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Guide: Everything SMEs need to know about Furlough

The government has announced a number of changes to the Coronavirus Job Retention Scheme – more commonly referred to as 'furlough'. These changes start to take effect from 1 July.

As businesses look to getting back to some form of normal and start to 're-open' they are faced with some crucial decisions.

This guide has been produced to help SMEs consider the implications for their business and guide them on the choices they have. It also provides practical guidance on how they can start to bring back employees from furlough, whilst ensuring they do things correctly and understand, and continue to get, the support they are entitled to.

Some aspects of the furlough scheme, and in particular the changes, are quite complex and have some significant implications.

Please do get in touch if you would like to receive some guidance or advice that is specific to your business and your circumstances.

For further information please contact Joanne Stronach, Head of Employment and HR on 01228 516666 or email joanne.stronach@cartmells.co.uk.

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1. What is furlough?

The word 'furlough' generally means temporary leave of absence from work. This can be due to economic conditions affecting one company, or matters affecting the whole country. Until now the expression has not carried any meaning in UK employment law but has been temporarily introduced in response to the unprecedented situation presented by the COVID-19 pandemic.

Furlough leave has been temporarily introduced by the government to provide employers with an option to keep employees on the payroll without them working; from 1 July, working reduced hours is allowed under the flexible extension to the furlough scheme. As the furloughed staff are kept on the payroll, this is different to being laid off without pay or being made redundant. The ability to furlough employees was introduced to support employers who are severely affected by coronavirus.

This provides employers with another option when reviewing the circumstances of their business, as an alternative to implementing redundancies or layoffs without pay.

2. What is the flexible furlough scheme and how can my business use it?

Prior to changes that come into effect from 1st July, an employee had to be on furlough leave for a minimum period of 3 weeks. Employees cannot do any work for their employer at all whilst they were on furlough.

From 1st July, the furlough scheme will become "flexible". This allows employees to work for some days (or even part days) and be on furlough leave for other days.

This additional flexibility will help businesses start to ease back into operation on a gradual basis that takes into account that may not have the income or demand for services to enable staff to return to work fulltime. For example, an employee would be able to work Monday and Tuesday and then be on furlough leave on Wednesday, Thursday and Friday.

3. What changes are happening to the furlough scheme?

There are many changes to the furlough scheme over the coming months as the financial support the government is providing is gradually reduced whilst employers will be required to make an increasing financial contribution. The key changes are as follows:

- From 1 August 2020, employers have to start contributing to the wages of furloughed employees. They will be required to meet the cost of employer NICs and pension contributions.
- From 1 September 2020 employers will also have to pay 10% towards an employee's wages as well as NICs and pension contributions.
- From 1 October 2020 employers will have to pay to 20% towards an employee's wages as well as NICs and pension contributions.

4. When do I have to submit my claim for furlough support?

The claim periods for the new flexible arrangements are limited. They are:

- Any claim in respect of the period before 30 June will have to be made before 31 July.
- Any claim in respect of a period after 1 July must start and end with the same calendar month which means periods of furlough leave will not be able to overlap months.

If you have staff whose furlough spans June and July, you will need to submit separate claims for June and July – even if the staff have been furloughed continuously.

You must include all staff in one claim, even if they are paid at different times. Whilst you can submit a claim up to 14 days before the end of the relevant claim period, this should be avoided in case you need to make staff work changes. If this happened, you would need to make adjustments to future claims which would make future claims more complicated for your business.

The government recommends that you don't claim until you are sure of the exact number of hours your staff will have worked during the claim period.

5. What agreements do I need for my furloughed staff?

For any staff that you have put on furlough leave, there should be a furlough agreement in place. This may be, as per the government guidance on 17th April 2020, a written communication to the employees affected:

"there needs to be a written record, but the employee does not have to provide a written response".

It is likely that the furlough agreement an employer has with staff will currently prohibit employees from carrying out any work for the employer during their furlough period.

Therefore, if you wish to take advantage of the flexible furlough arrangement, the furlough agreement will need to be amended or a fresh agreement entered into to record the new flexible terms.

6. What records must I keep?

The rules around record keeping are remaining the same but there are some additional points that employers must note if taking advantage of the flexible arrangement. For those employees on flexible furlough leave, employers must keep a record of:

- the usual hours worked by the employee;
- details of the calculation used to calculate those hours; and
- the actual hours worked during the furlough period.

This record must be retained for 6 years.

7. How are flexible furlough payments calculated?

If you do not intend to ask employees to return to work, your pay calculations will not change (but your contribution will increase from 1 August).

If your staff do return on a part time basis, the way in which flexible furlough payments are calculated is complex and considers a number of factors, including the usual hours worked, the hours actually worked and whether the employee has fixed or variable pay.

The government has provided a number of [practical examples online](#) which can be used to guide employers through the calculations.

Using your payroll system to help you with these calculations is advisable.

8. Which of my staff are eligible for furlough?

An employee must have had a minimum of 3 weeks of furlough leave prior to **30 June 2020 in order to be eligible for furlough (so they must have been put on furlough on or before 10 June 2020)**.

There is an exception to the rule for employees returning from maternity or paternity leave after 10 June. These employees can be furloughed as long as the employer has used the scheme before 10 June.

From 1 July, employers will not be able to claim furlough for more employees than it has in any previous claim.

For example, if you have only ever claimed for a maximum of 10 employees during any period before 1 July, you will not be able to exceed this amount going forward.

You can change which employees you put on furlough leave.

9. Can I furlough parents who have been on maternity or paternity leave?

There is a furlough extension for new parents returning to work after 10 June. Parents who have been on statutory maternity or paternity leave and who return to work after the 10 June cut-off date will be eligible for the furlough scheme.

This will only apply if you have previously furloughed employees.

10. What if I need to bring employees back from furlough?

From 1 July you can bring back previously furloughed employees on any work pattern e.g. full or part time and for any amount of time e.g. no 3-week minimum period.

For example, an employee would be able to work Monday and Tuesday and then be on furlough leave on Wednesday, Thursday and Friday.

11. What are my legal obligations in terms of holiday pay?

Employees should receive holiday pay when they are on holiday to reflect pay that they would have received had they been at work and working. The pay an employee receives will depend on how many hours they work, and how they are paid for those hours.

Holiday pay for those on furlough and also for those who aren't, should be calculated in line with current legislation and based on an employee's usual earnings. Where an employee has regular hours and pay, holiday pay is calculated on these hours but if they have variable hours or pay, then the holiday pay is calculated using an average of the previous 52-weeks' worth of remuneration. For furloughed employees taking annual leave, the employer must still calculate and pay holiday pay in accordance with legislation. If this is above the amount that employees receive whilst on furlough, then the employer must pay the difference but can continue to claim the 80% grant from the government to cover some of the cost of the holiday pay.

Employees on furlough can take holiday without disrupting their furlough. The notice requirements for their employer requiring an employee to take leave or to refuse a request for leave continue to apply. If an employer requires an employee to take holiday whilst on furlough, the employer should consider whether any restrictions the employee is under, such as the need to socially distance or self-isolate, would prevent the employee from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday.

12. How are bank holidays treated for furloughed employees?

Employees are still entitled to the statutory holiday entitlement for the year, so employers need to consider this.

For employees on furlough, where a bank holiday falls within their period of furlough and the employee would have usually worked that bank holiday, their furlough is unaffected by it. If the employee would ordinarily have their bank holiday as annual leave, then there are two options:

- **Bank holiday taken as annual leave.** If the employer and employee agree that the bank holiday can be taken as annual leave while on furlough, the employer must pay the correct holiday pay.
- **Bank holiday deferred.** If the employer and employee agree that the bank holiday will not be taken as annual leave at that time, then the employee must still receive the day of annual leave that would have been received. The leave can be deferred to a later date, but the employee must still receive their full holiday entitlement.

13. How should unused holiday entitlement be treated?

The government passed new emergency legislation meaning an employee can carry forward holiday where the impact of coronavirus means it has not been 'reasonably practicable' to take it in the leave year to which it relates. Where it has not been 'reasonably practicable' for the employee to take some or all of the four weeks' holiday due to the effects of coronavirus, holiday's not taken can be carried forward into the following two years leave.

What is 'reasonably practicable'?

When defining 'reasonably practicable' government guidance suggests an employer should consider:

- whether the business has faced a significant increase in demand due to coronavirus that would reasonably require the employee to continue to be at work and cannot be met through alternative practical measures
- the extent to which the business' workforce is disrupted by the coronavirus and the practical options available to the business to provide temporary cover of essential activities
- the health of the employee and how soon they need to take a period of rest and relaxation
- the length of time remaining in the employee's leave year, to enable the employee to take holiday at a later date within the leave year
- the extent to which the employee taking leave would impact on wider society's response to, and recovery from, the coronavirus situation
- the ability of the remainder of the available workforce to provide cover for the employee going on leave

Employers should do everything reasonably practicable to ensure that the employee is able to take as much of their leave as possible in the year to which it relates, and where leave is carried forward, it is best practice to give employees the opportunity to take holiday at the earliest opportunity.

Furloughed employees

Employees who are on furlough are unlikely to need to carry forward statutory annual leave, as they will be able to take it during the furlough period. However, to do so they must be paid the correct holiday pay which is likely to be higher than the rate of pay that will be covered by government grants, with the employer making up the difference.

If, due to the impact of coronavirus on operations, the employer is unable to fund the difference, it is likely that this would make it not reasonably practicable for the employee to take their leave, enabling the employee to carry their annual leave forwards.

In this situation, the employee must still be given the opportunity to take their annual leave, at the correct holiday pay, before the carried annual leave is lost at the end of the next 2 leave years.

14. What notice do I need to give employees I wish to bring back from furlough?

Technically no notice is required, so you could call an employee and ask them to return immediately. However, it is recommended that giving at least 48 hours' notice will allow you and your employees to have appropriate discussions and ensure that there are no concerns or other issues, for example employees needing to put in place childcare arrangements.

If you have employees that are members of unions, you may need to check if there are any specific arrangements in place with the unions or similar about notice.

In short, be as flexible and as amenable as possible.

15. Can I ask employees to take a pay cut?

There is no change here in terms of the law. Reducing hours and/or pay are considered to be fundamental changes to an employee's terms and conditions. As such, employees should be consulted, and any agreement must be made in writing.

For many employers this may be the only viable basis for their business to be able to continue, such have been the financial challenges of Covid-19.

As with all things, take a sensitive and consultative approach if you are considering this route.

16. Can a furloughed employee refuse to return to work?

The issue many employers are grappling with is whether a furloughed employee who refuses to return to work because of a stated fear of catching coronavirus can be dismissed.

Under the standard employment contract, the furloughed employee is obliged to follow reasonable instructions. One of those instructions contained in the employment contract will be that employees are to attend work within the hours set out.

The key issue in employment law is what is reasonable, and this depends on the precise facts of the case. As a result of the possible ambiguity an employer should carefully consider potential consequences before taking any disciplinary action for failure to attend work.

It is important to remember that although public health advice may say that it is safe for employees to attend work, the law is based on the employee's subjective perception of whether they thought that going to work posed a serious danger, and in this sense the law is often in favour of the furloughed employee.

If an employer decides to dismiss an employee or subject them to detriment, they should handle this very carefully. We expect significant number of claims from employees, as employers fail to follow the correct procedures.

If you are faced with this situation, we strongly recommend you seek legal advice.

17. How should I treat vulnerable employees?

Some employees will be at higher risk if they contract the virus than others and employers should consider this and remember that employees will have different needs. For example, if an employee has asthma or a suppressed immune system, steps should be taken to ensure that they feel safe and the employer should recognise that these individuals are more likely to feel in danger than those without these conditions.

18. I need to make some staff redundant; how do I do this?

There are very precise steps that businesses need to take if they are in the position where they need to make some staff redundant.

One of the key things that employers need to take care over is how they 'pool' their employees for redundancy purposes.

You are not entitled to use your furloughed group of employees as your pool for this purpose. You need to take into account all employees within a particular level whether furloughed or not.

Furthermore, it is vital that employers follow a fair redundancy process. Specifically, if you intend to dismiss 20 or more employees within a 90-day period you must carry out a collective consultation exercise.

That all said, redundancy is one of the potentially fair reasons for dismissal provided the employer follows the proper procedures.

For further information please contact Joanne Stronach, Head of Employment and HR on 01228 516666 or email joanne.stronach@cartmells.co.uk

With thanks

This guide has been produced in collaboration with member firms of the
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quality assured chartered accountancy and law firms.

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