

# The COVID 19 Job Retention Scheme – what do we know so far?

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## Employment Law News

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### The COVID 19 Job Retention Scheme – what do we know so far?

On 20 March 2020 the Government announced the launch of the COVID 19 Job Retention Scheme (the Scheme). The Scheme is designed to support employers retain employees in the face of the considerable challenges presented by the global

**coronavirus crisis. Here, we explain what is known about the Scheme so far and consider some tricky issues for affected employers.**

### **What is the COVID 19 Job Retention Scheme?**

Under the Scheme, the Government will foot 80% of the wage costs of employees who are placed on temporary leave by their employer instead of being made redundant. This type of leave will now be known as “furlough leave” (although, traditionally, it has been termed as “lay off”). These payments will be capped at £2,500 per month.

Initially, the Scheme will cover payments for a three-month period between 1 March 2020 and 30 May 2020. However, the Government has said it will extend the period if needed. There is no limit on Government funding for the Scheme. Full details of the Scheme are expected to be published shortly.

### **Why is the Scheme needed?**

Employees who are ready, willing and able to work are entitled to be paid their normal pay, even where the employer has no work for them to do. The exception is where there is an express right in the employment contract allowing the employer to lay off the employee temporarily without pay. However, such rights are rare. In most cases, employers aren't entitled to send an employee home without pay. This means the employer would be obliged to continue to pay the employee normally, unless the employee agreed otherwise.

The coronavirus crisis has had a drastic impact on businesses across many sectors, causing closures, lost custom, lower revenue and cash flow problems. The result is that many businesses will struggle to pay employees who are not working and have been left with no choice but to contemplate redundancies. The Scheme has been introduced to encourage employers to retain employees throughout this difficult time and avert mass redundancies.

## **Which employers can apply for funding?**

All UK employers with a PAYE scheme are entitled to apply for funding, regardless of size or sector. In order to be eligible for funding, the employer must designate the affected employees as “furloughed employees” and notify them of this change.

## **Which members of the workforce are covered by the Scheme?**

Funding will be available to cover the wage costs of employees who are placed on furlough leave instead of being made redundant. It's not yet clear how the employer will be expected to evidence an intention otherwise to have made the employees redundant. Will it be enough to simply declare that this is the case? Or must a formal redundancy process be underway?

Any employees who are still needed to work will not be covered. This includes anyone who is:

- working at the employer's premises;
- working from home;
- working on a reduced hours basis;
- off work by reason of unpaid dependent's leave or unpaid parental leave but who will be needed to work after that period of leave;
- off sick but who will be needed to work when they are better; and/or
- off work due to self-isolation but who will be needed to work after the relevant period is over.

Those not attending work due to the new [social distancing rules](#) announced on 23 March 2020, and who are unable to work from home, may be covered by the Scheme if they are at risk of redundancy.

It is not yet clear whether those with worker status are covered. Self-employed contractors will fall outside the

Scheme. However, a separate proposal to cover the income of self-employed contractors (at the lower of either 80% of monthly net earnings or £2,917) is currently being considered by Parliament as part of the [Coronavirus Bill 2019 – 21](#).

### **What happens to the furloughed employees?**

The furloughed employees will still be employed and will retain their normal employment rights, such as the right to accrue annual leave. They are not permitted to undertake any work for the employer whilst furloughed. It is not clear whether they will be allowed to work for others whilst furloughed, for example, in an attempt to bolster their income. Where an employee is to be furloughed, it would be sensible for the employer to retain the right to recall the employee to work at any time.

### **What payments are covered?**

The Government has said it will cover wage costs up to £2,500 per month per employee. It's not clear if this means basic salary only, or whether it also captures the value of benefits. However, it seems the intention is that the £2,500 represents the gross amount. If this is correct, this means that any furloughed employee earning up to £37,500 per annum would be paid 80% of their actual pay. Anyone who earns over £37,500 per annum would experience a shortfall over and above the 20% due to the application of the cap.

### **How and when will payments be made?**

The Scheme will be administered by HMRC via an online portal on which the employer will submit details of the furloughed employees and their earnings. The Government has said the portal will be up and running within weeks. Therefore, employers will not receive payments in their hands until April 2020, although the payments will be backdated to 1 March 2020.

### **Some tricky issues for affected employers to start thinking**

about now

- **How will employers choose whom to furlough?** Sometimes it will be obvious which employees need to be furloughed. If a shop or restaurant closes, its floor staff will be unable to work from home and there is no work available for them to do. Where the alternative is redundancy, then the employer could furlough them all. However, where the employer still needs some, but not all, employees to carry out work, then it is not clear how they should approach selection for furloughing. Can they just designate who is furloughed? Or will a process akin to a redundancy consultation process be needed? How will an employer deal with a situation where too many employees ask to be furloughed?
- **Does the employee need to consent to being furloughed?** The Government has said the change in status remains subject to the employment contract. Therefore, where there is no contractual right to lay off, the employer will probably need to agree the position with the employee. Further, where a relevant collective agreement is in place, the employer may need to engage in consultation with a trade union before furloughing employees. We expect that in the current climate most employees who are given the choice of being furloughed or made redundant will agree to be furloughed.
- **Can employers temporarily designate sick, self-isolating or stringently socially distancing employees (i.e. those in vulnerable groups) as furloughed employees in order to get some help with their sick pay bill?** If an employee is sick, self-isolating or stringently socially distancing they will usually be entitled to be paid Statutory

Sick Pay (**SSP**) and contractual sick pay if it is provided. This could add up to a significant cost for employers with multiple employees out of the business on one of these grounds (albeit that some SSP costs can be reclaimed). If these employees will be needed for work, then they are not covered by the Scheme since they would not otherwise have been made redundant. An attempt to designate such employees as furloughed temporarily as a means of covering the sick pay bill will probably be unlawful.

- **Will employers have to pick up the shortfall in pay?** Ordinarily, if there is no contractual right to lay off, the employer must maintain normal pay for employees who are laid off temporarily. This would mean that the employer would have to cover the shortfall in pay, namely the 20% not covered by the Scheme and any shortfall in the 80% suffered by those earning in excess of £37,500 per annum. However, the Government has said that employers may choose to pay any shortfall, but they are not obliged to do so. This suggests that a furloughed employee will be deemed to have agreed to be furloughed on reduced pay.
- **How will employers deal with the lag in receiving the Government funding?** Employers deciding to furlough now will face the challenge of paying the furloughed employees without having received funds from the Government. Some SME employers in limited sectors may be eligible to apply for a [Coronavirus Business Interruption Loan](#) to help provide short-term cash flow. Otherwise, if an employer is unable to make the payments, it should either pay the money through the payroll in the usual way and recoup it when it can or, if this is too tight

from a cash flow point of view, explain the position to the furloughed employees and seek their agreement to delayed payments.

- **Will employers have to furlough employees instead of making them redundant?** If an employer has chosen to make employees redundant, must it now furlough them instead? As part of a fair process, employers are obliged to consider ways to avoid redundancy. A potentially redundant employee might reasonably argue that a failure to consider furloughing means the process is unfair (since the employer's position may have improved by the end of the furlough period meaning redundancy is not needed). Therefore, it's probably necessary for employers to at least consider furloughing as an alternative. However, if the employer concludes that redundancy will still be the ultimate outcome then it should be able to proceed with a fair redundancy dismissal.

**BDBF is currently advising many employers and employees on the challenges presented by the coronavirus. If you or your business needs advice on furlough leave or other coronavirus-related matter please contact Amanda Steadman ([amandasteadman@bdbf.co.uk](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF contact.**

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