

Furloughed Workers - Summary (as at 9 April 2020)

NB: The updated points since 6 April 2020 are stated in italics.

Under the Covid-19 Job Retention Scheme (“JRS”) the Government has offered to meet (up to) 80% or £2,500pcm (whichever is the lesser) of the salary costs of staff who would otherwise be made redundant, or be laid off, or whose cost employers are unlikely to be able to cover due to consequences to their business of the coronavirus, and as such they have been asked to stop working, but have not been made redundant (NB: or, alternatively, have been made redundant for that reason but are reinstated and furloughed). The JRS payment will be for “at least” three months from 1 March 2020 (ie: to at least 31 May 2020).

The main features/issues are:

1. It is discretionary – employers do not have to use the scheme and may prefer to make staff redundant (especially if they have less than 2 years’ service). However, there cannot be any direct or indirect discrimination involved in the exercise or refusal of that discretion;
2. All PAYE staff are covered including zero hours staff are entitled to be considered to be furloughed if on PAYE. Further, Company directors can be furloughed. They can still perform their statutory duties, but not other work for the company;
3. The furloughed worker cannot work once furloughed (you may need to evidence that) but can do voluntary work or training which does not generate income for the employer;
4. However, employees can start a new job when on furlough (meaning they might end up earning 80% of the old salary and 100% of a new one). This was not prohibited in the earlier guidance, but the new guidance expressly allows it. The guidance does say it has to be allowed under the old employment contract, but presumably the old employer can waive that;
5. Employees can be furloughed multiple times, ie they can be furloughed, brought back to work, then re-furloughed (subject to each furlough period being at least three weeks);
6. You can backdate the commencement of the furloughing to 1 March 2020, so long as no work was being done during that period by that employee;
7. It is a reimbursement scheme (you only receive what you have paid out). ***It opens on 20 April 2020.*** When operational ***on 20 April 2020***, you make the claim for reimbursement to HMRC on

their new online portal (and they will (no doubt) require evidence to support the application form (and will no doubt be prepared for false/under-evidenced claims)). ***They expect the first payments to be made on 30 April 2020;***

8. The employer only has to pay 80% of the normal wage to a furloughed worker, subject to employment law rights. It is best to proceed by an agreed amendment to the employee's contract. ***The employee is entitled to take paid holiday leave while on furlough leave at full pay;***
9. Salary costs include the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions (up to April 2020, it was 3%) on that wage. However, the 80% does not include non-monetary benefits (eg the value of health insurance or a car);
10. An employer can reclaim 80% of compulsory (presumably meaning contractual) commission back from HMRC, as well as basic salary;
11. An employer can reclaim 80% of fees (whatever that means) from HMRC. The previous guidance said they could not; and
12. Employers must notify employees of their furlough status in writing (the previous guidance did not require it be in writing) and keep the record of that written notification for five years.

It remains unclear if employees can take annual leave when on furlough, and what should they be paid.

The Government's reply to Luke Evans MP's question in March 2020 on ambit of furlough leave was as follows -

- the aim is to get the scheme up and running before the end of April.
- the 80% is based on the higher of (i) the earnings in the same pay period in the previous year; or (ii) the average earnings in the previous 12 months (or less, if they've worked for less)
- employees taken on after 1 March 2020 are excluded from the scheme.
- businesses can re-employ people who have been made redundant since 1st March, and then furlough them.

- to qualify for the payment, an employee must be furloughed for a minimum of three weeks. They can then come off furlough. This means that employers cannot rotate staff weekly between furlough and non-furlough.
- employees on furlough leave can do volunteering or training, providing it does not generate any money for their employer.

Finally, ***HM Treasury sent an email to David Johnston MP, stating that employees who are TUPEd to a new employer after 28 February will be eligible for furlough.***