



## Quick Q&A on Furlough

### 1. Who is eligible for furlough under the current Coronavirus Job Retention Scheme (1 November 2020 - 30 April 2021)?

Employees on the real time information payroll systems on or before midnight on the 30 October 2020 who would otherwise have been dismissed for redundancy due to Covid-19 are eligible to be furloughed under the current scheme. It does not matter whether the employee was furloughed previously or not. If an employee is fully furloughed, the Government will contribute 80% of wages up to a cap of £2,500. Employers must pay employer's national insurance contributions and pension contributions. Employees must pay income tax, employee's national insurance contributions and pension contributions in the usual way. Employers may choose to top up the remaining 20% of employee's salary but are not under any obligation to do so.

### 2. What is flexible furlough?

This is where an employee works part-time and is furloughed for the remainder of their contractual hours. The employer pays the salary for the hours worked and the Government pays 80% of wages of the furloughed hours (the employer may choose to top this up to 100% but is not obliged to do so).

### 3. What steps should be taken if flexibly furloughing an employee?

- Consult with employees (and Trade Unions/employee representatives if applicable);
- Avoid discrimination or making assumptions when selecting employees for furlough;
- Agree with employees what the new working pattern will be;
- Document the agreement in writing;
- Get confirmation that the employee agrees to the new arrangement (a signed copy of the agreement is the gold standard but acknowledgement and written confirmation of agreement by e-mail will suffice. Employees should also provide written consent to the reduction in their pay (if any).

### 4. How are furlough claims calculated?

For those with fixed hours and pay, the employer should use the hours in the last pay period prior to or ending on or before 19 March 2020. For those not previously furloughed or who were employed on or after 20 March 2020, use the hours in the last pay period prior to 30 October 2020.

Those employed prior to 20 March 2020 on variable hours/pay, the hours used to calculate furlough are the highest of:

- The average number of hours worked in the tax year prior to 2019-2020;

- Or the corresponding calendar period in the tax year 2019-2020 (e.g. January 2019 or February 2019).

For those not previously furloughed, or who were employed after 20 March 2020, the usual hours are based on the average of hours in the tax year 2020/2021 calculated from the 6 April 2020 or the date of the employee's commencement of employment (whichever is later) up to the date before furlough begins.

## **5. What records should employers keep?**

Employers should keep records for 6 years. HMRC may, in due course, ask to see:

- The furlough agreement;
- The amount of furlough claimed for each employee;
- The claim period for each employee;
- The claim reference number;
- The method or workings for how you have calculated furlough pay;
- The usual hours worked by the employee;
- The actual hours worked by flexibly furloughed employees.

## **6. What happens if an employee does not agree to be furloughed or flexibly furloughed?**

If work of a particular kind (that the employee performs) has ceased or diminished at the place the employee works or across the business as a whole, there is likely to be a redundancy situation. A dismissal for redundancy is a potentially fair reason for dismissal provided it has been handled fairly. A fair procedure may include planning, consultation, devising objective selection criteria and applying them fairly, considering alternative employment, giving notice, payment of a redundancy payment and a right of appeal. It is recommended that legal advice is sought before taking such steps.

## **7. Can I claim furlough to pay an employee's redundancy payment or notice pay?**

From 1 December 2020 employers cannot claim furlough for any day on which an employee is serving statutory or contractual notice. The employer must pay for this themselves. Employers also have to pay statutory and/or contractual redundancy payments in full and cannot claim these from the Coronavirus Job Retention Scheme. Redundancy and notice pay should be calculated on the employee's full normal salary rather than being calculated on furlough pay or flexibly furloughed hours.

## **8. Can employees take holiday during furlough?**

Usual rules apply in the sense that employees may request holiday (in accordance with company policy) or employers can insist that employees take holiday provided that the requisite notice is given (i.e. twice the length of leave in question so two weeks' notice for one week's leave); or greater notice if provided for in the contract.

If holiday is not taken, it continues to accrue during furlough and could lead to too many employees attempting to take annual leave when returning to work after furlough or at the end of the holiday year. It is therefore sensible for employers to introduce policies whereby employees have to take certain proportions of their annual leave by certain dates in the holiday year.

If it has not been reasonably practicable for the worker to take all of their holiday by the end of the holiday year due to Covid-19, they may carry their four week entitlement under EU law over into the next two leave years. The remaining 1.6 week's entitlement under UK law can be carried forward by agreement by one year. We recommend only utilising this provision if absolutely necessary as it stores up problems in the future if annual leave is not managed effectively across the workforce.

#### **9. Can I claim furlough pay during an employee's holiday?**

Annual leave can be taken by employees on furlough but must be paid by the employer at 100% of the employee's contractual salary based on their pre-furlough working hours for at least the four week holiday entitlement under the EU Working Time Directive (which currently still applies post-Brexit) although arguably also for the remaining 1.6 week's leave under UK law (unless the employee consents to receive only 8% in respect of that period – which is unlikely to happen). The employer can however claim back 80% of pay during annual leave from the Coronavirus Job Retention Scheme.

#### **10. Can an employee request furlough?**

Employees can request to be furloughed if:

- They are shielding;
- Caring for someone vulnerable within their household; or
- Has childcare responsibilities.

That request does not have to be granted by the employer but any refusal without objective justification could be classed as discriminatory on the grounds of sex if the reason for the request is that the employee is caring for someone vulnerable within their household or has childcare responsibilities as statistically such responsibilities still fall to more women than they do to men.

Those who have Covid-19 or who are self-isolating and cannot work from home should be paid statutory sick pay (where eligible) and should not be furloughed.