

Coronavirus employment law update & FAQs

Addressing staff overheads

For most businesses, staff costs are the biggest overhead. With income reducing unexpectedly and potentially drying up, it is important to think about reducing costs very quickly before lack of cashflow takes your business into insolvency. Reducing staff costs might be necessary to save your business.

Coming out the other side

You also need to think about what happens when this pandemic is over. You don't want to so severely cripple your business that you cannot get up and running again. The idea is to keep it ticking over and keep your valued staff while you all get through this together. There is a balance to be struck.

The Government's assistance for businesses

The Government has introduced a number of extraordinary measures to help people and businesses get through a difficult few months. These are totally novel and include the Coronavirus Job Retention Scheme (JRS). Other schemes are available such as interest-free funding loans and delaying some VAT and tax payments. You can find more information about all of these here: <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses>

You still have the same responsibilities as an employer as before the pandemic

These measures do not override your existing responsibilities and liabilities as an employer. You are still at risk of Employment Tribunal litigation if you get it wrong.

We've prepared a short guide to hopefully help you stay on the right side of employment law.

FAQs

1. What is the Government's Coronavirus Job Retention Scheme (JRS)?

The JRS is an emergency measure brought in by the Government via emergency legislation to help businesses and workers impacted by the Coronavirus crisis. The purpose is to preserve jobs without there being a cost to employers who may not be able to afford to keep staff on. All businesses are eligible.

2. What does this scheme actually look like?

We still don't have the finer detail but the essence of the scheme is understood to be as follows:

- You ask an employee to cease work and remain at home (the scheme refers to this as being "furloughed"). The employee cannot do any work at all if they are furloughed. They must be treated as if they have left but you are keeping them in limbo with the aim of bringing them back into work at some point down the line.
- The scheme will pay you a grant so that for each furloughed worker the Government will pay up to 80% of regular earnings up to a limit of £2,500 per month plus the Employer's NICs plus the legal minimum pension contributions. This equates to maximum annual salary of £37,500. The employee will be taxed in the usual way. How tax works from your perspective is unclear at this stage but you will be spared up to 3 months of ER NICs and pension contributions.
- Payments under the scheme are paid to you and can be backdated to 1 March 2020 if staff have already been laid off. The scheme is anticipated to run for three months initially. We do not yet know if the three months includes March and is only available for April and May or whether it is any three month period going forward.
- Grant payments will be paid "within weeks" but there is no certainty on this as yet. It is expected that the scheme will be in place by the end of April. We still don't know the mechanism for the payments, including whether employers must pay their staff 80% of contractual salary *before* they can claim the payment back from the scheme and will update you when these details are released.
- We still don't know if someone can be furloughed and then return to work and be furloughed again. More on this as we find out.
- An amendment to the Coronavirus Bill has been proposed such that freelancers and the self-employed will be eligible for support. The proposal is that they will be entitled to a grant. Initially the scheme was only for PAYE staff.

- The employer does not have to make up the 20% shortfall in salary but may choose to do so.

3. Why would I choose to furlough someone?

The aim is to preserve jobs and give employers some flexibility. If you dismiss now for redundancy you might be short of staff when the current crisis is over.

4. Who do I choose to put on furlough?

Some staff will be more business critical. You may not be able to function at all as a business without some staff. Some commentators have suggested rotating who is on furlough but until we have more details of the scheme we do not know if this is possible. You must select fairly (i.e. on objective business grounds).

If you are worried about losing key staff, prioritise keeping them in work and furlough others. You may have staff that are home-schooling their children who would prefer to be on furlough. It is OK to discuss this with staff and make choices around what needs to happen. Sensitivity and constructive conversations might make choosing who to furlough easier.

Of course, if the crisis endures it may not be possible to save jobs. At that point you might wish to consider formal redundancies but at least staff will have had the option to be paid for three months before that has to happen.

5. How do I put someone on furlough and when?

You can do it whenever you choose but should have consulted the employee and sought their agreement. Agreement should be confirmed in writing.

6. Do I have the right to put someone on furlough if it's not in the contract of employment?

No, you will need to seek their agreement to varying their contract. Agreement is likely because the alternative is the stark reality of losing the job entirely.

If you have no contractual right and a staff member refuses to go on furlough, you cannot force it on them without risking a breach of contract claim.

There is also a risk of a constructive unfair dismissal claim. You reduce the risk of this if you can evidence that the furlough was a necessary step to avoid a redundancy dismissal and you sought their agreement.

7. Can my employee do work while he/she is furloughed?

No. Early signs from The Treasury are that furlough is an all or nothing scenario. The employee is either working or is not. There is no halfway house.

8. How does the grant from the Government work? Who pays the furloughed workers?

You pay the workers through Payroll. We still don't know the detail of any amendments to that process. It is your responsibility to make the payments to staff.

9. How long can I furlough someone for?

The JRS currently stipulates that it is available for three months. This may change. You may wish to begin with a shorter period. This might encourage staff to agree to it and give them hope there will be a job to return to. You don't have to furlough them for 3 months from day 1. A more tailored approach might yield more cooperation.

10. Do I need to review the position periodically?

Yes. Keep staff informed. If the company is not going to survive you should begin a redundancy consultation as soon as you become aware. Remember your employment law obligations before Coronavirus. They are all still there! If you are not sure how long the downturn is going to be for your business perhaps furlough people gradually and for shorter periods with the option for you to extend.

11. Does the JRS scheme apply only to employees or is it for workers too?

The scheme applies to both employees and workers.

12. Does JRS apply to freelancers and the self-employed?

Currently no but an amendment to the Coronavirus Bill has been proposed which would see these categories of workers getting the lower of 80% of salary based on monthly net earnings over a 3 year period and £2,917 per month.

13. What happens to holiday during a period of furlough?

We believe holiday will continue to accrue during furlough in which case staff will be due their full rate of holiday pay but again we await clarity on this.

14. Is furlough the same as "lay off"?

No. Furlough is a new statutory scheme and lay off is already enshrined in employment legislation. Your right to lay off staff outside of the scheme will depend on whether your contracts with staff have expressly given you this right. If not, it is possible for both parties to agree to change the contract to include the right to lay off, including laying off with no pay.

15. What is short-time working?

Short-time working is another way to avoid having to dismiss staff. It means providing staff with less work and less pay for a period while retaining them as employees.

16. What use to me are lay off or short-time working?

Both lay off and short time working are useful alternatives to dismissal when a business experiences an unexpected downturn or unforeseen circumstances.

17. Do I need a contractual right to lay someone off or shorten their hours?

Yes. If your contracts permit lay-offs and short-time working you are allowed to do it. Sometimes the right will have been collectively agreed with the company and the union. There might be a national right for your industry which you can follow. Otherwise, you will need staff to agree to it.

18. Do I have the right to lay off staff if it's not in the contract and they will not agree?

Yes, the law allows you to tell staff not to come to work but you will have to pay them.

19. Do employees have a right to payment during lay-off?

No, if their contract expressly states that they can be laid off with no pay or there is a long and well known practice of lay-offs with no pay in your sector.

Staff may be entitled to a statutory guarantee payment from you. There is a limit of 5 days payment in 3 months. The daily amount is also subject to an upper limit.

Guarantee payments for the year ending 5 April 2020 are £29 a day subject to a limit of 5 days or £145 in 3 months.

For the year from 6 April 2010 they will be £30 a day with a £150 limit.

20. When can an employee on lay-off treat themselves as redundant?

If the employee who is laid off receives no wages for 4 consecutive weeks or for 6 weeks in a period of 13 weeks they can send written notice to you that he or she intends to claim a redundancy payment.

21. What changes have been made to SSP during this pandemic?

Before:

SSP was payable from Day 4 of sickness and could not be recovered from the Government. It was your cost.

Now:

New measures have been introduced to provide paid sick leave from Day 1 of sickness absence. The Government has agreed that it will meet this cost as a result of the pandemic.

22. Other issues arising around SSP

Staff are unlikely to be able to provide a sick note from their GP at the current time especially if they contract Coronavirus and will be self-isolating. You may wish to adapt your sickness absence reporting arrangements and allow more self-certification.

We do not yet know if the Government will permit employers to reclaim SSP without the Med3 form they usually require for repayment. They will surely have to make an exception this time.

Further information

On the Coronavirus Job Retention Scheme:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses>

On lay-offs & short-time working:

<https://archive.acas.org.uk/media/314/Advice-leaflet---Lay-offs-and-short-time-working/pdf/Lay-offs-and-short-time-working-accessible-version.pdf>

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