



## **CORONAVIRUS JOB RETENTION SCHEME (CJRS) AND 'FURLOUGH' ISSUES**

The **'furlough'** process is a new term (and process) and therefore **Employers may need to seek legal or HR advice to ensure that employee contractual or other rights are not negatively impacted**, and/or decisions made now, don't result in **employment tribunal issues at a later date**.

Broadly, Employers should discuss with their staff and make any changes to the employment contract **by agreement**, and to be eligible for the CJRS scheme, employers should have written confirmation of the 'furloughing' of each employee.

Below are some of 'furlough' issues that have been confirmed by the Government in recent days.

### **Key Issues in respect of the 'furlough' process**

1. Employers should discuss with their staff and make any changes to the employment contract by agreement.
2. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.
3. To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. A record of this communication must be kept for five years.
4. Employees that are put on 'furlough' will still have the same employment rights at work including, Statutory Sick Pay, maternity and other parental rights, rights against unfair dismissal, redundancy payments etc.
5. An Employer decides what employees should be put on 'furlough', it is not a decision made by the employee (although an employee **MUST** agree to it)
6. An employee does not have to accept to be put on 'furlough' if offered, but the employer could then make the employee redundant instead, using the usual employment law procedure.
7. Employment law matters will arise for employers considering furloughing their employees and employers should seek guidance or advice as appropriate. For instance:
  - Employers will need to consider how to select employees for furlough leave (for instance, seeking volunteers in the first instance),
  - Equality and discrimination laws apply in this context so, for instance, employees should not be selected for furlough leave on discriminatory criteria (for example age) except for where discrimination is justified under employment law.
  - Collective consultation requirements may need consideration (broadly, where 20 or more employees are to be put on furlough leave and would be dismissed if they do not agree to resulting changes in terms of employment) .
  - In most cases, furloughing will require the agreement of the employees (for example, because it involves a reduction in pay) and amendment of contracts of employment.
8. An Employer should always be able to demonstrate they have used a fair and reasonable process to decide which employees to furlough, documented by a suitable audit trail



## Specific Employment Examples

### Apprentices

Apprentices can be furloughed in the same way as other employees and they can continue to train whilst furloughed.

However, you must pay your Apprentices at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage (AMW/NLW/NMW) as appropriate for all the time they spend training. This means you must cover any shortfall between the amount you can claim for their wages through this scheme and their appropriate minimum wage.

Guidance is available for changes in [apprenticeship learning arrangements because of COVID-19](#).

### Public sector organisations

The government expects that the scheme will not be used by many public sector organisations, as most public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.

**Where employers receive public funding for staff costs, and that funding is continuing, we expect employers to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.**

In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the scheme may be appropriate for some staff.

### Individuals

Individuals can furlough employees such as nannies provided they pay them through PAYE and they were on their payroll on, or before, 28 February 2020.

### Administrators

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme. However, we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business.

### Company Directors

As office holders, salaried company directors are eligible to be furloughed and receive support through this scheme. Company directors owe duties to their company which are set out in the Companies Act 2006. Where a company (acting through its board of directors) considers that it is in compliance with the statutory duties of one or more of its individual salaried directors, the board can decide that such directors should be furloughed. Where one or more individual directors' furlough is so decided by the board, this should be formally adopted as a decision of the company, noted in the company records and communicated in writing to the director(s) concerned.



Where furloughed directors need to carry out particular duties to fulfil the statutory obligations they owe to their company, they may do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provides services to or on behalf of their company.

This also applies to salaried individuals who are directors of their own personal service company (PSC).