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Furlough Leave and Redundancies

What is the Government Job Retention scheme?

The Government Job Retention scheme was announced on 20th March 2020 and opened on 20th April 2020 in response to the COVID-19 pandemic. Under the scheme, all UK employers, regardless of size or sector, can claim a grant from HMRC to cover 80% of the wages of employees who are not working but are kept on payroll (“furloughed”), of up to £2,500 a month for each employee or PAYE worker, plus the associated employer national insurance contributions and employer auto-enrolment pension contributions. The scheme is backdated to 1st March 2020 and is open to the end of June 2020, unless extended further. It is open to employees who were on the payroll on 19th March 2020 and it is the employer who designates an employee to be furloughed.

For the duration of the furlough leave, the furloughed workers are not required to work and this is a condition of eligibility of the scheme. The scheme does not change the relationship between employer and employee.

What is the aim of the scheme?

The aim is to help employers whose operations have been severely affected by COVID-19 to retain their employees and protect the UK economy. There have been several debates on whether it should just be open to employers who would otherwise need to make their employees redundant and it does not seem to be the case, as this has been clarified by a Treasury direction. It is unlikely there will be a forensic analysis of the circumstances of furlough by HMRC.

What steps must employers take to put employees on furlough leave?

Employers will need to:

- Decide which employees to designate as furloughed employees – if the employer needs to very urgently furlough employees or make them redundant in order to be able to continue to trade, a limited selection procedure carried out on an urgent basis is likely to be acceptable. However, where an employer does not have immediate financial concern, a more comprehensive procedure, similar to drawing up a matrix of objective criteria in a similar way to a redundancy scoring exercise will be acceptable.
- Notify furloughed employees of intended change.
- Consider whether the employer needs to consult with employee representatives or trade unions.
- Employers must seek the employee’s consent – most contracts will not allow an employer to reduce an employee’s pay, provide them with no work and change their employment status without agreement, so this must be sought and this is normally in the furlough agreement letter.
- Confirm the employee’s new status and obtain their consent in writing and include confirmation that the employee will not work while they are furloughed. This document must be kept for five years.
- Submit information to HMRC about the furloughed employees and their earnings.





Redundancy payments

Employees who have two or more years of continuous employment have the right to a redundancy payment if they are made redundant.

This is calculated by multiplying the full number of continuous employment service years an employee has, their gross weekly pay (which is capped at £538) and a multiplier depending on their age – employees over 41 receive 1.5 week's pay, employees from 22 to 41 receive 1 week's pay and under that is 0.5 week's pay.

Can an employer make employees on furlough redundant?

An employee can be made redundant whilst they are on furlough leave or afterwards, and their redundancy rights will not be affected by them being furloughed, as normal employment law will still apply. However, an employer cannot claim reimbursement of redundancy payments under the scheme. Employees would also be owed notice pay if they are made redundant, unless they work their notice. Employers may want to pay their employees in lieu of notice, however there is no mechanism by which they can reclaim the PILON payment from the government under the furlough scheme. It therefore may be financially preferable from the employer's perspective to keep employees on furlough for their notice period so that at least part of their notice pay can be recovered from the government.

An employer must ensure they follow a fair redundancy process including individual consultation and fair selection criteria and that they are paid their redundancy payment based on the pre-furlough leave rate.

Collective consultation obligations

If an employer is proposing to furlough 20 or more employees and intends to dismiss those employees who do not consent to change their terms due to furlough variation, within 90 days or less, the employer will need to engage in the collective consultation process under s188 TULCRA. These employees will be dismissed by reason of redundancy for the purposes of s188 and the employer will need to inform and consult employee representatives unless they can rely on a special circumstances defence showing that this was the reason they could not consult with their employees.

What about employees who had been given notice of redundancy before the scheme was introduced?

It is possible for an employer to propose to employees who have been given notice of redundancy but are still employed, that they be put on furlough instead. However, their consent may not be forthcoming for the reduction in their pay (unlike employees who are expecting to have a continuing relationship with their employer). The employer would also need to consider the employee's entitlement to statutory notice pay and whether the aims of the scheme are met if the costs of paying the employee during their notice would be incurred regardless of the pandemic.

Can an employer re-engage employees who were made redundant after 19th March 2020?

An employer can re-employ them, put them on furlough and claim their wages from the date on which they furloughed them, even if they do not re-employ them until after 19th March 2020. This applies as long as the employee was employed on 19th March 2020 and was on the payroll on or before 19th March 2020.

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