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Coronavirus Job Retention Scheme – Further Government Guidance 26th March'20

The below is a summary of the current government guidance on the scheme at this stage:

Who can claim?

- The Scheme is open to all employers in any sector and of any size as long as they operated a PAYE scheme on the 28th February 2020;
- The scheme will run from the 1st March for a period of 3 months (and may be extended)

How will it operate?

- The minimum period of furlough will be 3 weeks;
- Employees can be 'designated' as on a period of 'furloughing' if there is no work available;
- Only employees who were on the payroll as of the 28th February 2020 will be eligible to be furloughed. Therefore, any employees who have been employed after 28th February will not be eligible for the scheme. If you have informed them, in the interim, that they are furloughed, you will need to consider if the company is willing to continue paying them (without reclaiming) or consider alternatives such as lay-off or short time working;
- This scheme will apply to full time, part time, agency employees and employees on flexible or zero hours contracts. **Details as to how to calculate the wage are outlined below;**
- The scheme will also cover employees who have been made redundant since the 28th February 2020 as long as they are re-hired by the employer;
- This scheme will not apply to employees whose hours have been reduced based on 'short-time';
- Employees are kept on the payroll during any period of 'furloughing' but do not work for the employer during this period;
- Employees will need to be given written confirmation that they are 'furloughed';
- The Employer will need to write to employees who are designated as 'furloughed' and keep copies of this communication;
- Employees who were on unpaid leave prior to the 28th February will not be eligible for the scheme;
- Employees who are self-isolating or on sick leave should continue to be paid relevant sick pay until their sick periods expire, after this they can be considered for furlough if there is no work available;
- Employees who have serious underlying health issues and are shielding in line with Government guidance can be furloughed.

How is the wage calculated?

- The Employer will be required to continue to pay the employee and will be reimbursed for 80% of wages up to a maximum of £2,500 in a calendar month;
- While on furlough, the employees' wages will be subject to normal income tax and other deductions;
- Employees who are on statutory maternity pay, statutory adoption pay or shared parental pay should continue to be paid in the normal way;
- Where employees receive enhanced contractual maternity pay, adoption pay or shared parental pay these are wage costs that can be recovered in accordance with the scheme;
- The Employer will also be reimbursed for the associated National Insurance contributions and the minimum automatic enrolment employer pension contributions on the subsidised wage;



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- Employers remain liable for any national insurance contributions and minimum automatic enrolment pension contributions on behalf of furloughed employees;
- At a minimum the employer must pay their employee the lower of 80% of their normal wage or £2,500 per month;
- For full-time and part-time salaried employees, the employee's actual salary (before tax) at the 28th February 2020 should be used to calculate the 80%;
- Any calculation of the 80% should exclude fees, commission and bonuses;
- For employees with variable pay you can calculate the 80% as the higher of:
 - a) the equivalent earnings for that month in the previous year or
 - b) average monthly earnings in the 2019/2020 tax year.
- If the employee only started in February 2020 then you should pro-rata their wages to calculate the 80%;
- Once the 80% calculation has been done employers will need to calculate the amount of employer's National Insurance contributions and minimum automatic enrolment pension contributions they are entitled to claim through the scheme;
- Minimum Wage legislation will not apply to furloughed employees and employees can be paid 80% even if this takes them below the minimum wage levels. However, note this does not apply where employees are required to do online training while furloughed – the minimum wage legislation will apply during these periods;
- There is no requirement under the scheme for the employer to top up the other 20% of wages – but they can choose to top up the remaining wages if they wish to;
- Any of the employer's National Insurance contributions and minimum automatic enrolment pension contributions paid on wages of the additional 20% wages will not be recoverable through the scheme;
- Pension contributions above the minimum employer contribution will also not be recoverable under the scheme.

How to make the claim?

- Employers will need to register with HMRC for re-imburement through an online portal (when implemented);
- Employers will require the following information to claim - PAYE reference number; number of employees being furloughed; the claim period (start and end date); amount claimed (per the minimum length of furloughing of 3 weeks); Bank account number and sort code; contact name; phone number;
- You can only submit one claim every 3 weeks (The minimum period of furlough) and these can be backdated to the 1st March 2020;
- HMRC will retain the right to audit claims.

Other points to note:

- At this stage if employers have no work for employees then they should start to designate such employees as 'furloughed' and write to them individually to confirm this after agreeing this process with them.
- It is clear that all discrimination and equality principles will still apply to selection and designation for furlough and employers should apply normal principles of fairness and non-discriminatory treatment.
- Attached also draft letters for informing employees:



- one of the letters is for transferring those already on 'lay off' to a period of 'furloughing and
 - the other is for those who are being designated as 'furloughed' for the first time.
- Essentially the decision to furlough is down to the employer on the basis of the above principles. Suggestions that an employee can simply request to be furloughed are wide of the mark under the current guidance.
- Normal employment law principles will continue to apply and therefore as an employer you will need to consult and seek the consent of your employees to designate them as furloughed. Failure to seek the employees' consent could result in claims against the company. Ideally written and signed consent would be the best way to do this but in the current circumstances this is unlikely to be practical to obtain – at the very least employers should have documented meetings/conversations with those employees to be designated as 'furloughed' (either group or individual depending on the practicalities) in order to get their agreement to be 'furloughed'.
- Given that this designation is an alternative to 'lay-off' or 'redundancy' it is unlikely that employees will voice any objection to being 'furloughed'.
- Once employers have decided which employees are being furloughed, they should then begin the administrative task of working out employees furloughed pay (and other recoverable payments) in accordance with the above principles. The Government will be releasing further detailed guidance on how these calculations should be done and those involved in these finance and payroll procedures will need to keep up to date with the Government advice on calculating recoverable payments.

Treatment of Annual Leave

An obvious question regarding furloughing relates to annual leave during these periods. While we understand the concerns that there may be large banks of unused leave following a return to work, there is simply no clarity on this point in the latest Government guidance. At this stage the government has offered no clarity on whether annual leave can be used during periods of furlough or whether paying annual leave would break a period of furlough. Once we have more clarity from the Government on this issue we will update you accordingly.

However the Government have just released guidance on the relaxation of rules relating to statutory annual leave to support key industries in this regard.

- Government to amend regulations to allow statutory annual leave to be carried over into the next 2 years;
- Measures will ensure workers won't lose their leave statutory entitlements;
- This move gives flexibility to businesses at a time when it is needed most;
- Currently, almost all workers are entitled to 28 days' holiday including bank holidays each year. However, most of this entitlement cannot be carried between leave years, meaning workers lose their holiday if they do not take it;
- There is also an obligation on employers to ensure their workers take their statutory entitlement in any one year – failure to do so could result in a financial penalty;
- The regulations will allow up to 4 weeks of unused leave to be carried into the next 2 leave years, easing the requirements on business to ensure that workers take statutory amount of annual leave in any one year;



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- The changes will amend the Working Time Regulations, which apply to almost all workers, including agency workers, those who work irregular hours, and workers on zero-hours contracts.

The above changes and the failure to address whether annual leave can be taken during periods of furlough could indicate that the government do not envisage annual leave being used during periods of furlough. As soon as we receive any clarity in regard to this point we will update you.

Keep safe in these challenging times.