

Chattertons Solicitors & Wealth Management

COVID-19: Flexible Furlough Guidance

BY YOUR SIDE. FOR YOU. FOR YOUR BUSINESS.

1. INTRODUCTION

COVID-19 is a viral infection that can affect your lungs and airways. Our knowledge of the coronavirus is always changing as new information and data becomes available. The government guidance and ACAS advice for employers is continuously being updated as the situation develops. There have now been over 41,000 deaths in the UK, with most individuals who have passed away being those over 70 or with underlying health conditions.

2. SYMPTOMS

The main symptoms of the coronavirus:

- A high temperature (over 37.8 degrees Celsius);
- A new, continuous dry cough.
- Loss or change to your sense of taste or smell.

It is believed that the virus is spread in cough droplets which can be directly transmitted or transmitted through touching the droplets on hard surfaces.

3. SELF-ISOLATION PERIODS

The guidance from the government remains that those with symptoms must self-isolate. The periods of self-isolation are:

- At least 7 days if you have symptoms and live alone.
- 14 days if you live with someone who has symptoms.
- 14 days if someone in your support bubble has symptoms.

If an employee displays symptoms of the coronavirus at work, employers should immediately send them home and tell them to avoid touching anything. It would be recommended to thoroughly clean the work environment to stop the virus spreading to other employees.

4. WHAT IS THE CORONAVIRUS JOB RETENTION SCHEME?

This scheme was set up by the UK government to pay a percentage of the wages of those employees who have been affected by a drop in work due to the pandemic. This could include those working in pubs, non-essential shops and the tourism industry. Certain requirements must be met, for example employees must have been on a PAYE payroll on or before 19th March 2020. Equality laws continue to apply and those furloughed or asked to work must not be selected or treated unfairly.

5. WHAT IS FLEXIBLE FURLOUGH?

Up until the end of June 2020, employers are only entitled to recover payments from the Coronavirus Job Retention Scheme for their furloughed employees if they undertake no work for their employer.

From 1st July 2020, this is going to change, with the scheme gradually being phased out. Employers will be asked to start contributing towards the cost of their furloughed employees' wages and more flexibility in terms of work allowed to be undertaken for employers will be introduced to ease employees back to work. The aim of flexible furlough is to avoid a sudden

end to the scheme and reduce the need for redundancies by continuing to support businesses over the next few months while lockdown restrictions ease.

6. TIMELINE

The following changes are being implemented in the coming months:

June 2020 No changes are being made and furloughed employees must continue to undertake no work for their employer.

1st July 2020 80% of pay and National Insurance and pension contributions will be funded by the scheme up to £2,500 per month.

Employees are able to work part time for their employer, for any amount of time and any shift pattern and be furloughed for the time not worked. This is called being 'flexibly furloughed'. The claim made to the CJRS will be for the hours not worked and the employer will pay for the hours which are worked.

There is no minimum period of being flexibly furloughed, e.g. it does not have to last for at least three weeks. Employees can be brought on and off of flexible furlough more than once.

Although employees may now work part of the time and be furloughed the remaining part of the time, they still must not undertake any work for their employer during the hours/days they are furloughed, other than training, volunteering or working for another employer.

To claim the employee must:

- Have been previously furloughed for three weeks or more as at 30th June 2020; the last day that new entrants could be placed on furlough was therefore 10th June 2020 (not including those returning from family-related leave); and,
- Have been on the PAYE system on or by 19th March 2020.

A claim period must be a full calendar month from 1st July 2020, to reflect the changes being made to the scheme each month thereafter.

The number of employees furloughed in the claim period up to 30th June 2020 cannot be exceeded in any further claim periods (not including those returning from family-related leave).

31st July 2020 Deadline for employers claiming under the CJRS for the claim period ending 30th June 2020.

1st August 2020 Employers must now pay the National Insurance and Pension Contributions for their furloughed employees. The scheme will still fund 80% pay up to £2,500 a month. Any hours worked by the employee on flexible furlough must be paid by the employer.

1st September 2020 Furloughed employees must still receive 80% of their wages, up to £2,500, but the scheme will now only fund 70% of this up to £2,187.50, with the employer having to top up the extra 10% and also pay National

Insurance and Pension Contributions. Any hours worked by the employee on flexible furlough must be paid by the employer.

- 1st October 2020 Employees on furlough are still entitled to 80% pay up to £2,500 but the scheme will now only pay for 60% up to £1,875, with the employer having to pay the remaining 20% plus National Insurance and Pension Contributions. Employers will have to pay their employees for any hours worked.
- 31st October 2020 The scheme will end and employers will receive no further government funding for employees who are affected by decreased work as a result of the pandemic.

Employers may still top up their furloughed employees' wages to 100% if they wish during the above months.

7. POINTS TO CONSIDER FOR CALCULATIONS

With these changes comes complex guidance on calculating the grant available for flexibly furloughed employees. Some points to note are:

- a. Even if employees remain on furlough in June and into July, these are to be treated as separate claim periods. This is because from July, a claim period cannot exceed 1 calendar month unless it includes the first or last day of a calendar month which is included in another claim. A claim should be matched with your payroll date, where possible.
- b. If an employee is fully furloughed, they will not be undertaking any work and you will not need to calculate their usual hours, only the maximum wage amount due.
- c. If an employee is flexibly furloughed, you need to calculate their usual hours and furloughed hours.
- d. Regular payments need to be taken into consideration, including regular wages and non-discretionary payments. Discretionary payments such as bonuses and benefits such as a company car cannot be included in the calculations.
- e. National Minimum Wage - an employee cannot be paid less than the National Minimum Wage for hours worked. However, for the hours they are furloughed this does not apply as they are not working, and therefore 80% of their usual wage may fall below the minimum. If employees undertake any training whilst furloughed, this must be paid at least at the National Minimum Wage.
- f. Returning from family related statutory leave - an employee who has been on family-related leave and who has not previously been furloughed is exempt from the deadline of 10th June 2020. If they return from their leave after this deadline they can be furloughed, provided they were on your PAYE payroll on or by 19th March 2020. However, you must have furloughed another employee for at least three weeks between 1st March and 30th June 2020. If an employee returning from maternity leave wishes to come back to work and be furloughed, they must give at least 8 weeks' notice and furlough pay will only be made at the end of that 8 week period.

In terms of calculating their pay, any statutory pay received while they were on leave is disregarded and you must complete calculations based on 80% of their salary before

tax. For those on variable pay, calculations are made from either 80% of the same month last year, or an average for the 2019/2020 tax year.

- g. Returning from sick pay - the above also applies for employees who have been on sick pay and are then furloughed; any pay received during sick leave is not taken into consideration and instead the employee's salary before tax, or variable pay based on an average are used.
- h. Returning from unpaid leave - if an employee is furloughed straight after unpaid leave, the calculations use the amount they would have received if the leave had been paid.
- i. Deductions - the usual deductions taken from an employee's pay continue to apply, including any student loans and National Insurance and pension contributions.
- j. Holiday - furloughed employees continue to accrue holiday entitlement as if they were working their usual hours. Employees are entitled to a minimum of 5.6 weeks' holiday per year, although this may be more depending on their contract of employment. If holiday is taken during furlough, the employee must be paid their normal holiday pay and not a reduction, and therefore their pay must be topped up to 100% above the grant.

The government website has a calculator to assist employers and also provides several detailed examples; however, they state that this may not always be suitable and it remains the employer's responsibility to check the calculations are correct.

8. RECORD KEEPING

Further requirements for keeping records have been introduced. Any changes to an employee's contract of employment should be agreed and it should be confirmed in writing that they have been flexibly furloughed, even if you have a previous written agreement of them being fully furloughed.

The guidance is contradictory in that one section states records must be kept for 5 years, and another states they must be kept for 6 years. It is therefore advisable to work to the longer date. Records must be kept of the employees claimed for and the relevant claim period, who has been furloughed, if they are working then how many hours this is for, the claim reference number and calculations. HMRC have had to provide a huge amount of funding to employers in a very short time and audits will later be carried out which will require these details.

9. CHILDCARE ISSUES

With many schools and nurseries remaining closed, some of your employees may struggle with childcare. Those unable to work because of their caring responsibilities are entitled to be furloughed after 1st July 2020 as long as they have been previously furloughed for a period of at least three consecutive weeks.

Employees with dependents under the age of 18 with at least one year's continuous service are also eligible to request **parental leave**. Parental leave allows eligible employees to take up to 18 weeks' unpaid parental leave in respect of each child. This can be taken in blocks of a week or a number of blocks, but not exceeding more than four weeks' a year in relation to each child. Ordinarily, employees should give their employers **21 days'** notice of their request for parental leave. However, we would advise that employers are flexible during this time as it may not be practical for your employees to meet this criteria. Employers do have the right to postpone or refuse a request for parental leave where it would unduly disrupt the business,

but they must discuss alternative options with the employee and notify them of their decisions in writing within 7 days of receiving the request.

Under ordinary circumstances, it would not be appropriate or practical for employees to work from home whilst also providing childcare following the school closures as it is likely they are unable to dedicate 100% of their designated working hours to the business. We would advise that employers are flexible under the current circumstances. As the childcare difficulties are going to impact the majority of parents in the workforce, it may be considered unrealistic to expect them all to take parental leave and it may also leave the business understaffed. We would suggest a pragmatic approach under these unprecedented circumstances, such as allowing employees to work their hours more flexibly to work around their childcare responsibilities as long as the business needs can still be met.

10. SICK PAY AND FURLOUGH

An employee who becomes ill while they are furloughed is entitled to the minimum Statutory Sick Pay, however they are able to remain furloughed instead. It is your choice whether to place them on SSP or keep them furloughed and make a claim to the CJRS. If the employee is moved to SSP, then a claim under the furlough scheme cannot be made.

11. REDUNDANCIES

Redundancy is a form of dismissal. This occurs where a business closes permanently or there is a reduced need for employees from a particular role. Employees should be appropriately consulted prior to any redundancy taking place.

As employers are gradually being asked to contribute more towards their furloughed employees' wages, this together with the time it will take to make furloughing arrangements and calculate payments may mean redundancies are anticipated.

Employees must not be unfairly selected for redundancy. They may be entitled to a redundancy payment and notice pay and it is sensible to seek legal advice regarding the process.

12. DISCLAIMER

The law and advice set out in this booklet is correct as at 15 June 2020. We strongly recommend that all employers ensure they are keeping up to date with the government advice as the situation progresses. Despite the advice about the coronavirus pandemic constantly changing, employment legislation will remain in force and must be adhered to in order to minimise the risk of a claim being brought against an employer. Therefore, if you are in doubt about anything, we recommend that you seek advice. Should you require any clarification on this matter, do not hesitate to contact a member of our Employment Team on 01205 351 114.

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