

Furlough scheme (coronavirus job retention scheme)

Source: Legal updates for charities and other voluntary/third sector organisations – Sandy Adirondak

Furlough is an American term meaning leave of absence – normally referred to in the UK as being laid off or on temporary leave, *and used by some international organisations to refer to an assignment abroad*. A person who is laid off or on furlough remains employed but is not working. Chancellor Rishi Sunak announced the coronavirus job retention scheme (which he referred to as furlough) on 20 March, and less than a week later, on the 26th, HMRC issued guidance on the scheme. *Further guidance was issued on 4 April clarifying many points. But there are still some uncertainties, which will remain until further guidance is issued or legislation is put in place.* The summary below is not long but not comprehensive, so it must be read alongside the guidance [under Resources below].

Key points of the scheme

- The job retention scheme starts from 1 March and will run until 31 May, and may be extended.
- Two purposes underlie the scheme. One is to protect the jobs of employees for whom there is no work or reduced work and/or not enough money to pay them because of the coronavirus crisis, and who would otherwise have to be, or already have been, laid off or made redundant. The other is to help employers adversely affected by the coronavirus crisis to survive – even if they are closed or their usual work is reduced – so they can pick up again afterwards, with at least some or even all of their staff still employed.
- To help achieve this the government will make a grant to employers to cover 80% of the salary, up to a maximum of £2500, for eligible employees who are placed on furlough. The grant will also cover employer's national insurance and minimum stakeholder pension contributions. The grant must be used for these purposes. *The 80% can include commission, bonuses etc to which there is a contractual right.*
- Although the grant will cover 80% of a furloughed employee's salary, this does not mean the employer can automatically reduce their pay to 80%. Unless the employer has a contractual right to do this, the reduction will need to be agreed with the employee and the contract will need to be varied [see Contract of employment, below].
- An employee who does not agree to proposed furlough leave may be at risk of redundancy or termination of employment.
- If the contracts of 20 or more employees will need to be varied, and especially if the employees could be at risk of redundancy, the employer is likely to have to consult trade union or employee representatives.

- It's an all or nothing scheme: During the furlough period the employee is **not allowed to work for the employer**, even as a volunteer. *Work in this context means anything that generates income for the employer, or provides services to, for or on behalf of them.* The employee can, however, attend training for the employer, provided the training is not "work" as defined. The employee can be paid to attend the training if this has been agreed with the employer.
- *The guidance for employees, as revised on 4 April, prohibits employees on furlough from "making money for or providing services to your employer or a company linked or associated to your employer". For issues arising from this additional requirement, see *During the furlough: the employee's relationship with their organisation*, below.*
- An employee on furlough can volunteer for any other organisation, provided they comply with public health guidelines, and provided the volunteering does not provide services or generate any income for their employer.
- *Unless a furloughed employee's contract prohibits them working for another employer, they can work for another employer while on furlough.*
- The grant will be backdated to whenever the employee stopped or stops working for the employer. This cannot be earlier than 1 March.
- HMRC's system is not expected to become operational until late April, and there will be a huge workload when it does, so the employer will probably not receive the grant until late April or May. In the meantime, even though the furloughed employee is not working, they must receive their usual full pay during this period – unless the contract of employment allows leave on no pay or reduced pay, or the reduction to 80% of pay has been agreed in writing [see below, Contract of employment].
- Organisations which receive public sector funding that includes staff costs are expected to use that funding to pay the staff, and not put them on furlough
- The furlough scheme **cannot be used for staff who are working**, even if their working hours or pay have been reduced because of the pandemic, and even if the employer cannot afford to pay them. It is an irony that the furlough scheme is intended to help employers stay open through the crisis, but they may find they can't generate the income necessary to pay the staff who are working – while they can receive a government grant to pay furloughed staff not to work.

The scheme in practice

To be read alongside the most recent HMRC guidance – see Resources below.

- **Duration of scheme.** The scheme will run for three months starting from 1 March. It is expected to be operational by the end of April, and may be extended beyond its expiry on 31 May.
- **Duration of an employee's furlough.** As agreed between the employer and employee. The minimum is three *consecutive* weeks; the maximum is three months

(from 1 March). It can have started any time on or after 1 March, and the employer's claim will be backdated to whenever it started (but the employee cannot have done any work at all for the employer since it started). An employee can be on furlough more than once, with the periods following on from each other or being separate, provided no period extends (for now) past 31 May. This means that an employee can come off furlough after being on it for at least three *consecutive* weeks, then return to work, then go on furlough again for another three weeks or more. This would allow the employer to rotate furlough amongst the workers.

- **Employer eligibility.** Any UK business or organisation can apply, including charities and other voluntary organisations, and recruitment agencies with agency workers paid through PAYE. The employer must have created and started a PAYE payroll scheme on or before 28 February 2020, *have enrolled for PAYE online*, and have a UK bank account. The scheme also covers the public sector but the government does not expect them to use it as much, because they will need to continue to provide most of their public services or contribute to the Covid-19 response. *Individuals who are employers can furlough employees such as nannies, provided they were on the employer's PAYE payroll on 28 February.*
- **What the employer can claim from the government.** A grant to cover the lower of 80% of the employee's usual monthly earnings or £2500, plus the employer's national insurance contribution and the minimum automatic employer's stakeholder pension contribution on this amount.
- **Calculating 80% of earnings.** For full-time and part-time salaried employees, the 80% is based on their actual pay as of 28 February. For employees whose monthly earnings vary, see the HMRC guidance for employers [under Resources below]. *Monthly earnings include past overtime, fees and contractual commission payments. The following are not included as monthly earnings: discretionary commission and bonus payments, including tips; non-cash payments; the cost of non-monetary benefits provided to workers, including taxable benefits in kind; and benefits provided through salary sacrifice schemes.*
- **Definition of employee.** The guidance uses the **tax definition** of employee, i.e. an individual who must be taxed through PAYE, rather than through self-assessment as a self-employed person. This is different from the **employment law definition**, which distinguishes between employees *who are entitled to all employment rights; workers do not meet the definition of employee but carry out work for an individual or body which is not their client or customer; and self-employed. "Workers" are legally defined in s.230(3)(b) of the Employment Rights Act 1996, and are sometimes referred to as limb (b) workers to distinguish them from employees and self-employed people. They are entitled to some but not all employment right. HMRC's revised guidance makes clear that limb (b) workers, as well as some others who are not legally employees under employment law, are eligible for furlough [see the sections under Employee eligibility, below]. (I had never heard the term "limb (b)" and had to Google it.)*

- **What the employee gets from the employer.** At least 80% of their usual monthly earnings *including past overtime, fees and contractual commission payments*, to a maximum of £2500, minus tax, national insurance and any other deductions from their pay. The employer can choose to pay the additional 20% of salary, and/or to include *discretionary commission, bonuses etc, but this will not be covered by the furlough grant*. Even if 80% takes the pay below national minimum/living wage, this is not unlawful because NMW/NLW apply only if the employee is actually working. There is an exception if the employee is required to complete a training course while furloughed; in this situation NMW/NLW must be paid for the training time. (And because of the public health stay at home and social distancing rules, the training would almost certainly have to be online.)
- **Employee eligibility for furlough, in general.** The employee can be on any type of contract (permanent or temporary; full-time, part-time, flexible or zero-hours), provided they were on the organisation's PAYE payroll on 28 February. Agency workers are also eligible, provided they were on the agency's PAYE payroll on 28 February, and do not do any work for the agency while on furlough.
- **Apprentices.** *Apprentices can be furloughed in the same way as other employees, and can continue to train while on furlough. They must be paid at least the apprenticeship minimum wage, national minimum wage or national living wage as appropriate, for all the time they spend training. If this comes to more than 80% of their usual monthly earnings, the employer must cover the shortfall.*
- **Employee eligibility if the organisation receives public sector funding**
HMRC's *initial* guidance was particularly sketchy and unclear on furlough in organisations which receive public sector funding, *and this was not clarified in the guidance issued on 4 April*. The guidance states that where an organisation receives such funding for staff costs, and the funding is continuing, employers are expected to continue paying staff, and not to furlough them. (This is presumably because furloughing them would be claiming additional public sector funding.) This restriction on furloughing could have profound implications for organisations whose grant applications or contract bids explicitly (or even implicitly?) include provision for staff costs.

The guidance also says, "Organisations who are receiving public [sector] funding specifically to provide services necessary to respond to Covid-19 are not expected to furlough staff." Obviously it makes sense that staff involved in the response, and whose salaries are covered by the funding, should not be furloughed. But as worded, the guidance implies that if the organisation gets a grant for Covid-19 work, it cannot furlough any of its other staff, even if they are not involved with coronavirus-related work.

The guidance does go on to say that furlough may be appropriate in a small number of public sector-funded organisations, for example if the organisation is not primarily funded by the public sector and it is not possible to redeploy staff to assist with the coronavirus response. But this does not help much. Basically, the guidance

was and remains ambiguous, and organisations with public sector funding should not necessarily assume that they will be able to claim furlough funding.

It may be necessary to take advice about this, although until the legislation is in place and/or HMRC issues further guidance, even the wisest advisors may not really know. I recommend signing up for Bates Wells' charity and employment newsletters, as they will almost certainly be liaising directly with HMRC about this and will put out an update as soon as it is clarified (<https://bateswells.co.uk/newsletter/>).

- **Employee eligibility if the employee has caring responsibilities.** *HMRC guidance makes clear that employees do not have to be at risk of redundancy or being laid off in order to be furloughed. They are eligible if they have caring responsibilities resulting from any aspect of coronavirus, such as schools or childcare being closed, or having to care for a vulnerable person in the household.*
- **Employee eligibility if on a fixed-term contract.** *Employees on fixed-term contracts can be furloughed, and the contract can be renewed or extended during the furlough period. If the contract ends during the furlough period because it is not extended or renewed, the furlough grant for that employee can no longer be claimed.*
- **Employee eligibility if on unpaid leave or redundant.** Employees made redundant after 28 February are eligible for furlough if they are rehired by the organisation. (Presumably they would have to repay any redundancy pay they have received.) Employees placed on unpaid leave or given notice of redundancy after 28 February can be asked whether they prefer to be on furlough instead. If their redundancy or lay-off (unpaid leave) has already started (after 28 February), their furlough starts from the date their redundancy or leave started. If the furlough has not already started, the start date is as agreed with the employer. The worker cannot do, or have done, any work for the employer since the start date. An employee whose unpaid leave started on or before 28 February cannot be furloughed. This is presumably to help ensure that the unpaid leave is genuinely related to coronavirus-related pressures on the employer.
- **Employee eligibility if on other leave.** Employees who are **shielding** in accordance with public health guidance (basically "the 1.5 million" who have been advised to stay totally at home for 12 weeks) can be furloughed. Those who are **self-isolating** in line with public health guidance should get statutory sick pay, but can be furloughed after it ends (in relation to SSP, self-isolating means the employee has coronavirus symptoms and is self-isolating for seven or more days, or someone in their household has symptoms so the employee is self-isolating for 14 days. Employees who are self-isolating because the government has told us all to stay indoors except for essential shopping etc are not eligible for SSP, but can be furloughed because it is for a reason connected with coronavirus.

Those who are receiving **statutory sick pay** because they are ill, including with Covid-19, should continue to receive it, and can be furloughed after it ends. The

normal rules for **maternity, adoption, paternity** or **shared parental** leave and pay apply. *The employer can claim through the furlough scheme for enhanced (earnings-related) contractual pay for employees who qualify for maternity, adoption, paternity or shared parental pay.* The guidance does not prohibit those who are on maternity or similar leave from agreeing to return to work early and then being furloughed, or changing to shared parental leave and then being furloughed.

- **Foreign nationals.** *Foreign nationals can be furloughed.* If they are sponsored under tier 2, 4 or 5 of the immigration system, the Home Office and UK Visas and Immigration announced on 3 April that employers can temporarily reduce the pay of their sponsored workers to 80% of their salary or £2500 per month, whichever is the lower. Any reductions must be part of an organisation-wide policy to avoid redundancies, and in which all workers "are treated the same". The sponsored worker's pay reduction must be temporary, and pay must return to at least previous level once these arrangements have ended. The change to reduced pay must be notified to UKVI, as must any other change in the sponsored worker's working arrangements – apart from working from home, which does not need to be notified.

The UKVI guidance [see Resources, below] does not link the pay reduction to the furlough scheme. It therefore appears that the employer can reduce pay even if the sponsored worker does not meet the furlough requirements – for example if they were not on the employer's PAYE scheme on 28 February (but obviously the employer would not be able to claim the furlough grant). Any change, whether linked to the furlough scheme or not, will almost certainly require a change to the employee's contract [see Contract of employment, below].

- **Company directors, and employees who are also company directors.** Community interest companies, charity trading subsidiaries, other voluntary sector companies, community benefit societies (CBS) and sometimes even charitable companies may have company/CBS directors who are paid for their work as directors, and/or who may be employees as well as directors. Directors who are paid for their role as directors are taxed under PAYE as office holders *rather than* employees, *but are eligible* for the furlough scheme. If a director does other work for the company, and for that work has an employment contract and is taxed under PAYE as an employee, they are eligible for the furlough scheme in that capacity. *Whether furloughed as a director or an employee, any statutory duties they are required to undertake by virtue of their role as a director will not count as work for the purposes of the scheme.* The same *The decision to furlough a director must be formally made by the board, minuted, and communicated in writing to the director.*

The same rules apply to salaried individuals who are directors of their own personal service company.

- **Who is not eligible for furlough.** Employees who were not on the employer's PAYE scheme on 28 February. Employees taken on after 28 February. Any employee who is doing, and will continue to do, work which generates income or provides services

for the organisation – even if their hours and/or pay have been reduced, or even if they are going to do it on an unpaid basis.

- **Employer process.** If 20 or more employees are to be furloughed, collective consultation may be necessary [see below]. If not, the employer discusses furlough leave with staff and decides who is to be designated as furloughed (a worker can request it, but the employer does not have to agree to the request). Employer discusses their proposal with employee(s), and agrees with them the necessary changes to the contract of employment. The employer must confirm to the employee in writing that they have been or will be placed on furlough leave, and the details. When HMRC's dedicated web portal goes live, probably in late April, the employer will submit a claim through the portal. HMRC's current guidance lists the information to be provided, with more detailed guidance to be produced nearer the time. *The start date for a claim is the date the employee started furlough, not the date the decision was made or the date they received written confirmation of their furlough status.*
- **Collective consultation.** If the employer proposes to vary the contracts of 20 or more employees, and those who do not agree to the change (i.e. do not agree to be furloughed, or to accept any other change in hours, pay etc) will or may be made redundant, the employer has a duty to inform and consult trade union or employee representatives and notify the Secretary of State for Business. If consultation is not reasonably practicable, the employer may be able to claim a "special circumstances" defence, but this should not be done without taking advice. If the contract already allows the employer to reduce hours and pay, collective consultation may not be necessary – but it may still be advisable, especially if 20 or more redundancies may result farther down the line. Basically, if 20 or more employees are going to be furloughed and the contract does not allow for them to be laid off, get advice about whether collective consultation is necessary, and how to do it in the current circumstances.
- **Deciding who is to be furloughed.** See separate section below.
- **During the furlough: the employee's relationship with their organisation.** The furloughed employee cannot provide any service to, for or on behalf of the employer, or do anything that generates income for the employer (for example, producing goods that the organisation sells, or fundraising). In other words, no work *that meets this definition* can be done for the employer, either as an employee or volunteer – even if the volunteering is in a completely different part of the organisation and has nothing to do with their normal job. Although the employee cannot do any work for their employer, they are still employees and the employer should keep in touch with them – but not in a way that draws them into the work.

The employer and furloughed employees should all be aware of just how strict this rule about not working for the employer [*and probably associated/linked organisations*] can be. In reality, of course, HMRC is unlikely to know if a furloughed employee does some work for the organisation, or does something outside of work

that generates income for or provides services to the organisation. If the *furloughed* employee breaks the rules by carrying out work and the employer condones this, whistleblowing to HMRC may be tempting ...

The employer can, if necessary, make a furloughed employee redundant during or at the end of the furlough period. If this happens, all of the usual redundancy protections apply (notice period, consultation, redundancy pay etc), as do the protections against unfair dismissal.

- **During the furlough: voluntary work with another organisation.** The furloughed employee can volunteer for any organisation other than their own, but because of Public Health Covid-19 restrictions there will be limits on what they can do outside the home – the same as for anyone volunteering at present. Some commentators have said employees on furlough can volunteer only with organisations helping people who are vulnerable, but *this is not the case. A person, including a volunteer, is allowed to leave home to help a vulnerable person or people, or if their volunteering cannot be done from home – whether it is related to the coronavirus response or not.* There is, of course, no restriction on home-based volunteering. Any volunteering during furlough leave must not, even indirectly, provide services to or generate income for their employer .
- **During the furlough: paid work with another organisation.** In relation to other employment, the HMRC guidance says that if the furloughed employee has more than one employer, each job is treated separately. They can be furloughed for each, with the 80%/£2500 cap applies to each employer individually (provided the employee was on both employers' PAYE on 28 February), or they can be furloughed for one job and receive normal pay for the other.

If a furloughed employee is contractually allowed to work for another employer – or to put it another way, if they are not contractually prevented from doing so – they can do this while on furlough [presumably as long as the work is not with a linked or associated company]. If the furloughed worker's contract requires the employer's consent before taking other paid work, this consent will be necessary. The furloughed employee must complete the PAYE starter checklist form for their new employer, completing Statement C ("You have another job").

HMRC's guidance for employees, as revised on 4 April, says that an employee who takes on another job while on furlough must be able to return to work if the original employer ends the furlough, and must be able to undertake any training the original employer requires during the furlough. This is not (yet) in the revised guidance for employers, but it probably will be. The Working Time Regulations restriction on weekly working hours does not apply while the employee is on furlough, but when they return to work, they need to be aware of the limit and not work more than is allowed.

Any work undertaken during the furlough must comply with Public Health Covid-19 restrictions.

- **When employers can apply.** HMRC expects the new online portal to be up and running by the end of April. Although the scheme is designed to help employers avoid lay-offs and redundancy, it does not appear that organisations will be asked, at application stage, to confirm that they have been severely affected by coronavirus. (Unlike in the Republic of Ireland, whose coronavirus wage subsidy scheme requires evidence of a 25% decline in turnover.) If the application is accepted the initial grant, backdated to when the furlough started (not earlier than 1 March), will be paid into the employer's bank account. Further claims for each employee can be made at intervals of no less than three weeks. The guidance has basic details of how to apply, information to be provided, how to show the grant income and the payments to employees in the accounts, the tax treatment of the grant, and what happens when the furlough scheme ends. Further guidance will be issued in due course.
- **Errors and fraud.** HMRC will be able to audit all aspects of the scheme retrospectively, and claw back fraudulent or erroneous claims.

Deciding who is to be furloughed

Apart from the requirement not to discriminate on the basis of a characteristic protected under the Equality Act, and the need to be clear and objective about the process, there are no rules about how to choose who is to be furloughed. One possible starting point is for the employer to ask for volunteers from among those eligible – but too many employees might volunteer, and/or the organisation may find itself losing, for the duration of the furlough, an employee whose work is absolutely essential for the survival of the organisation. It may therefore be more sensible to start with consideration of which roles are crucial to the organisation's functioning and survival at least until the furlough scheme initially ends on 31 May.

HMRC guidance says, "Employers are free to consider allocating any critical business tasks to staff that re not furloughed." This is where a catch-all clause at the end of the job description, for example "Such other duties as are reasonably required by the employer" is helpful. In the absence of such a clause, any change should be agreed in writing.

Bates Wells solicitors say, "If the employer needs to very urgently furlough employees or make them redundant in order to be able to continue to [operate], a limited selection procedure carried out on an urgent basis is likely to be acceptable. However, where an employer does not have any immediate financial concerns, it is likely to be more reasonable for it to follow a more comprehensive procedure." Remember, an employee on furlough cannot do any work for the organisation that generates income or provides services while they are on leave, so it is important to ensure key personnel are not all furloughed at the same time.

Employers may want to take the following factors into account when deciding who should be offered furlough leave.

- Given the risks of coronavirus infection from travelling on public transport, it is reasonable to prioritise those who have to use public transport to get to work or to carry out their work.
- Prioritising workers defined by Public Health as high risk (over 70, certain medical conditions) is age discrimination, and/or disability discrimination if the medical condition is legally a disability. But if such prioritisation is challenged, it is likely to be seen as objectively justifiable and thus allowed under the Equality Act 2010, given that these groups have been strongly advised to remain at home. Note that it is not unlawful to discriminate against someone who does not have a disability or medical condition.
- Discrimination against employees sponsored under immigration tiers 2, 4 or 5 is not allowed, *or discrimination on the basis of nationality*.

Regardless of how the decisions are made and what they are based on, all such discussions and decisions, and the rationale, should be recorded in writing.

The importance of the contract of employment

The furloughed employee remains legally employed, and their contract of employment remains in place. It is important for the employer and employee to understand the implications of this.

Unless the contract allows for the employee to be laid off (not working for one or more days when they would ordinarily work) on reduced or no pay (apart from statutory guarantee payments), the employee must be paid their full salary or wages for those days. The fact that the government's job retention scheme is only giving the employer enough to pay 80% of the employee's usual earnings does not make it OK for the employer to pay only that amount. The employer and employee must agree to a variation of contract to allow the reduction in pay, and any other changes to the contract.

The employer should make clear to the employee that if they do not agree the proposed variation, the alternative may be redundancy.

The employer will need to check pension scheme rules, and contractual provisions for how pension contributions are calculated, especially if furloughed employees want to temporarily reduce or suspend employee pension contributions during the furlough.

Because the contract remains in place, apart from the furlough variation of hours and pay, the employee continues to accrue continuity of service, and is entitled to all statutory rights apart from national minimum/living wage. Contractual provisions, unless they are varied by agreement, also remain in place, so the employee continues to accrue contractual annual leave and remains entitled to all other non-discretionary contractual benefits. Any enforceable conditions in the contract, for example a requirement not to work for another employer, remain in place. If a company car is provided and the contract says it can be used for business and personal use the employee will be entitled to keep it during the furlough; if the contract says it is for business use only, the employer could ask for it to be returned, or

the contract could be amended to allow personal use (the employer's insurance may need to be amended). Any other benefits should be negotiated.

Resources

The government publications will be updated regularly, so always check you are using the most recent version. The internet address should remain the same even when the content is revised.

Claim for your employee's wages through the Coronavirus Job Retention Scheme. For employers. HMRC, published 26 March 2020, revised 4 April 2020. Covers the following. <https://tinyurl.com/tapx56j>

- Who can claim, including specific guidance for public sector organisations and organisations receiving public funding.
- Employees you can claim for.
- Employees in specific situations: *apprentices; already made redundant or stopped working for you; on unpaid leave; self-isolating or on sick leave; shielding; with caring responsibilities, including for children; has more than one job; is on a fixed-term contract; does volunteer work or training while on furlough; or is on maternity, adoption, paternity or shared parental leave.*
- *Eligible individuals who are not employees: office holders, company directors; agency workers and more....*
- *Agreeing to furlough employees.*
- How much you can claim.
- What you'll need to make a claim.
- Claim.
- *After you've claimed, including when the government ends the scheme; when your employees are on furlough; employee taxes and rights; working for a different employer; treatment of the coronavirus job retention grant.*
- *When your employees are on furlough.*

Check if your employer can use the Coronavirus Job Retention Scheme. HMRC, for employees, published 26 March 2020. Covers the following.

<https://tinyurl.com/rekfrnw>

- Check if you're eligible.
- How much you'll get.
- While you're on furlough.
- If you do not want to go on furlough.

Coronavirus (Covid-19): Advice for tier 2, 4 and 5 sponsors. Home Office and UK Visas & Immigration, 27 March 2020, updated 3 April. Cover the following.

<https://tinyurl.com/tw75cds>

- If your student or employee is absent.
- If you're sponsoring a student who is distance learning.
- If you're sponsoring employees who are working from home.

- If you cannot pay the salaries of sponsored employees because you've temporarily reduced or ceased trading.
- If you have issued a certificate of sponsorship or a confirmation of acceptance for studies and the sponsored employee or student has not yet applied for a visa.