

## **Employment Law Questions and Answers relating to Covid-19**

### **The Government's Job Retention Scheme**

#### **1. What is furloughing?**

The Government has devised a job retention scheme ("JRS") on 20 March 2020 to cover wages for Employees on temporary leave ("furlough") due to coronavirus (Covid-19). This scheme (<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>) is an alternative to mass lay-offs.

#### **2. How does the scheme work?**

Under JRS, if an Employee is designated as "furloughed," HM Customs and Revenue (HMRC) will reimburse the Employer for 80% of the wage costs relating to the Employee, up to a maximum of £2,500 per month. The Employer may top up wages and this is something organisers can negotiate.

#### **3. Who can access the scheme?**

The scheme has been made available to any UK Employer that on 28 February 2020 had a PAYE payroll scheme for automatic deduction of tax and National Insurance as part of wage payment.

#### **4. Who decides whether someone is furloughed?**

The Employer decides who is to be furloughed. In choosing staff to be furloughed, Employers will have to consider discrimination laws and the implied duty of 'mutual trust and confidence'. Employers are likely to seek volunteers.

As this will require a variation of the Employee's contract, an Employee's consent is required before they go on furlough.

There is no requirement for consultation with unions however, UNISON should rely on its links with Employers to ensure that its members selected for furlough are not selected on the bases of inadvertent prejudice, discrimination, breaches of mutual trust and confidence etc.

#### **5. Are Public Sector organisations / Organisations that receive public funding entitled to use the scheme?**

Yes. However, the guidance states that:

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- a. it would expect the majority of public sector Employees to continue to provide essential public services and contribute to the response.
  - b. “Where Employers receive public funding for staff costs, and that funding is continuing, 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”.
- 6. What about Organisations that are not primarily funded by the Government, are they eligible for JRS?**
- The guidance states that in a small number of cases, such as where Organisations are not primarily funded by the state and whose staff cannot be redeployed to assist with the coronavirus response, the scheme may be appropriate for some staff.
- 7. Will a company in administration be able to access the JRS?**
- Yes.
- 8. Will JRS cover Employees who were made redundant since 28 February 2020.**
- Yes, if they are rehired by their Employer. This is up to the Employer, but again Organisers can negotiate with Employers.
- 9. Can an employee work while on furlough?**
- No, they cannot work and they cannot provide services or generate income.
- 10. Will furlough wages be subject to income tax and deductions?**
- Yes
- 11. Can Employees on agency contracts be furloughed?**
- Yes. Furlough should be agreed between the agency, as the deemed employer, and the worker. The Government advises the agency to discuss the need to furlough with any end clients involved. As with Employees, agency workers should perform no work for, through or on behalf of the agency that has furloughed them while they are furloughed, including for the agency’s clients.
- Where an agency supplies clients with workers who are employed by an umbrella company that operates the PAYE, it will be for the umbrella company and the worker to agree whether to furlough the worker or not.
- 12. Can Employees on flexible / zero-hours contracts be furloughed?**
- Yes. They will be paid by the Employer whose payroll they are on.

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**13. What is position where an employee has more than one job?**

Employees with more than one job can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

**14. Who pays Employer National Insurance contributions and minimum automatic enrolment Employer pension?**

Employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment Employer pension contributions on behalf of furloughed Employees and can claim for these costs from the Government in addition to the wage.

**15. Can a furloughed employee do volunteer work/training?**

Yes, if it does not provide services to or generate revenue for, or the Employer.

If Employees complete online training courses whilst they are furloughed, then they must be paid at least the full NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

**16. Can Employees not furloughed be asked to work on critical business tasks because of the pandemic?**

Yes

**17. Do Employees need to consent to furlough?**

Yes. Employers should discuss with their staff and make any changes to the employment contract by agreement. 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.

To be eligible for JRS 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.

**18. Do Employees have to 'click' in an email to change the contract and sign up to the JRS?**

See the question on "Do Employees need to consent to furlough?"

Clicking an email is a form of consent, but an employee would expect a manager to speak with or email them to discuss arrangements prior to receiving such an email.

Imposing furlough could risk constructive or unfair dismissal claims and/or claims for unlawful deduction from wages for the difference of wages under JRS and an Employee's contractual rate of pay.

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The employer can terminate and offer re-engagement on terms which incorporate the JRS where consent cannot be obtained. This will take longer, and if 20 or more Employees are affected, then this will trigger statutory requirements to inform and consult with the Employees or their union.

**19. What is the minimum period for which an Employee may be furloughed?**

The minimum period for which Employees can be furloughed is three weeks.

**20. Can employer rotate staff for 3 weeks on furlough and then working 3 weeks?**

Yes

**21. Can Employees with caring responsibilities be eligible for furlough?**

Employees who are unable to work because they have caring responsibilities resulting from coronavirus can be furloughed. For example, Employees that need to look after children can be furloughed.

**22. If you belong to a category of employee/worker that is required to shield, then can you be furloughed?**

Yes. If you are not on sick pay but instead are shielding for health reasons you will also be eligible for furlough pay.

**23. What about Employees on unpaid leave?**

An Employer can only claim JRS for Employees that started unpaid leave after 28 February 2020.

**24. Dealing with Employers that have already imposed cuts**

Government guidance makes clear that the JRS will not apply for Employees who have already agreed reductions to hours or pay. This means it will be very difficult to persuade Employers to reverse any such changes, but negotiators should highlight the availability of the government's Coronavirus Business Interruption Loan Scheme to support cash flow if the Employer were to do so.

**Redundancy**

**25. What is the position around furlough and staff that who may already be on notice period or been issued redundancy notice along with staff who may be issued notice of redundancy during the period of furlough?**

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Some Employers may have jumped the gun ahead of the announcement of the Job Retention Scheme and given notice of redundancy to Employees. JRS applies only to Employees employed up to 28 February 2020. However, there are special rules that permit an Employer to reinstate Employees dismissed as redundant after 28 February 2020 so that they can be put on furlough instead and claim wages under the JRS.

Where members wish to continue in their employment, negotiators should seek withdrawal of the notice and ask that the Employer agrees that the Employee under notice be considered for furlough instead.

Negotiators should ensure that their continuity of service remains intact and they do not start again at 0.

**26. Can Employer still make staff redundant and will their redundancy rights be affected by furlough?**

The aim of the JRS is to avoid redundancies. The decision to put Employees on furlough is made by the Employer and any dismissal for redundancy must still stand up to the scrutiny of the law on unfair dismissal and redundancy pay.

These rights normally depend on qualifying Employees having 2 years' service but note that 'automatic' unfair dismissals (e.g. where the Employee is dismissed because of a qualifying protected disclosure) can be claimed by Employees with less than 2 years continuity of employment.

**Pay**

**27. At what rate will Employees be paid to be furloughed?**

Only an Employee's actual salary will be paid, and this does not include fees, commission and bonuses. Full-time or Part-time Employees will be paid 80% of their actual salary at 28 February 2020.

**28. How much will an Employee be paid on furlough if I am a term time employee and I am on an annualised contract?**

Only an Employee's actual salary at 28 February 2020 will be paid, and this does not include fees, commission and bonuses. You will get 80% of what you normally get in a month.

**29. How much will an Employee be paid on furlough if I am a part time employee?**

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Only an Employee's actual salary at 28 February 2020 will be paid, and this does not include fees, commission and bonuses. You will get 80% of what you normally get in a month.

**30. How much will an Employee be paid where they are on a zero hours contract or their salary varies from week to week/ month to month?**

Where an Employee's pay varies by week or month, and they have been employed for 12 months before the claim, an Employer can claim and pay the Employee the higher of the same month's earning from the previous year or the average monthly earnings from the 2019-20 tax year.

For Employees whose pay varies but they have been employed for less than a year, the claim should cover the average monthly earnings since they started work.

**31. What will Employees on National Minimum Wage/National Living Wage be paid while furloughed?**

The government has stated that Employees on the National Minimum Wage (NMW) or National Living Wage (NLW) can be paid less than the legal minimum on the justification that the NMW/NLW does not apply to furloughed Employees.

However, if Employees are required to engage in training activity such as completion of an online training courses whilst they are furloughed, they must be paid at least the NMW/NLW for the time spent training. The minimum period for which Employees can be furloughed is three weeks.

**32. How will my NMW payments be calculated during periods of furlough**

Individuals are only entitled to the National Living Wage National Minimum Wage for the hours they are working.

Therefore, furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below the National Living Wage or the National Minimum Wage.

However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the National Minimum Wage for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

**33. What if I am on an annual salary and regularly receive performance bonuses, unsocial hours payments?**

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Only 80% of your basic salary will be payable even if this amount is lower than the National Minimum Wage. If you received bonuses or payments or allowances for unsocial hours, weekend work, London Weighting payments or allowances for my work environment of work location **in addition to your basic salary**, these may not be included in the calculation of your salary for the purposes of the furlough payments.

In these circumstances your salary payments during furlough will be 80% of your basic salary, even if this amount would be below the National Living Wage or the National Minimum Wage.

**34. What if my basic pay in my contract or employment is the London Living Wage?**

You should be entitled to receive 80% of the London Living Wage because this will be your basic salary for the purposes of the furlough payments.

You may need to check your contract of employment to determine what your basic salary actually is. As indicated above, if the payment for work in a geographical area is not part of your basic salary, then this may not be counted.

### Annual leave

**35. Can people request annual leave when on furlough?**

This is unclear at the moment. Even if they can, it is unclear at what rate they would be paid. However, annual leave entitlements continue to accrue.

**36. Can an Employee cancel annual leave whilst on furlough?**

Again, this is unclear, but presumably yes.

**37. What is someone cannot use their annual leave entitlement for the year?**

Following amendments to the law, all workers (includes Employees) who have not been able to take all their statutory annual leave entitlement (4 weeks) due to COVID-19 will be able to carry this over into the next two years.

For this to apply it must “not be reasonably practicable for a worker to take some or all of the leave to which they ... as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society)”.

It is not clear if this applies to furloughed staff (arguably it does), or only just those working.

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The remaining 1.6 week's leave under statute can be carried over by up to a year by agreement with their employer under existing law.

**38. At what rate of pay will someone on furlough be paid?**

It is unclear at what rate someone on annual leave whilst furloughed would be paid.

**Sickness during furlough**

**39. Will an employee who falls sick be entitled to sick pay?**

Yes. Employees placed have the same employment rights as before. If you are ill, you are eligible for statutory sick pay or contractual sick pay. You can be placed on furlough when you recover. Once you have recovered and are selected for furlough, your sick pay will stop and your pay will be determined under the furlough scheme.

If you are not on sick pay but instead are shielding for health reasons you will also be eligible for furlough pay.

**40. Will an employee who falls sick whilst on furlough be entitled to sick leave on the furlough rate of pay or their normal rate of pay?**

This is currently unclear. Employers cannot claim under JRS for Employees while they receive getting Statutory Sick Pay. Under an Employee's contract of employment, they would still need to pay them enhanced sick leave provisions, as their contracts will apply if they are no longer eligible for JRS whilst off sick.

**41. What is someone dies during furlough? Will their rights and entitlements be affected in any way?**

No. The furlough scheme should not affect workers' employment rights or pension entitlements if they die in service.

**42. Will workers be required to provide a sick note if they have COVID-19?**

Employees will not need to provide a GP fit note if they contract COVID-19. If evidence is required by an employer, those with symptoms of coronavirus can get an isolation note from [NHS 111 online](#) and those who live with someone that has symptoms can get a note from the [NHS website](#).

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## **Maternity/Paternity Leave (and other equality issues e.g. vulnerable Employees)**

### **43. Will those on Maternity leave have to be furloughed?**

No, there is no requirement to put those who are on maternity leave on furlough. There are a number of legal protections for workers on maternity leave under the Equality Act 2010 and related legislation. Any selection process by an Employer to put staff on furlough must not breach those rights.

### **44. Will those on Maternity leave be entitled to take furlough leave?**

The latest Government guidance is not clear on this issue. In theory, a worker on maternity leave could agree to return before the expected date in order to be put on furlough. This is not something that should be agreed lightly, as there would be no right to return to maternity leave after the period on furlough ends.

### **45. What rate of pay should be paid for those on maternity leave?**

There are statutory maternity pay ('SMP') rates and calculations which depend on an individual's circumstances in the period before maternity leave commences. An employee eligible for SMP or Maternity Allowance would be entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

Additionally, there can be contractual maternity provisions that supplement SMP. The guidance states an Employer can claim through the scheme for enhanced (earnings related) contractual pay for Employers that qualify.

### **46. What about workers who are pregnant and forced to either attend work or take unpaid leave?**

Pregnant workers are particularly vulnerable and should not be put in this position. The Government 'strongly advised' pregnant workers to work from home if possible. This was before recent emergency legislation-imposed workplace closures and further restrictions on travelling from home. Where the nature of Employee's role means there is no suitable alternative work available that could be done from home, the Employer should consider suspending the Employee on full pay in line with requirements for the risk assessment of pregnant workers under The Management of Health and Safety at Work Regulations 1999.

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**47. What is the position for over 70s, workers with diabetes, heart disease who are told to either attend work or take unpaid leave?**

There are protections under the Equality Act 2010 for workers with protected characteristics of age and/or disability. Note that whether an individual has a disability for the purposes of the Equality Act 2010 can often be an issue disputed by an Employer. These rights are particularly important to raise where an Employer is considering putting Employees on furlough.

When these rights are read in the context of the Government's guidance on COVID-19 about which groups are 'strongly advised' to remain home, an Employer should be challenged on whether this type of policy (remain at work or take unpaid leave) can be objectively justified as a proportionate means of achieving a legitimate aim for workers with those protected characteristics.

**TUPE and furlough**

**48. If you are TUPE transferred whilst you have been furloughed, will you still be entitled to furlough?**

Yes. Following a TUPE transfer there is an automatic transfer of rights and as a matter of law the new employer steps into the old employer's shoes.

The new employer will need to pay the employee under the furlough arrangements or under contract (i.e. if they are not furloughed).

There was some confusion as to whether the new employer (transferee) would be entitled to seek reimbursement from HMRC, given that the arrangement was made between the old employer (transferor) and HMRC, where a transfer took place after 28 February 2020. However, David Johnston MP confirmed on 6 April 2020 that those transferred on or after 20 February 2020 can be furloughed under JRS.

**Trade union rights and collective agreements**

**49. Should UNISON agree Furlough Agreements with Employers?**

Where the Employer recognises UNISON and decides that there is not enough work for all Employees, it should consider proposing a Furlough Agreement for negotiation and agreement with UNISON.

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It is not for UNISON to provide a template to the Employer as no one size fits all and the obligation to furlough is solely on the Employer. Any agreement should specify what temporary variations of contract are required and why. The Employer should consider volunteers to be put on furlough and explain any selection method it proposes to use if there are not enough (or too many) volunteers. Any selection method by the Employer must avoid unlawful discrimination.

**50. Can a branch secretary or representative carry on with their union duties/activities during furlough?**

This will be a very busy and difficult time for most members. Employees who are on furlough should not be carrying out work for the Employer, but this should be considered separately to the role of Branch representatives carrying out trade union duties and activities. New methods of communication will need to be considered, but Branch representatives must continue to liaise with colleagues from Regional and National teams for advice and guidance where it is needed.

**51. Ensuring appropriate procedure to achieve furloughed status**

In general, it is unlikely that a collective agreement over the Job Retention Scheme will be binding on individual Employees. Therefore, unless contracts allow for an Employer to make the necessary change to an Employee's status as furloughed, the Employer will need to obtain each Employee's agreement to be placed on furlough leave. Providing all the issues set out above regarding the operation of the scheme have been addressed with the Employer, staff should of course be encouraged to accede given that the alternatives would be redundancy or unpaid leave, but it will always remain the individual's choice to decide.

**52. Danger of 'unofficial' industrial action**

The complex legal requirements to take industrial action mean there are lots of pitfalls that can affect whether industrial action is authorised and lawful. There are very serious legal and financial risks for both UNISON and individual members who participate in 'unofficial' industrial action.

Industrial action is a reserved area for specialist legal advice and all queries relating to this topic must be referred to the Director of Legal Services (Adam Creme) urgently before any steps are taken.

**Return to work after furlough**

**53. When furlough ends and staff come back to work, they will need to undertake alternative duties. Can this be imposed/agreed at this point in time?**

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No, unless this is a requirement to undertake alternative duties to deal with the pandemic. We would still expect the employer to agree these with the employee.

### Pensions

#### **54. Will Employers be able to use the pension contribution towards pensions/ public sector pensions?**

The Coronavirus Act 2020 introduced some changes to NHS pensions in relation to the suspension and abatement of pension for recently retired healthcare professionals returning to work. These came into effect on 25 March 2020 and are due to last 2 years, but the Act permits for this period to be shortened or extended.

#### **55. What will the effect of furloughing be on pension accrual?**

The relevant scheme rules will normally define what amounts to pensionable pay and the reduction in wages will be the main issue that affects pension accrual.

Note that minimum auto-enrolment Employer pension contributions also fall within the amount that can be claimed through the JRS. Employers can claim this and associated Employer national insurance contributions. In addition to 80% of wages (up to £2,500 per month per Employee).

Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

#### **56. What will happen to Employee contributions to pensions during furloughing?**

Unless the scheme rules provide for something else where the pensionable pay has decreased, the Employee will be expected to continue to pay normal contributions from what they receive while on furlough.

### **Non-employment law questions**

#### **57. During the COVID-19 crisis what should I do if I am contacted by a member about a non-employment related legal query (i.e. they have suffered a personal injury or need assistance as they are facing work related criminal allegations)?**

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In light of the current situation and the most recent government advice due to the COVID-19 outbreak we have had to adapt our processes and UNISONdirect will be unable to process calls for members wishing to use our Legal Assistance scheme.

We have been working with our lawyers Thompsons to find the best solution to ensure our members can continue to get the legal support they need in relation to **non employment law assistance**.

Issues related to member's work and employment law assistance should in the first instance, as before, continue to be directed to your branch (see the contact page on our website for more information).

For all other legal queries – this refers to: seeking personal injury advice following a work or non-work accident/injury suffered by members, or a non-work related accident suffered by their families; if our members want criminal law advice or to access our initial free legal advice scheme; or if they want legal help with wills and conveyancing – please call our new dedicated UNISON number **0808 252 2783**. This number is open 24/7. Please advise members when they call they should have their UNISON membership number to hand.

If members want to look through in more detail the terms and conditions for our Legal Scheme which also outlines scope eligibility please signpost them to our Legal Services web pages and refer to our Legal Services Guide.

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