

## **Coronavirus Job Retention Scheme**

Many businesses are facing the real prospect of catastrophe in the face of enforced shut down or a collapse of custom owing to the personal restrictions imposed on us all in order to try to combat the coronavirus COVID-19. The difficulty is in taking steps to prevent insolvency while also being able to service customers again when the restrictions are lifted. The purpose of this article is to consider one of the options available to businesses and what the legal implications may be.

The most obvious route to retaining staff at minimal cost during the crisis is to take advantage of the Coronavirus Job Retention Scheme. Under this scheme, the Government has promised to reimburse more or less immediately 80% of the salaries (up to a maximum of £2,500pcm) of any PAYE staff who are asked not to work. That means those earning up to £37,500 a year will receive a full 80%.

From that simple proposition though, there are many questions being asked about how the Retention Scheme will work in practice and what the legal implications may be. With the publication late on 26 March of more detailed guidance, we can now answer many of those questions.

First, it is important to recognise that nothing in the Scheme alters the underlying employment law. Asking any member of staff to go on 'furlough' (as the Government is suggesting we call it) represents a variation of the employee's contract. As such it requires consent and insisting could be taken by the employee as a dismissal.

It is fair to say that may be unlikely in the current climate especially as the alternative to furlough may well be redundancy. All the same, it will be good practice to consult about furlough arrangements with staff especially where there is still some work to be done and so you have keep some people working (possibly under considerable stress) while others have a paid 'holiday'.

There is no easy answer there but it will be important not to discriminate and as far as possible secure consent. It will be a tough test of an employer's diplomacy skills.

Leaving aside consultation, there are several common questions which have been raised.

**Who does it apply to?** It only applies to employees who were on PAYE as at 28 February 2020. It does not cover workers or other contractors who are paid on invoices nor anyone added to the payroll after 28 February. It also only applies to employees who are on furlough for a minimum of 3 weeks.

**When does it operate?** The start date is 1 March and it will apply for minimum of 3 months i.e. until the end of May. It will reviewed and may be extended if needs be.

**When will we be refunded?** This remains uncertain. A dedicated website is being set up for registration of details and to enable the repayments to be made and the aim is for this be completed by the end of April. Once up and running, claims may only be made every 3 weeks at most.

As payments will presumably take a little longer after that, this still risks imposing significant cash flow difficulties for some businesses. In that event, they should consider applying for a Coronavirus Business Interruption Loan Scheme to help. Significant sums are said to have been made available and the Government will pay the first year's interest and costs as well as guaranteeing 80% of the loan (which should prevent banks

	seeking excessive security).
Do I have to pay the missing 20%?	The indications from Government are that while you may pay the 20% it is not obligatory, at least under the terms of the scheme. So, you don't need to pay it in order to claim the 80% but there is no suggestion of any legislation to override existing employment law. Therefore, unless there is an agreement with the employee, I consider that the failure to pay the 20% will be a breach of contract. An employee could claim constructive dismissal or, more likely, bring a claim for the 20%. It is therefore vital to obtain and record consent.
Does the grant cover ENIC?	Yes. The refund will include any Employer's National Insurance and the minimum automatic enrolment pension contributions on the 80% of salary (but not any higher payments an employer may have to make).
How do I work out the 80%?	In the case of variable earnings, the base figure will be the higher of the earnings in the same period last year or the average pay over the last 12 months.
What about National Minimum Wage	The NMW is only payable for those who are working. Therefore, it is not unlawful for payments to be lower than the NMW while on furlough.
Can staff go on part-time furlough?	No. The employee can do no work at all. Staff may do training or volunteering provided it earns nothing for the employer. While training, employers will have to ensure the staff are paid NMW
Can I rotate staff on furlough?	Rotating furlough staff would be an excellent way of sharing the load. Nothing has been said to encourage or discourage this so, as it stands, there is no reason to suppose this cannot be done. As noted above, staff must be furloughed for a minimum of 3 weeks for eligibility to bite so any rotation would need to take that into account
Does holiday continue to accrue?	Yes. The contract of employment remains in place so all rights, including holiday will continue to accrue as normal.
Can I force an employee to take holiday during their furlough?	In principle, yes, subject to complying with the statutory notice requirements. These generally require an employer to give notice of double the mandated holiday. So, if wanting a member of staff to take 2 weeks' holiday, 4 weeks' notice would be required. As the employee would be entitled to full holiday pay and would no longer be on furlough so no 80% refund would be claimable this is an expensive option but some employers are worried about there being unmanageable holiday requests coming later in the year. The better answer to this would be to allow employees to carry some holiday forward.
Can I make staff redundant during or after furlough?	Yes. Subject to complying with the consultation requirements, if the circumstances of the business mean redundancies are necessary you can take that action whenever you wish.
What about staff I've already made redundant?	The Government has explicitly advised that the scheme applies to those made redundant after 1 March but who are now reinstated.
What about new employees?	As noted above, the scheme only covers staff who were employed and on the PAYE payroll as at 28 February 2020. Staff taken on after that date are not covered by the scheme

For the reasons discussed, it will be essential to consult with staff and secure their written agreement to being put on furlough. We can help with consultation and with forms of agreement so do get in touch if that would be helpful.