

# Throgmorton – COVID-19: Lockdown and What Next

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## **Q. Are many employers taking advantage of the Coronavirus Job Retention Scheme?**

**A.** The majority of our clients are enabled by technology and their employees can work remotely whilst self-isolating. For some of our clients the volatility brings opportunity, and employees have been exceptionally busy.

For others, economic conditions are more challenging, and a number have implemented Furlough or salary reduction schemes.

## **Q. If I want to implement Furlough Leave, what should I be considering?**

**A.** If you want to take advantage of the Government grant, you should be paying attention to the Government webpages, which state:

“... If you and your employer both agree, your employer might be able to keep you on the payroll if they're unable to operate or have no work for you to do because of coronavirus (COVID-19)...”

1. The employee and employer must agree, we have a free template letter that we can provide, in order to evidence the explicit agreement. (email [hr@throgmorton.co.uk](mailto:hr@throgmorton.co.uk) if you would like a copy).
2. The employer may be asked to evidence to HMRC that they were unable to operate or had no work for the employee.
3. If you are selecting some employees to be Furloughed, you will need to ensure that your selection process is not discriminatory.

We have issued a longer and more in-depth note on Furlough which can be accessed [HERE](#).

## **Q. What do we do about Bank Holidays for Furloughed employees?**

**A.** You have two options:

1. Pay the Bank Holiday in full as normal; or
2. Accrue the day to be paid or used when Furlough is finished.

The common law principle that you cannot be on more than one type of leave at once was established in NHS Leeds v Larner [2012] EWCA Civ. 1034 a case judgement in relation to holiday accrual for those who are on long-term sick leave. This is the precedent that we always advise clients to observe if one type of leave... in this case Furlough, overlaps another type of leave... a public holiday.

**Q. My employees all want to cancel holidays that they have booked, can I refuse?**

**A.** It really depends upon what your employment contract and handbooks say.

You can ask employees to take some or all of their booked leave, it is better for employee well-being for leave to be taken regularly, it may be necessary to spread leave across the year in order to avert operational issues or refusal of holiday requests during peak business periods later in the year.

Employees who have been Furloughed may still take holiday as normal.

You should bear in mind that the government has already issued guidance that employers obligation to ensure that employees have and utilise 4 weeks of leave plus 8 public holidays each year (under the Working Time Directive) will be waived to allow employees to carry over unused leave into 2021. The leave may be used at any point in 2021.

**Q. We have a new employee due to start and we can't really get them properly onboarded right now, what options do we have?**

**A.** You can put them straight onto Furlough or talk to them about a deferred start date, if their existing employer is willing to extend their notice period.

**Q. We have a new employee due to start and with the change in economic outlook we probably don't actually need them anymore, what options do we have?**

**A.** This is a really tough one, you need to talk to them sooner rather than later. Their existing employer may be willing to allow them to stay, or they may have had other options, that might still be available.

If not, they are likely to ask you to Furlough them until the lockdown is over. It would be a reasonable expectation that you'd do that, given that finding a new role will be exceptionally challenging during lockdown. If you furlough them, they will still be entitled to contractual benefits. If you feel that you cannot do that, you will need to honour the terms of the termination clause in the contract of employment.

Be aware that any of these actions has the potential to damage your reputation in the market.

**Q. One of our employees has resigned and is working notice, they have asked us to extend their notice or consider rehiring them, what should we do?**

**A.** If you have an employee who resigned and is under notice or has already left, you are under no obligation to extend notice, re-hire or allow them to withdraw notice or offer to place them on Furlough. Remember to look at the considerations of Furlough set out in the second question on the preceding page.

**Q. We have been dealing informally with a performance issue, it is about both failing to meet deadlines and the quantity of work produced, the employee has not proven able to demonstrate a great deal of self-discipline, what can we do about it now?**

**A.** Your IT person should be able to assist you with logging on and off and inactive period data, have a look at that. If the active time is lower than you expect, sense-check it against peers and take into account whether the individual now has caring responsibilities, then set up a call to talk to the employee about it. You need to decide whether this issue should be handled as underperformance, or as an attendance issue which would normally be managed as misconduct.

Set out your expectations clearly and ensure that the employee knows what acceptable performance looks like to you. You do not need to be face to face to kick off either a performance improvement plan, set up a disciplinary meeting or organise a hearing to discuss the termination of employment. Follow it up in writing.

If you decide to terminate employment, and they have short notice, you could consider applying furlough leave until such time as lockdown is lifted to make the situation easier for the employee to manage.

If you need further information please do not hesitate to get in touch with your usual Throgmorton contact or **Lauri Cox** at [lauri.cox@throgmorton.co.uk](mailto:lauri.cox@throgmorton.co.uk).