



# Coronavirus: Furloughed Workers and What it Means for Business

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## Biography

*Tina Chander is a Partner and Head of the Employment team at leading Midlands law firm, Wright Hassall (<https://www.wrighthassall.co.uk/expertise/employment-hr/>) where she deals with contentious and non-contentious employment law issues. She acts for employers of all sizes from small businesses to large national and international businesses, advising in connection with all aspects of employment tribunal proceedings and appeals.*

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## Abstract

*The coronavirus has changed the world and some companies are finding that they are unable to operate or they have no work for staff to do during the pandemic. For them, there is the option to put workers “on furlough”, which is a temporary leave of employees due to special needs of a company or employer, which may be due to economic conditions at the specific employer or in the economy as a whole. Employers facing difficulties are able to access support through the Coronavirus Job Retention Scheme to keep staff on the payroll and avoid redundancies.*

## Introduction

The Coronavirus Job Retention Scheme is designed to help businesses that would otherwise be forced to lay off staff in the face of the unprecedented disruption caused by COVID-19.

All businesses with a PAYE scheme in place on 28 February 2020, regardless of size or sector, will be able to benefit from the scheme with the government reimbursing employers up to 80% of their employees’ wages, to a maximum of £2,500 per month, plus employer’s NICs and auto-enrolment pension contributions.

Employees on agency contracts and flexible or zero hours contracts can also benefit from the scheme. In addition, the scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.



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*HR and Employment*

### **Furloughed workers: what does that mean?**

Businesses have to 'designate affected employees as furloughed workers and notify your employees of this change'. However, employers still have to heed employment law which means that, having designated those employees whose jobs were at risk, they will need to agree with those employees that they will be 'furloughed'.

Given the extraordinary situation prevailing at the moment and given the alternative to being furloughed, it is likely that most employees will agree to the terms.

For those workers who do not agree, they will either have to take unpaid leave for an indeterminate period or employers are likely to have to go down the redundancy route. It should be noted that furloughed workers are designated by the employer – an employee cannot 'self-designate'.

### **Eligibility**

Employees hired on or after 1 March 2020 are excluded from the scheme, presumably to stop people 'gaming' the system by hiring family members after the scheme was announced and then furloughing them.

However, those businesses that have made people redundant since 28 February 2020, can re-employ them and then furlough them. To qualify for payment under the Job Retention Scheme, an employee must be furloughed for a minimum of three weeks in order to prevent employers putting staff on a furlough 'rota' for instance, one week on furlough, one week off.

### **Who can be furloughed?**

Normal employment law still applies so employers must not discriminate when deciding who to furlough. Employees returning to work after a period of sickness absence, or self-isolation, can be furloughed, however they cannot be furloughed whilst they remain on a period of sickness absence or self-isolation.

Furlough will only take effect when this period comes to an end. Employees who are "shielding" however, will be eligible to be furloughed. Employees on maternity leave can be furloughed if they agree to return to work early or change to shared parental leave, alternatively they will remain on Statutory Maternity Pay where this is applicable and will not be furloughed until their return.

When agreeing changes and moving to furlough status, it is important to remember that normal employment law processes apply. Employers must be careful not to discriminate against any employees when deciding who to offer furlough to.

### **Furloughed workers remain employed but must not work**

Assuming the designated employee has agreed to be furloughed, they cannot undertake any work for their employer at all. If the employee continues to work, even reduced hours, they are not eligible for the scheme. The good news for furloughed staff is that they can volunteer or undertake training providing neither activity generates income for their employer. Whether or not people can take



advantage of this while confined to their house is, of course, another matter altogether.

### **How it will work?**

While furloughed, the government will pay related employment costs including pension contributions and NICs (but not commission or bonuses) in addition to wages. All furloughed workers will remain employed by their employer for the duration of the scheme.

Employers can make up the missing 20% of their employees' salaries but that is their choice (or ability to pay). There is no legal obligation for the employers to top up the salary to 100%, but any contractual clauses regarding withholding pay and deductions should be taken into account when this decision is being made.

For those employees who are furloughed, their employment status will change but their employment record remains continuous.

Employers need to give HMRC a list of furloughed employees. Employers pay their workers as usual, via PAYE, and then apply for funding, every three weeks (not weekly) to cover 80% of their wages (up to £2,500 of gross pay).

You will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated Employer NICs and minimum automatic enrolment employer pension contributions on that subsidised wage. Fees, commission and bonuses should not be included.

For workers whose pay varies, the 80% is based on the higher of:

- the earnings in the same pay period in the previous year; or
- the average earnings in the previous 12 months (or less, if they have worked for less).

If employees paid the minimum wage are furloughed, the fact that 80% of their earnings will bring their wages below the NMW does not contravene the legislation as people are only entitled to the NMW if they are working. They can, however, claim the NMW if undertaking training.

The HMRC system through which payments can be made should be up and running by the end of April. The scheme is expected to run for three months, subject to review.