

As Cartmell Shepherd Solicitors are members of the UK200 Group we are able to share with you the latest advice on 'Furlough' from **Helen Spencer FCIPD, Managing Partner of Member Firm Whittingham Riddell**. We hope you will find this useful and we will continue to share any information we receive going forward.

Q: What does the word 'furlough' mean?

Furlough generally means a temporary leave of absence from work. This can be due to economic conditions affecting a particular company or the country as a whole. Until now, the expression has not applied to UK employment law. Due to the COVID-19 pandemic, Furlough leave has been introduced by the UK government as a means to keep employees on the payroll without them required to work. This is different to being laid off without pay or being made redundant. Employees who get furloughed must not work for the employer during their furlough period, however, usually return to their job afterward the issue at hand has been solved, unless redundancies follow.

Q: Which employers does the Coronavirus Job Retention scheme apply to?

Any employer in the country will be eligible for the Coronavirus Job Retention scheme, including Charitable and non-profit organisations. However, this scheme is intended to **only** apply to employers who cannot cover staff costs due to the coronavirus. This scheme will continue to support financing a part of their employee's wage which will avoid unnecessary redundancies. Currently, we do not know if there is any room for disputes with the HMRC concerning whether the employer can cover staff costs or not. Equally, it's debatable if a large company with healthy profits, balance sheet and cash flows will be also eligible for this scheme; or whether evaluation of their accounts will be considered and a determination as to whether the employer qualifies. Presumably, public sector employees will not be affected as the scheme **only** applies to employers who cannot cover costs. It is not known if owners of small businesses who pay their own salary are covered or if they have to furlough themselves. Alternatively change to additionally self-employed workers are not covered by this scheme.

Q: How can employers access the Coronavirus Job Retention scheme?

The Coronavirus Job Retention Scheme is accessible for employers through an online portal. Once the employer accesses the portal, they provide details of the affected furloughed employees and submit this information to HMRC. The exact information required we are unsure of, however, we can assume details will include information about the employee's earnings and NI number. We recommend employers:

- Select employees affected in a fair way for being furloughed
- Decide whether you would like to pay 80% of their salary or to supplement it
- Gain the employees' written consent unless contractual provisions already cover lay off
- Stop the employees working from home if they were, or send them home from the workplace

Q: Which employees can be furloughed under the Coronavirus Job Retention Scheme?

Potential furloughed employees are those that would otherwise be dismissed as redundant or laid off as part or all of their workforce. The 80% wage guarantee does not cover zero-hour contracts or casual workers, unless they work on the PAYE system. As stated above, self-employed workers are not covered by this, however, will have easier access to benefits to cover a drop in income; including removal of the income floor for universal credit and easy access to the application process – online and by telephone. Additional measures for the self-employed may follow in due course.

Q: What about part-time employees?

There is no guidance relating to part-time employees. The reason is explained in the example below:

Say an employee works for two employers - Employer A for three days and Employer B for two. If Employer A decides to furlough the employee, they would receive 80% of salary for those three days. However, if Employer B decides **not** to furlough the employee, meaning they still receive their full wage from Employer B as well. The problem arises if the Employer B offers the employee additional work. As the employee is currently not working for Employer A, in theory they take up extra work from Employer B.

The scheme is intended to help employers and employees who would struggle financially without work. This could lead to abuse of the system in some respects. We hope to receive further guidance on this in due course.

Q: Are payments to the furloughed workers under the Coronavirus Job Retention Scheme a loan or a grant?

The Coronavirus Job Retention Scheme, is a grant which employers do not have to pay back. The scheme is running on a three month basis for the time being and may be extended if necessary. The current details for this system are as follows:

- HMRC will pay 80% of furloughed workers wages, up to a cap of £2,500 per month.
- HMRC are setting up a new online portal for reimbursement.
- The pay will be backdated to wages payable from 1 March 2020.

Q: Do employees have to agree to be furloughed?

Yes, the employer must consult the employee about being furloughed and the employee must agree with the employers decision. Changing an employees work status is always subject to existing employment law at the time. The possibility to lay-off workers is dependent of the wording of the employment contract. However under the Employment Rights Act 1996, lay-offs are a different legal concept and the wording in contracts may enable some employers to impose a furlough period. If there is no lay-off provision in the existing contract the employer will need to agree with the employee that they going to become furloughed because no work is available. Inevitably employees will mostly agree to this as the main alternative would be dismissal by reason of redundancy with a possible delayed of redundancy payment or no redundancy payment (for employees who have worked for less than two years).

There may be some negotiation in minor cases. For example, in sectors like hospitality, some staff may be needed and while others may not. Some employees may resent the fact they are classed as 'essential' staff whilst others are being furloughed on 80% of salary. Equally others may resent that they are considered dispensable whilst others are working and receiving their full package.

We recommend all employer discuss all options with employees and stay up to date with the latest information at [GOV.UK](https://www.gov.uk).

If employees do not agree to be furloughed can we dismiss by reason of redundancy?

Yes, employees can be dismissed by reason of redundancy by the employer if the employee does not agree to be furloughed. In this case the employer must make sure the redundancy definition is met and the proper process followed. If employers feel furlough is likely to be followed by redundancies it may help to select employees for furlough using a process similar to redundancy selection. This would involve using objective criteria, such as a scores matrix based on skills, productivity, previous appraisals etc.

Is an employer required to supplement employees' salary over the 80%?

No, however, employers can make up the additional pay, but this is not a requirement.

For employees who have been furloughed employers can choose to:

- Only make the salary payment reimbursed by the government
- Pay all of the difference between the grant and the employee's normal salary

- Pay part of the difference between the grant and the employee's normal salary

Any extra payment the employer chooses to make will be either the additional 20% of salary, or any amount in excess of £2,500. If management choose to pay more, it will depend upon the business' overall health and cashflow affecting the ability to fund payments. Concerns about staff retention once the crisis has passed may also affect decisions being made.

The employers affected will have greatly reduced or eliminated income during these three or more months. So many employers will not be able to supplement the government's payment. There is no reason why employers could not choose to supplement the salaries initially and then choose not to in later months, although presumably then the employee's consent to the furlough could theoretically be withdrawn. An employee would be unlikely to withdraw consent when the alternative is redundancy.

Will the furloughed employees receive £2,500 exactly?

It is currently unclear if furloughed employees will receive exactly £2,500 until more detailed guidance is issued. However, it is logical that employees who earn under £3,125 a month will receive less than £2,500.

This is due to those earning £3,125 a month, 80% of salary would be £2,500:

- Employees who earn less than £3,125 a month normally, will get 80% of their salary for three months (or more)
- Employees earning in excess £3,125 a month will receive the £2,500 figure which is less than 80% of their salary for those three months (or more) unless the employer chooses to supplement it
- The £2,500 may include employer's NI and pension contributions, but this is not yet clear. Therefore £2,500 may end up not being the precise maximum gross pay which the employee receives, if for example, pension contributions are then taken into account
- The £2,500 a month figure has presumably been chosen as it is broadly £30,000 a year which is the national median net salary

Can employees work for the employer when furloughed?

Employees must not undertake any work for the employer while furloughed to qualify for the scheme. The grants do not cover the wages of employees working reduced hours due to the virus, and the employees must not work for the employer at all during the furlough period.

If you have any queries relating to the above information please do contact Joanne Stronach or Claire Davies who would be more than happy to discuss this further with you.

You can contact Joanne Stronach by email joanne.stronach@cartmells.co.uk or call 01228 516666.

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