

## EMERGENCY INTERIM ADVICE NOTE ON FURLOUGH LEAVE

### Introduction

On Friday afternoon the Chancellor announced a package of measures to help businesses.

One of the measures is something called **Furlough leave** for employees in respect of which employers might claim back up to 80% of employee wages.

The Government information about exactly how this will work is sparse at present but there will likely be regulations and more detailed guidance very soon.

At the moment there are more questions than answers about Furloughed workers.

### Corona Virus Job Retention Scheme

The Chancellor's package of measures includes something called the Corona Virus Job Retention Scheme (as well as other things like business rates holiday and changing the law on statutory sick pay for example).

The Job Retention Scheme will allow all UK employers to access financial support to continue paying part of their employee's salary *for those employees who otherwise might have been let go in the crisis*. This is the wording from the Government guidance. I think the words "laid off" also used in the document are used in a general not technical sense and means "to pay the salary of those who would otherwise have been made redundant or indeed "laid off"" using the technical definition of "laid off".

All UK businesses are going to be eligible so that includes companies and sole traders employing people LLPs partnerships, charities etc.

### How will it work?

This is what the Government says about how the scheme works. First of all it says para 1:

"You'll need to *designate* affected employees as Furloughed workers and *notify your employees* of this change" Change is *subject to existing employment law and depending on the employment contract may need negotiation*".

So:

If looking to take advantage of the scheme you will need to *designate affected employees as Furloughed workers* and *notify them of this change*. That sounds like it's something just made by the employer but its not. The next part reads: "*subject to employment law and you may have to negotiate it*".

### What does "Furloughed" mean?

Furlough leave and Furloughed workers is not a concept currently recognised in the law. Don't get hung up on the actual word or any dictionary definitions of it at this point.

### What do employers need to do?

Changing employee's status remains subject to existing employment law and depending on their contract may be subject to negotiation.

To me this means that if 20 or more employees are affected then collective consultation is likely triggered which is rules about how the employer's proposal needs to be put to the employee and what details it needs to contain. It is possible that there may be a way around this process depending on how grave the threats are to the business.

Putting consultation aside for a moment, that essentially means *an employer will need to agree with an employee* that they are going to become Furloughed workers. (Preferably in writing so you have a record of it).

A small number of contracts of employment contain a right to remove work, and where this is the case employers probably can just notify the employee that they are Furloughed.

But, in most employment contracts especially where there's no specific lay off or short time working clause, *the employer will need to agree with the employee that they are going to become Furloughed workers*.

### **How will employees react?**

It is almost inevitable that employees are going to agree to be Furloughed because it's almost inevitable that given the option of "we're either going to make you redundant and by the way we don't have the money to pay you redundancy pay so sue us, or sue the government fund, and maybe you'll get some in 6 months' time would be their option 1.

Option 2 would be for them to just go home and the employer saying "*if you're not working we won't pay you anyway*".

Option 3 is now for the employee to agree to become a Furloughed worker and get either 80% or 100% of their salary for agreeing to stay at home. It's a complete no brainer for staff at that level—every employee is going to go for option 3 possibly with the exception of a couple of slightly more militant employees saying "I want to be at work and I have a right to be at work" and they will need to be dealt with separately for example by way of being put at redundancy risk.

Option 4 might be that staff wish to take some of the leave as holiday or end up taking time off as sick leave and some of their reaction may depend on what benefits they have under their contracts that they might look to benefit from before going Furloughed.

Option 5 might be that an employee earns a lot more than £2500pcm and doesn't wish to take the pay cut but they might then risk redundancy.

More information should be in the regulations and guidance to be published in the next day or two.

### **How do employers claim?**

Once employees have been designated as Furloughed workers, the next thing to do and, this is from the guidance: "*you will need to submit information to HMRC about the workers that have been Furloughed and about their earnings through a new online portal*". The portal is yet to be set up. It will likely require major programming probably to set it up.

### **How much can be claimed?**

It goes on to say that HMRC will reimburse up to 80% of Furloughed workers wage costs up to a cap of £2,500 per month. HMRC are working urgently to set up a system for reimbursing employers – existing systems are not set up to facilitate payment to employers.

So HMRC will reimburse up to 80% of Furloughed workers wage costs up to a cap of £2,500. It's not clear if that's the maximum wage and workers get 80% of that (i.e. £2,000) **OR** whether the £2,500 is the 80% figure i.e. with workers earning £3,125 (and the employer gets 80% of that which is £2,500). We'll find out soon when the government gives more guidance.

£2,500 per month is broadly £30,000 p.a which is just a little more than the national median salary.

### **What other conditions are there?**

The government has also produced guidance for employees which says that to qualify for the scheme: *"you should **not undertake work** for your employer while you are furloughed, this will allow your employer to claim a grant of up to 80% of your wage for all employment costs up to a cap of £2,500 per month"*. So, this suggests that the £2,500 will end up in the employees pocket and that it will likely cover pension contributions, national insurance contributions made by employers and so on. Again, we await the detail. Importantly it seems they shouldn't do work.

### **What about the other 20% of pay or pay above the £2,500 figure?**

The employer's guide is not clear on whether the employer has to top up pay by 20% to top it up to the normal level. But the guide for employees says *"you will remain employed while Furloughed, your employer can choose to fund the differences between this payment and your salary but does not have to"* so that is pretty clear, the employer can say "you'll get 80% of pay the government is reimbursing us for but we're not going to pay you the other 20% because you're not working".

The significance is that if an employer chooses to withhold 20% of normal wages they must have a contractual right to do so or they will have to have the employee's agreement to do so – so employees are very likely to agree the offer if the alternative is redundancy or just not being paid.

### **What other issues might arise?**

There are a few points about this. Again, a lot of it we just don't know the detail of at the moment.

What happens if some employees think they'd like to take 80% of wages for doing nothing rather than going to work to earn the extra 20% ? This is unlikely to be a problem because without the employee's agreement Furlough leave isn't going to happen.

So, an employee cannot demand from an employer that they will stay at home and want 80%, they have to have been offered the chance to do it by the employer. Of course this is not going to solve the problem of the people who are still at work and look around and see the colleague who was working next to them who might have been laid off or made redundant and for that reason might have been a less capable worker as they are the ones who may have been dismissed due to redundancy, sitting at home and getting 80% of their salary when the better employee might still be working at work to get 100%. This is likely to cause problems and we'll have to see how this plays out.

An employee on Furlough leave remains on the books. This means that their continuous service will be extended. In turn, subject to eligibility criteria, this may mean that if in future the employer finds themselves in a position where employment may need to be terminated then the level of statutory redundancy pay may be slightly higher and notice pay more expensive if longer service translates for that employee into a longer notice period.

### **Is it open to abuse?**

Yes it is. You could easily see that some struggling businesses might claim they've sent their employee's home on Furlough pay and therefore recover 80% of the salary from the government yet actually have that employee working in some fashion. Some employees might not know that they've been designated by employers as on Furlough leave on the new government portal that's coming up. The employers (wrongly) might not tell them.

So, there's likely to be abuse and we don't know yet what steps the government will put in to prevent that abuse. We'll have to wait and see.

This note will likely be superseded by Government guidance when it comes out likely early this coming week.

It is not intended as full advice and it's content is likely to be time limited and superseded by regulations very soon. Please get in touch for specific advice relating to your organisation.

If you would like further information about staffing issues please don't hesitate to get in touch.

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