

Frequently asked questions about Coronavirus Job Retention Scheme (Furlough Leave) and related issues

Updated 23 March 2020

Q1: Is this a completely new concept in the UK?

A: Yes. Furlough leave does already exist in US labour law so this is a term that we have imported from America.

Q2: Which businesses are eligible?

A: All UK businesses are eligible regardless of size and (apparently) regardless of whether ultimate ownership lies within the UK or overseas.

Q3: How does the scheme work?

A: Employers can place employees on leave, requiring employees to perform no work and, presumably, requiring employees not to attend the place of work. The Government will reimburse 80% of the wage cost of furloughed workers up to a cap of £2500 per month (see further questions 9 and 10 below). Employers can, but are not obliged to, make up the 20% difference.

Q4: When does the scheme take effect?

A: The scheme has retrospective effect from 1 March 2020 and is expected to apply for three months, so until the end of May 2020. Employers can implement furlough leave immediately.

Q5: Do we require employees' consent to put them on furlough leave, bearing in mind this means that they won't be performing any work and, if we don't top up the Government contribution, they will have a 20% pay cut?

A: If feasible, it is better to obtain employees' written consent to a variation of contract which entails a pay cut. Attached to this FAQ sheet is a draft

furlough leave agreement. Having employees sign this agreement will mean that there has been an agreed variation to contract for the specified period, and no further pay will be due. But in present circumstances some employers may have little option but to implement furlough leave, with its inherent pay cut, unilaterally and without consent. To encourage consent, employers can point out that the alternative is immediate redundancy. Although technically payment in lieu of notice and redundancy pay would be due immediately, in practice employees could have a long drawn out employment tribunal case ahead of them before they would secure payment of the sums. Pointing this out is not a comfortable position for employers to take, but is arguably a “least worst” scenario if it encourages employees to agree to furlough leave.

Q6: Wouldn't this lead to constructive dismissal claims?

A: Yes, in normal times forcing employees onto home leave and a unilateral reduction of salary, perhaps coupled with a statement that entitlement to redundancy pay would be delayed, is likely to be a constructive dismissal. The Government's furlough leave guidance makes it clear that employees remain subject to existing employment law and that implementation of furlough leave may be “subject to negotiation”. Particularly bearing in mind this latter comment, unilateral imposition of furlough leave and the pay cut could indeed be grounds for claiming constructive dismissal. But to claim constructive dismissal the employee has to resign. Why would they resign and have no job, as opposed to a job and 80% of salary? And the prospect of a return to full salary in the hopefully not too distant future will hopefully be enough to persuade them not to do this.

Q7: Can an employee insist on going onto furlough leave?

A: No. It is the employer's decision and the employer can choose whether or not to implement furlough leave and, if implemented, which employees it will apply to.

Q8: Can we ask employees who are on furlough leave to perform some work from home?

A: Probably not but details of the scheme have yet to emerge and this may become clearer over the next few days. The intention of the Government is

that furlough leave is a direct alternative to redundancy so the expectation is that the employer has no work to give furloughed workers.

Q9: What is the timescale for reimbursement of salaries?

A: HMRC are working urgently to set up a system for reimbursement and the current expectation is that the portal will be live in about 2 to 3 weeks, so applications can be made then. However, there is likely to be further delay before payments are actually made so the current best estimate is that payments will come through at the end of April 2020.

Q 10: If we pay the 80% of salary and do not top up the additional 20%, could employees have a claim against us for unlawful deductions from wages? And will higher paid employees have a claim for salary in excess of £2500 per month?

A: Absent a signed furlough leave agreement, yes. But, particularly given the effect of the crisis on the Tribunal system, any case is likely to take many months to come to a hearing. By then other options may have emerged and in the interim we hope that employees recognise the moral imperative of accepting furlough leave in the current crisis.

Q11: Doesn't a lack of work mean the employees are redundant?

A: Yes, in normal times, reduction in work or closure of workplace would result in redundancy. But in the current situation that is an unattractive route for most employers to take. Presumably most employers want staff to stay on with reduced pay so that they are in post when things start to return to normality. This seems to be a better situation than making redundancies now and then having to recruit new staff when business picks up again.

Q12: If an employee insists that he/she is redundant can we resist this?

A: This answer is similar to the answer given to Q6 above in relation to constructive dismissal. The employee would have to leave, bring an employment tribunal claim and wait for a year for that claim to come to a full hearing. In the interim he/she would have no job and no income, making it a very unattractive option for employees. Weighed against that, a pay cut, even for highly paid employees, for a few months is likely to be a better outcome for most employees.

Q13: We made some employees redundant in March 2020. Can we now reinstate them and put them onto furlough leave?

A: Yes, we can see no reason why employers cannot do this. If payment of notice and statutory redundancy pay was made, employers would presumably ask for this to be reimbursed before entering into the furlough leave arrangement.

Q 14: We see no alternative but to make redundancies. Do normal rules apply?

A: Employees with 23 months' service or less cannot claim unfair dismissal and no legal action can result if they are made redundant immediately. It is safer to use 23 months as the cut-off rather than 24, because notice periods can enable employees to cross the 2 years' service line. For employees with 2 years' service or more, in essence normal rules do apply, but consultation periods can be abbreviated.

Q 15: We may need to make 20 or more redundancies at one location within a 90 day period. Do the collective consultation rules apply?

A: In these circumstances it is necessary to enter into a period of consultation with employee representatives, either a trade union or representatives elected for the purpose. However, collective consultation is not required if "special circumstances" apply. Likelihood of insolvency is not of itself a "special circumstance" but the background to this crisis, with sudden Government announcements changing the employment picture overnight is, we believe, likely to be a "special circumstance", thus obviating the need to conduct collective consultation. The maximum penalty for failure to conduct collective consultation is 90 days' pay per affected employee. If a tribunal did find that collective consultation ought to have been conducted, any award in the present circumstances is likely to be much less than 90 days and, as above, a case could take a year or more to come to a hearing.

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23 March 2020

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Note 2: The information given in this document is based on the legal position as at 23 March 2020. Further emergency employment legislation could change, possibly very significantly, the current legal position.