

# Throgmorton - COVID-19: Job Retention Scheme - Furlough Guidance

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## Overall objective

The overall objective is to keep people at home while enabling employers to retain staff who will be needed when they begin to rebuild their businesses in the future. This will enable work to begin again with a critical core who have the necessary knowledge.

Rules as outlined in official statements released at 27 March 2020:

1. The scheme is effective from 1 March 2020, so is to be backdated. It will last for at least 3 months and will be extended if necessary. Employers can only claim once every three weeks, ie they cannot get weekly reimbursement. Note that while the scheme is backdated to the beginning of March as it is intended to support all those employed then, a firm will only be eligible to claim the grant once they have agreed the furlough with their staff and staff have stopped working for the employer. This will of course be subject to employment law in the usual way.
2. Furlough leave must be taken in blocks of three weeks to meet funding eligibility criteria. There is nothing in the rules to prevent rotating furlough leave amongst employees, providing that each employee is off for a period of at least three weeks.
3. The employee must not be working at all. If they work for even an hour (presumably during their entire three-week furlough period), they are not eligible. However, they are able to undertake training and do volunteer work, provided they do not provide services to or make any money for their employer.
4. The Employer cannot impose changes, they must be agreed with employees as an alternative to redundancy. Changes in hours (and acceptance of 80% pay), assuming the contract does not already allow for that, normal employment law applies. The employer must be careful not to discriminate in deciding who to offer furlough too. Our view is that prioritising vulnerable workers is unlikely to be discrimination, as prioritising the over 70s (direct age discrimination against those under 70) is almost certainly justifiable, and those who do not suffer from serious health conditions are not a protected class.
5. Employees on sick pay or self-isolating cannot be furloughed but can be furloughed afterwards. Employees who are shielding (self-isolating) can be placed on furlough. Employees on maternity (or similar Statutory leave) can continue to draw SMP (or similar) payments. The guidance does not prohibit those on maternity leave agreeing to return to work early and then being furloughed or electing to change to shared parental leave and then being furloughed.
6. It is available to employees on the payroll at 29 February 2020.

7. All UK businesses are eligible, 'any employer in the country, small or large, charitable or non-profit' to use the Chancellor's words. The Government does not expect public sector employers to use the scheme as long as central government continues to fund wage costs in the usual way.
8. Agency employees may also benefit, but only if they are not working and ceased work due to Covid-19.
9. The scheme pays a grant (not a loan) to the employer. The scheme will be audited and reviewed by HMRC.
10. National Minimum Wage (NMW) is only applicable to hours worked and so does not apply during Furlough, the 80% can be paid even if that takes the employee below NMW. However, if they undertake training during Furlough, you must pay that at NMW rate.
11. The government will issue further guidance on the mechanics of claiming the payment in due course. It says it expects the scheme will be up and running by the end of April.
12. The employer will pay the employee through payroll, using the Real Time Information (RTI) system as usual, as required by the employment contract. This contract may be renegotiated but that is a matter for employment law. So RTI system reporting of payroll will continue as normal.
13. The scheme will be administered by HMRC:
  - Relevant employees must be designated as furloughed employees.
  - Employers will submit information to HMRC through a new online portal.
  - As this will take time to build, businesses should look to the Coronavirus Business Interruption Loan Scheme to support cash flow in the meantime. The narrative used in the information released so far says 'if your employer cannot cover staff costs due to COVID-19 they may be able to access support...'. This is a conditional phrase which may relate to existing funds available to the employer.
14. Employers can reclaim up to 80% of wage costs up to a cap of £2,500 per month, plus (not including) the associated employer NICs and minimum auto enrolment pension contributions on that wage. Fees, commissions and bonuses are not included.
15. An employer can choose to top up to 100% but does not have to (subject to employment law and renegotiating any contractual entitlements).
16. For employees whose pay varies, the employer can claim for the higher of (i) the same month's earning from the previous year (e.g. earnings from March 2019); or (ii) average monthly earnings in the 2019-20 tax year.

17. The employer MUST use the money reclaimed for the express purpose of paying furloughed workers, your accountant will need to show this explicitly in your accounts.

## **Frequently asked Questions**

### **What happens with Owner managed companies?**

Many owner managed company director/shareholders pay themselves small salaries via the Company and the balance of income as dividends. The scheme does not extend to dividends. 80% of the salary can be reclaimed under the scheme.

### **How is payment going to work in practice?**

It is understood that the employer will pay the contractually agreed amounts as required by the employment contract, or the new agreed terms. We can provide a template Furlough terms agreement letter should you wish. Email [HR@throgmorton.co.uk](mailto:HR@throgmorton.co.uk) with 'Request for Furlough template' in the subject line and we will provide it to existing clients without charge. You will continue to pay the employee, and HMRC the PAYE and both primary and secondary National Insurance Contributions. The grant will be paid directly to the employer. The mechanism for claiming will be clarified by the end of April.

### **What is the £2,500 maximum grant based on?**

The £2,500 monthly grant covers employment costs, i.e., salary, employer pension contributions required by auto enrolment (if applicable), and employer NIC. It does NOT cover bonuses, commissions, dividends, or the like.

### **Will entitlement to other employment benefits continue during the period of furlough?**

The rules for the grant will not displace the existing employment contract. So, we would expect the employee's contractual benefits would continue, including rights to sick pay and leave.

Similarly, entitlement to holiday continues, at a minimum aligned to Working Time Directive Rates. E.g. 4 weeks of leave per annum PLUS 8 bank Holidays. You could opt to rotate employees off furlough for a three week period, with their agreement, and use holiday instead, this would help you to manage requests for holiday in the second half of the year, when businesses are trying to rebuild after the period of hibernation.

### **Who will be eligible?**

Eligible employees are those on the payroll on 29 February 2020. If redundancy had already happened at that point, this cannot be unwound. It has yet to be clarified whether or not those re-employed under a new contract will qualify, although the policy intent would seem to support this would be reasonable.

It is anticipated that the rules will specifically make provision for:

- a. Sickness cover where a continuing employee is now off sick, and a furloughed worker can provide cover.

- b. Where employees agree to share shifts to enable more of them to continue to be paid.
- c. Those employees who have resigned their existing roles and are working notice but due to start with your company during the hibernation period.

This will again depend on the employment contracts of those affected. We will revert with guidance when we have it.

### **How do I decide who to Furlough?**

The matter of which employees an employer decides to furlough will be a matter for negotiation with your employees, taking into account the view presented above where vulnerable employees and those over 70 may be common sense options. Consider a basic pooling exercise akin to what you would do in a redundancy situation or open a voluntary furlough option.

### **What if my employee refuses?**

An employee does not have to accept furlough if offered, but the employer could then make the employee redundant instead using the usual employment law procedure. Bearing in mind that Furlough is supposed to be a measure used to prevent redundancy it is possible that the legitimacy of the Furlough could be subject to challenge by HMRC if there are no consequences as a result of employee refusal to Furlough.

### **Can employees work for other employers whilst on Furlough?**

Your employees cannot fulfil any paid work for you during Furlough. Our current understanding is that if the employee has a separate employment with a different and unconnected employer which will be unaffected by furlough, that this can continue. Your contracts of employment may have provisions which prevent them from performing any work for any other employer, if you wanted to provide flexibility to them, you could seek to vary the terms as part of the furlough agreement.

They can do voluntary work and can undertake training. HMRC will of course have visibility of pay records, you may want to make this explicit in your communications to employees and reserve the right to reclaim Furlough pay in the event of a breach of these rules.

If you need further information please do not hesitate to get in touch with your usual Throgmorton contact or **Kerry Kelly** at [kerry.kelly@throgmorton.co.uk](mailto:kerry.kelly@throgmorton.co.uk) or **Adam Hewitson** at [adam.hewitson@throgmorton.co.uk](mailto:adam.hewitson@throgmorton.co.uk).