



Coronavirus Job Retention Scheme

NB: the note below is based upon information the government have published so far about the scheme. Only a limited amount of information has been made available at present and the draft legislation which will be needed to implement the scheme has not yet been published.

Overview

The scheme is designed to incentivise employers who may otherwise have dismissed their employees in the current climate to keep these employees in employment instead.

Key elements of the scheme

- The government will reimburse 80% of the salary for employees who are 'furloughed' (given temporary leave)
- This will be subject to a cap of £2,500 per month
- Reimbursement will be backdated to 1st March
- The scheme will last initially for 3 months but the Chancellor has said the scheme will be extended 'for longer if necessary'
- Employers have to notify employees that they are being 'furloughed' (notification in writing may or may not be required but is recommended)
- Employers will need to submit information to HMRC about the employees who have been 'furloughed' and their earnings through a new online portal
- The government has indicated the scheme will apply to anyone who is subject to the PAYE system – so many workers will be included as well as employees
- Reimbursement will be via a grant from HMRC
- The grants should be available by the end of April
- Usual employment laws are not suspended and continue to apply (see below).

What about the additional portion of salary?

The Chancellor said "employers can top up salaries further if they choose to" which suggests there will not be a requirement to continue to pay staff 100% of their salary.

However, the Government's online guidance states that "changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation." The new rules do not therefore create an *automatic* right for employers to pay only 80% of an employee's salary.

An employer can only lawfully reduce an employee's salary if a) they agree to the change or b) there is a clause in the contract which allows them to do so (often referred to as a 'lay off' clause). Dismissal and re-engagement may be possible in some circumstances but for staff with two years' or more service it is risky, highly damaging to employee relations and should normally be considered a measure of last resort.

If there is no lay off clause in the contract or if the employee won't agree to reduce his or her salary, an employer who wants to take advantage of the scheme will have to pay the additional 20% of the employee's salary. A prominent figure in the trade union movement has indicated that employees and unions should push hard to ensure employees who are 'furloughed' are paid at least 90% of their usual salary and possibly more.

As employees who are 'furloughed' will be at home and won't have their usual commuting costs, it is to be hoped they would agree to be paid 90% of their salary (or possibly 80% depending on their circumstances). Where there is a lay off clause in the employee's contract an employer can unilaterally reduce an employee's salary (although please see below comments about the implied duty of trust and confidence).

How do we choose who to 'furlough'?

In the main this will be driven by economic considerations, but from an employment law perspective there are the following considerations:

- Selection of staff for 'furlough' mustn't breach the implied term of trust and confidence. So in most cases, an employer must act reasonably when selecting who is to be 'furloughed'. For example, where two employees have the same or similar roles, selecting one for 'furlough' because they are perceived to be not as good as the other is likely to be a breach of the implied term, absent clear evidence of that (although as always, an employer can of course take commercial risks when deciding who to furlough.)
- Selection of staff for 'furlough' must not be discriminatory. This may happen inadvertently – eg, selecting staff who work part time rather than full time, because full time cover for a role is required (this example may not necessarily be unlawful, but care needs to be taken to ensure it isn't).
- Even with a lay off clause, the manner in which staff salaries are reduced should not breach the implied term of trust and confidence. In particular, any salary reduction and furloughing should be done in a sensitive manner and with as much notice as it is possible to give.

Where selection of staff for furlough breaches the implied term of trust and confidence and / or is discriminatory employees can bring a claim for lost wages and they may also resign and claim constructive dismissal. With discrimination claims, an employee can bring the claim whether they resign or stay in employment. Similar claims may be brought if the manner in which salaries are reduced breaches the implied term of trust and confidence. If

a discrimination claim succeeds employees will also be entitled to an award for injured feelings.

What if we want to just reduce the hours of all staff and keep everyone working, albeit on reduced pay?

It does not appear the scheme will apply in this situation. Employers are likely to have to stand the cost of the employee's reduced wages in full. However, more detail is awaited.

One way around this problem may be to alternate staff who are put into 'furlough', with some staff working one week and others working the next. However, it is not clear whether the scheme will apply in such situations or whether staff have to be put into furlough and remain there until brought back into service.

Can we still make staff redundant?

Yes – there is nothing in the scheme which prevents employers from making staff redundant.

However, in many cases it will be economically beneficial to retain staff and see what happens with the economy rather than making them redundant now (which, of course, is the whole purpose of the scheme).

For example, if the cost of one employee is £30,000 per annum, even if an employer pays 100% of their wages it will still be a relatively modest outlay to 'furlough' the member of staff for 3 months – in this example, the cost will be £1500. That amount is likely to be less than the cost of notice and redundancy pay. The position may be different for short serving employees who have a week's notice and aren't entitled to a redundancy payment or for more highly paid employees.

For employees who have the right to claim unfair dismissal, the decision to make staff redundant must be 'reasonable'. It remains to be seen what view an Employment Tribunal would take of a decision to make an employee redundant in circumstances where they could be 'furloughed' at either no or minimal cost to the employer. We are in uncharted territory, but employees who are made redundant whilst the 'furlough' scheme is in operation will almost certainly argue that an employer's decision was unreasonable. Of course, if you do decide to make staff redundant the usual consultation processes will be required as well.

Continuous service

Subject to any legislation brought forward by the government as part of this scheme, an employee's length of service will continue to increase whilst in 'furlough'. Accordingly, employers should be mindful of:

- Staff who have less than two years' service who will accrue two years' service whilst on furlough (and hence be entitled to claim unfair dismissal)

- Employees gaining another full year of service whilst on furlough and hence increasing the amount of their statutory redundancy pay entitlement if they are eventually made redundant
- Staff accruing holidays whilst on furlough. (It should be possible to manage this in most cases by requiring staff to take certain periods as holiday – although it is unlikely (but not yet clear) that the 80% rebate will be available during periods of holiday. Please also bear in mind the lack of clarity about whether staff can be put into furlough and then brought back into service before being furloughed again – the same issues will arise if staff are asked to take holiday and then return to work.)

None of the above are likely to be overriding considerations but are just points to bear in mind.

Benefits in kind

There is nothing in the government's announcement that suggests the costs of any benefits in kind will be reimbursed. The scheme appears to apply to salary only and it is likely (although not certain) that employers will have to continue to fund benefits in kind such as life assurance, gym membership, mobile phones, etc in full. We will know more when further details of the scheme are published.

Where an employee's salary is reduced this may affect the level of pension contributions which are made. Employers should be clear (and careful) about such issues when writing to employees.

Other considerations

Of course, the legal position is only one consideration when deciding how to deal with any particular employee.

Other considerations are likely to include:

- Reputation / publicity – an employer who makes some or large numbers of staff redundant when this scheme is in operation may face public criticism. Already on Twitter some people are urging a boycott of organisations who have made redundancies in the current climate.
- Cash flow – the grants are not expected to be paid before the end of April and of course there is the risk HMRC aren't able to pay the grants then. This may create cash flow problems. The government has announced other measures to assist businesses (see below) and it may be possible to agree delayed payment of wages or salary with staff.
- Other measures being taken by the government to assist business – even if there is a cost to an employer of furloughing staff, other measures such as deferral of VAT and interest free loans may mean this is a cost employers are more willing to bear.

- The long term success of the business – until very recently, most businesses found it difficult to recruit talented staff. It may be worth retaining even highly paid staff using the ‘furlough’ scheme for the longer term benefit of the business.

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Please note that this is intended as a general guide only and does not constitute formal legal advice. Bridge McFarland LLP cannot accept any liability for reliance upon it.