitted an Income Tax Self-Assessment tax return for the tax year 2018-19
- have traded in the tax year 2019-20
- be trading when you apply, or would be except for COVID-19
- intend to continue to trade in the tax year 2020-21
- have lost trading profits due to COVID-19.

Note that self-employed trading profits must also be less than £50,000 and more than half of the individual income must come from self-employment.

Can contingent workers within public sector organisations be eligible for the furlough scheme?

The general position is that the government expects public sector organisations not to use the scheme as most public sector workers are continuing to provide essential services or contribute to the response to the coronavirus pandemic. Similarly, private sector employers who receive public funding for staff costs are expected to continue to pay staff and not to furlough them.

However, there is separate [guidance from the cabinet office](#) which applies to contingent workers (e.g. agency workers and contract workers working through a PSC or through an umbrella company) and which provides that they can be furloughed provided they:

- are in the middle of ongoing contracts for central government departments, their executive agencies or non-departmental bodies,
- are unable to work due to the outbreak of COVID-19, for example due to sickness absence, self- isolation or the temporary closure of the workplace, and
- cannot work from home.

Contingent workers are entitled to be paid 80% of their pay rate up to a maximum of £2,500 per month excluding statutory costs such as national insurance, holiday, apprenticeship levy and pension and supplier margin. Full details of how the payments are calculated and administered are set out in the Cabinet Office guidance.

Where contingent workers would have been let go as a result of their assignment coming to an end, irrespective of the spread of COVID-19, an employer is not able to make a claim for them through the coronavirus job retention scheme.

Can employees on fixed term contracts be furloughed?

An employee on a fixed term contract who is on the employer's PAYE payroll on or before 28 February 2020 can be furloughed. However, where the fixed term ends without being renewed the employer can only claim the grant of up to 80% of salary plus employer's NIC's and minimum automatic enrolment employer pension contributions up to a maximum of £2,500 until the date the contract terminated. The government has confirmed that a fixed term contract which was due to come to an end during the period of the furlough leave can be extended or renewed.

Can an agency worker be furloughed and if so who is responsible for paying them?

The updated guidance clarifies that any agency worker who is paid by PAYE including those employed by an umbrella company can be furloughed. Where the agency worker is employed by an umbrella company it will be the umbrella company that is responsible for furloughing the agency worker. An agency worker who is employed by an agency cannot work for or on behalf of the agency although they will be able to work for another agency.

Where the agency worker is directly employed by the agency and they have not been furloughed or provided with work they should write to the agency in the terms suggested in our last Q&A. The agency worker should also check the provisions of their contract to see if they are entitled to a payment between assignments.

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