# A COLLABORATIVE VIEW ON
# THE CORONAVIRUS JOB RETENTION SCHEME

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## INTRODUCTION

1. This document represents the collaborative view of the Coronavirus Job Retention Scheme of David Reade QC, Michael Ford QC, Sean Jones QC and Caspar Glyn QC. We have identified areas where there is no consensus view and hope that even the identification of that uncertainty is helpful.
   1.1. We hope this document will be of use to employment law advisers, businesses, unions and employees. The aim is to set out the scope of the scheme, how to implement it, how it operates and then to identify the problems and uncertainties in the Scheme's operation. That clarification is necessary is unsurprising. It is not a criticism. The Scheme was developed as an emergency response to an unprecedented need to shut down parts of the economy to save lives. We ask the Government to resolve the uncertainties in their Revised Guidance[1]. Our view is a technical analysis, not an evaluative one.
   1.2. For convenience the issues upon which we would invite resolution in any further Guidance are set out at the end this document.

## THE CORONAVIRUS JOB RETENTION SCHEME

2. The Scheme is a grant. It is a promise by the Government to repay employers who don't dismiss employees, but instead retain them. It is not set out in legislation, though it was derived from s.76 of the Coronavirus Act.[2] It operates through the PAYE scheme. Payment will be made if qualifying factors are met. The scheme does not change any existing statutory rights such as the right not to be dismissed unfairly, the right to a redundancy payment, protection from discrimination or rights to paid annual leave. Nor does it change common law rights which might give rise to contractual claims. However, we do not rule out the common law evolving to address challenges which the pandemic has raised.

## 3. SCOPE OF THE JOB RETENTION SCHEME

### 3.1. What is the Cut Off Date under the Scheme?

**Short Answer**

[1] Published on 4 April 2020 and available at https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

[2] See the Explanatory Notes to s.76 at §589.

28th February 2020.

**Explanation**

According to the Revised Guidance, the Scheme applies to:

> *'furloughed employees that were on PAYE payroll on or before 28 February 2020. Employees hired after 28 February 2020 cannot be furloughed and claimed for in accordance with this scheme'*

Note that employees who were made redundant or who ceased working after 28 February 2020 but who are re-employed after that date can be put on furlough and claimed for under the Scheme. This is discussed further in section 5.7 below.

### 3.2. Does the Scheme Cover 'Atypical' Workers?

**Short Answer**

The Scheme covers many categories of worker beyond the traditional full-time employee. In each case the critical question is whether the individual is paid via PAYE.

**Explanation**

The Revised Guidance makes clear that the Scheme extends beyond those who are permanent, full-time employees paid via PAYE. In particular, it covers the following categories of workers:

Agency workers. Agency workers are often not employees at common law or statute. However, by virtue of s.44 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") they are treated for income tax purposes as holding employment with their agency and their income is taxed as earnings from employment, meaning that they are paid via PAYE. The Revised Guidance states that where agency workers are paid by means of PAYE, they are eligible for support under the scheme "including where they are employed by umbrella companies". The body which has to take the decision to furlough is the one which pays via PAYE – either the agency or, where it operates furlough, the umbrella company.

Limb (b) workers/gig economy. As is well known, many employment rights extend beyond those who are employees and apply to those who are limb (b) workers. Recent cases in the 'gig economy', such as ***Autoclenz*** and ***Uber***, have highlighted how tribunals and courts will expose 'sham' arrangements to decide if an individual is in reality a worker or employee. Under the Scheme, however, the question depends on whether the individual is *in fact* paid through PAYE and not on what is "really" their employment status. To that extent, "limb (b)" workers are eligible for furloughing, as the Revised Guidance explains. Nannies paid through PAYE, for example, can be furloughed. Where limb (b) workers are not paid via PAYE and instead pay tax via self-assessment, they may be eligible for support under the separate scheme for the self-employed.

Workers on Zero-Hours Contracts. The Revised Guidance is explicit that those engaged on zero-hours contracts are eligible for reimbursement under the Scheme provided they are "employees". We take this to mean that they are paid via PAYE, in accordance with how the rules operate for "limb (b)" workers. Their pay for the purpose of the Scheme is 80% of their average earnings, based on the previous year, the 2019-20 tax year or, where they have not worked a year, the period since they started work. It will be necessary to confirm in writing that such workers have been furloughed.

Company directors. Company directors potentially have two legal statuses. They are officers of the company (see "office holders", below). In addition, they may have a contract of employment with the company and as such be paid salary via PAYE. Where they are employees, they are eligible for support under the Scheme in common with any other employee. The Revised Guidance makes clear that any decision to furlough should be formally adopted and communicated in writing to the director. Importantly, directors can continue to perform their statutory functions while furloughed. As the Revised Guidance states:

> "*Where furloughed directors need to carry out particular duties to fulfill the statutory obligations they owe to the company, they may*

> *do so provided they do no more than would reasonably be judged necessary for that purpose, for instance, they should not do work of a kind that would carry out in normal circumstances to generate commercial revenue or provide services to or on behalf of their company*".

Office holders. Some individuals providing services other than by a contract of employment, such as club secretaries, trade union officers and company directors, are legally categorised as office holders. They are eligible for support under the Scheme so long as they are paid via PAYE.

Personal Service Companies. There is no definition of a personal service company ("PSC") but the typical arrangement involves an individual incorporating a limited liability private company of which he or she is the director and the principal or sole shareholder. Sometimes family members or others are also shareholders or directors. The PSC exists in order to provide the labour of the individual to a third-party client or several clients. The individual may be an employee of the PSC: see *Secretary of State for Business v Neufeld* [2009] ICR 1183, CA. In his capacity of employee or office-holder, the director of a PSC is eligible for furloughing just like any other company director.

However, there is an added wrinkle. Under what is known as the IR35 legislation, where the relationship between the individual and client would be employment but for the inter-position of the PSC, payments or benefits from the PSC are deemed to be earnings from employment with the PSC for tax purposes, and the PSC should then make deductions under PAYE.[3] It is presumed in these circumstances that all the amounts paid via PAYE count for the purpose of furloughing, though this has never been made clear.

Salaried Members of LLPs. They too are eligible for furloughing, provided always they were designated as employees for tax purposes under the Income Tax (Trading and Other Income) Act 2005. The Revised Guidance

[3] ITEPA ss. 49, 50, 54-6.

explains that a variation of the LLP agreement may be necessary, and states that that the furlough arrangements should be adopted formally as a decision of the LLP. For those LLP members who are treated as employees under s.863A of the 2005 Act, according to the Revised Guidance the relevant salary is their "profit allocation, excluding any amounts which are determined by the LLP member's performance, or the overall performance of the LLP".

Apprentices and trainees. For reasons buried in the depths of history, apprentices are not employees as a matter of common law. The law usually, however, extends employment rights to them: see e.g. s.230(2) of ERA and s.54(2) of the NMWA. Similar confusion about employment status may apply to those who are engaged for training only, including under government-sponsored training schemes. The Revised Guidance is explicit that apprentices can be furloughed as other employees, and we presume this applies to any individuals on apprenticeships or training arrangements so long as they are paid via PAYE, Whereas "ordinary" employees cannot do any work while furloughed, apprentices can continue to train while furloughed

**IR35 Clarification that would be helpful.**

- *Are payments of via PAYE pursuant to the IR35 legislation treated as relevant income for the purpose of furloughing?*

3.3. **Is any employee eligible for furlough or must the employee be someone that would otherwise have been dismissed for redundancy?**

**Short Answer**

It seems that the employer is free to furlough any employee.

**Explanation**

The Scheme is a "coronavirus job retention scheme". The Revised Guidance[4] says that the Scheme is available:

> "*If you cannot maintain your current workforce because your operations have been severely affected by coronavirus (COVID 19), you can furlough employees …*"

Read literally, that would seem to exclude the possibility of using the scheme where you can maintain your current workforce or where you cannot, but the reason is unrelated to the coronavirus. But the Revised Guidance goes on to say:

> "*However, all employer are eligible to claim under the scheme and the government recognises different business will face different impacts from coronavirus*".

That strongly suggests that an employee can be furloughed even if they would not, otherwise, have had to have been dismissed for redundancy. We consider, on balance, that the Scheme is available in circumstances that would not amount to a redundancy situation as ordinarily understood in Employment Law. Other parts of the Revised Guidance reinforce this view. For instance, the Scheme allows an employer to re-employ an employee who stopped working for them on or after 28 February 2020. The section of the Revised Guidance is headed: "*If you made employees redundant or they stopped working for you after 28 February*" [Emphasis added]. If you can re-employ and furlough someone who was not dismissed for redundancy, you should, logically, be able to furlough someone who is not redundant. This fits, too, with the inclusion of workers on zero-hours contracts and agency workers in the Scheme who typically will not be made redundant but simply not provided with work.

It should be noted, however, that there is some material in the Revised Guidance which points in the opposite direction. There is reference to an ability to furlough shielding employees "*if they are unable to work from*

[4] Published on 4 April 2020 and available at https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

*home and you would otherwise have to make them redundant*"[5] although that is the only category of worker in respect of whom that point is made.

Since this question is at the heart of eligibility, it would be better not to leave it to close interpretation of the wording of the Revised Guidance and a clearer statement on the issue from the Government would be welcome.

3.4. **What if an employee was engaged on a fixed-term contract that was due to expire anyway, can an employer extend their fixed-term and furlough them?**

**Short Answer**

Yes.

**Explanation**

The Revised Guidance provides:

> "*Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee's contract ends because it is not extended or renewed you will no longer be able [to] claim [a] grant for them."*

That is the logical consequence of there being no requirement that the job retained would otherwise have been lost due to redundancy. The last sentence of the Revised Guidance does not, in our view, preclude the re-employment of someone whose fixed term has been allowed to expire.

***Redundancy Clarification that would be helpful***

- *Can the Government confirm that it will not disallow (or later reclaim) reimbursement where an employer is unable to demonstrate that the employee would have been dismissed for redundancy had they not been furloughed?*
- *Can the Government confirm that an employee whose fixed-term contract has been allowed to expire may, nevertheless, be re-engaged and furloughed?*

[5] See section 3.4 below.

3.5. **Can employees who are on sickness absence be furloughed?**

**Short Answer**

Not if they are entitled to SSP.

**Explanation**

The Revised Guidance states:

> "*You cannot claim for employees while they're getting Statutory Sick Pay, but they can be furloughed and claimed for once they are no longer receiving Statutory Sick Pay."*

Employees who are self-isolating are entitled to SSP.

The application of the Revised Guidance is straightforward in the easiest case, i.e. where an employee is absent and receiving SSP and the employer wishes to furlough them.

The application is less clear in other cases. That is principally because the eligibility criterion is not sickness absence, but receipt of SSP.

**First, what if the employee has exhausted his entitlement to SSP but is still absent?**

On a plain reading of the Revised Guidance, it should be possible to furlough the employee because they are "no longer receiving SSP". Absent any other indication, they would seem to be entitled to receive 80% of their usual monthly pay or £2500 a month (whichever is the lower) since anything less than that would be a breach of the Scheme's rules.

**Second, what if the employee has exhausted his entitlement to SSP but is receiving contractual sick pay – can they be furloughed?**

The answer is not obvious, but we think on balance that they can. The aim of the Scheme is to give an employer a measure of protection from ongoing employment costs and thereby to help prevent dismissals. Allowing those whose entitlement to SSP has been exhausted but who receive contractual

sick pay to be furloughed is consistent with both the letter and the spirit of the Revised Guidance.

What is less clear is what should count as their usual monthly pay in those circumstances. There are two possibilities:

(1) It should be the pay they would receive if they were not ill; or

(2) It should be their contractual sick pay rate.

It is not clear which approach the Government intends. On the one hand, their insistence that you cannot be furloughed if you are in receipt of SSP suggests that they think people should not be able to use the Scheme to move to a higher rate of pay than they would receive if simply absent through sickness. On the other hand, the boundary for access to the Scheme is formulated specifically and solely by reference to SSP entitlement. On balance, we consider that employers would be entitled to reimbursement of 80% of the employee's contractual sick pay rate or £2500 per month whichever is the lower. That comes closest to maintaining the status quo whilst ensuring an income and protecting the job. There is nothing, however, in principle or in the Revised Guidance that appears to preclude an employer and employee expressly agreeing that, whilst on furlough, the contractual rate should be raised to the sum that would have been payable had the employee been at work.

**Third, what if an employee is furloughed and then falls ill so that they become entitled to SSP?**

The Revised Guidance does not appear to envisage this possibility. There are two possibilities:

(1) The furlough arrangements continued unchanged; and

(2) The employee is moved to sick leave and receives only SSP.

This does require urgent clarification. If being sick brings an end to furlough, there will be adverse consequences for employer and employee alike. The employee will likely experience a drop in income and the employer may find that the minimum three consecutive weeks of furlough have not been completed and that none of the sums paid prior to the sickness

are recoverable. Those consequences are so significant that it is difficult to envisage that that is what the Government intends. However, requiring the employee to swap to SSP will be cheaper and it would be consistent with the refusal to allow those already in receipt of SSP to be furloughed.

***Sick Pay Clarification that would be helpful***

- *Can the Government confirm that an employee who is absent sick but whose entitlement to SSP has been exhausted may be furloughed and, if so, that the HMRC will reimburse 80% of the pay they would have received had they been at work or £2,500 per month whichever is the lower?*
- *Where an employee is absent sick and has an entitlement to contractual sick pay can they be furloughed? If so, is that only where they are not entitled to SSP? If they are furloughed will the HMRC reimburse 80% of contractual sick pay only or can they be paid at their regular rate?*
- *Is it open to an employer and employee to agree that, where it is lower, contractual sick pay may be increased to the value of normal monthly income as part of any express furlough agreement?*
- *If an employee falls ill and becomes entitled to SSP whilst on furlough does that bring the furlough period to an end?*

3.6. **Can "shielding" employees be furloughed?**

**Short Answer**

Yes

**Explanation**

Government advice is that people who are at very high risk of severe illness from coronavirus because of an underlying health condition should stay at home and avoid any face to face contact. That is described as "shielding". The advice also covers people who live with people who need to shield:

> *"If you have someone else living with you, they are not required to adopt these protective shielding measures for themselves. They should do what they can to support you in shielding and they should stringently follow guidance on social distancing, reducing their contact outside the home."*[6]

[6] https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19

Since someone who is shielding is, essentially, self-isolating, one might have thought that they fell to be treated as being entitled to SSP and that they fell outside the furlough scheme. However, the Revised Guidance is clear that both shielding employees *and* those who "need to stay at home with someone who is shielding" may be furloughed.

The Revised Guidance requires that they should not be able to "work from home". However, it goes on to require that an employer would "otherwise have to make them redundant".

This last requirement is surprising. First, for the reasons that we have set out above, we do not think there is any general requirement for employees to be at immediate risk of dismissal for redundancy before they can be furloughed. There is no logical reason why shielding employees should be singled out for a more onerous test. Indeed, there is a real prospect that such a test would amount in many cases to disability discrimination. Second, when dealing with employees with caring responsibilities no similar requirement is identified and, again, there is no logical reason for a more onerous test to apply in relation to shielding employees. An employee who has to care for someone who is very ill may, on the particular facts of their case, fall into either category. We conclude that it is unlikely that the Revised Guidance intends to use the phrase "make redundant" here to mean dismiss for redundancy and that it is an inexact way of expressing the point that there would be no other tasks which the employee could be required to perform.

**Shielding Clarification that would be helpful**

- *Can the Government confirm that shielding employees (and those who live with them) can be furloughed even if they would not otherwise be at immediate risk of dismissal for redundancy?*

### 3.7. Can employees with caring responsibilities be furloughed?

**Short Answer**

Yes.

**Explanation**

The Revised Guidance provides:

> "*Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed*."

There is an existing regime which allows employees (but only employees in the narrow sense) reasonable time off unpaid to provide care in what might be called "emergencies"[7]. The furlough scheme has obvious advantages for an employee in that it covers long-term and pre-existing caring requirements and is paid.

## 4. IMPLEMENTING FURLOUGH

### 4.1. How can Furlough be implemented?

**Short Answer**

By agreement between employers and their employees or their representatives.

**Explanation**

The Revised Guidance says that

> *"Both you and your employer must agree to put you on furlough"*
> *"If you and your employer both agree, your employer might be able to keep you on the payroll if they're unable to operate or have no work for you to do because of coronavirus (COVID-19). This is known as being 'on furlough'.*
> *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."*

[7] Employment Rights Act 1996, s. 57A

The Scheme does NOT change employment law. It does not give employers a right to place an employee on furlough or a right to reduce their wages to 80%. Both contractual and statutory protections exist such as:

- the right to full notice pay (the greater of either the notice period in the contract) or 1 week of notice after one month of service and then one week for each completed year of service between 2 years up to a maximum of 12 weeks[8])
- the right not to be unfairly dismissed
- the protection from discrimination on matters such as ethnicity, gender, disability and age
- the right to a redundancy payment if the conditions are fulfilled.

The only safe method to implement furlough is by agreement.

4.2. **How do I reach agreement?**

In our experience the best way to reach agreement is by both parties being open, frank and co-operative – for the employer to explain the situation which the business is facing as a result of the pandemic, the loss of income that it is facing, the challenges ahead for the business and its aim to explain that it will want to return the employee to work as soon as the business reasonably can. The business should be clear as to how the furlough system will enable the business to weather the storm.

The agreement should cover all the terms of the furlough agreement including the level of pay. Practical Law have a useful precedent to help employers on their free, comprehensive and very useful Coronavirus pages here.

4.3. **Can an agreement be reached between an employer and employees' representatives that applies to everyone at work?**

**Short Answer**

[8] Section 86 Employment Rights Act 1996

Yes, but only if there is a collective agreement which is incorporated into individuals' terms and conditions.

**Explanation**

This is an option where an employer has a collective agreement which is incorporated into individual workers' terms and conditions. If there is a collective agreement that covers a group of staff and that agreement extends to pay, terms and conditions then changes to the collective agreement will change the individual employment contracts. A change to the collective agreement as to furlough will be effective for the whole relevant group of employees whether the individual members of staff agree or not, and whether the staff are members of the union or not. Absent a collective agreement which is incorporated into individuals' contracts of employment, those contracts cannot be varied by an agreement with union or other representatives because the rights are individual contractual rights.

4.4. **Can a furlough be imposed by an employer on employees?**

**Short Answer**

Generally, no because an employee has a right to pay for being ready and willing to work. It may be possible where the contract of employment contains an unambiguous clause entitling an employer unilaterally to vary terms. However, there is considerable controversy as to whether the use of any variation clause in such circumstances would be lawful.

**Explanation**

Agreement between employer and employee is the only low risk way forwards. Some employers have a clause in their contract that purports to allow them to make changes to pay, and to terms and conditions. It is drafted so as to give them wide powers. If the clause unambiguously covers the changes required by furlough such as the need not to work and the ability to reduce pay then this may be an effective mechanism[9]. The use of these clauses will always require expert and fact-specific advice. There is no

[9] *Bateman v ASDA Stores Ltd [2010] IRLR 370*

consensus in employment law that a variation clause could properly be used to place employees on furlough where e.g. this results in a reduction in pay.

4.5. **What happens when no agreement is reached in respect of furlough?**

**Short Answer**

Unless a variation clause can be used then, in the absence of agreement the employee cannot be placed on furlough against their will. The employee will retain their right to normal contractual pay. Neither, according to the Revised Guidance, can the employee compel the employer to place them on furlough: under the Scheme the decision is for the employer alone.

**Explanation**

The employee does not lose their normal rights by refusing to go on to furlough. The Revised Guidance says that

> ***"If [the employee does] not want to go on furlough***
> *If your employer asks you to go on furlough and you refuse you may be at risk of redundancy or termination of employment, depending on the circumstances of your employer. However, this must be in line with normal redundancy rules and protections."*

Putting an employee on 80% pay and instructing them to do no work without agreement or without properly using a variation clause would be likely to open the employer up to several claims. In this situation the employer might instead consider dismissing the employee for redundancy or another reason such as the need to save the business.

If 80% pay and furlough was imposed without agreement the employee would, broadly, have three options –

Option 1 Treat themselves as dismissed and claim full notice pay (contractual or statutory) and unfair dismissal (including potentially any contractually enhanced redundancy pay);

Option 2 Treat themselves as dismissed but then accept the furlough and claim for unfair dismissal[10];

[10] *Hogg v Dover College [1990] ICR 39 EAT / Alcan Extrusions v Yates [1996] IRLR 327*

Option 3 Make it clear that the reduction in pay is not accepted and then claim the reduction either contractually or as an unlawful deduction of wages.

Depending on the facts of the case the employer may be able to make the employee redundant and or terminate the contract of employment. The employee may be able to make claims for constructive unfair dismissal and or unfair dismissal. Depending on the facts an Employment Tribunal may find that the dismissal is fair or unfair.

4.6. **What about frustration?**

**Short Answer**

This is not a matter addressed in the Revised Guidance. It is a controversial doctrine in employment law. Even if potentially it might apply, its application to dismissals in relation to coronavirus is uncharted territory.

**Explanation**

Sometimes an unanticipated event which is not the fault of either party either makes it impossible to perform their contractual obligations or so radically affects what is required in order to perform them that the law treats the contract as having been "voided" and the parties are released from their obligations. This is known as "frustration".

Although the doctrine of frustration has been applied in Employment Law contexts[11] its proper application is a matter of considerable controversy and one on which we have ourselves found it difficult to reach any consensus. A finding that a contract of employment has been frustrated will depend to such an extent on the particular circumstances of the relevant employer that it would not be appropriate in this document to try to give specific guidance.

[11] Examples of frustration in employment law include a shipfitter who was off work due to illness for 18 months (*RA Marshall v Harland & Wolff [1972] IRLR 90*), a joiner off work with angina for 8 months (*W Scarr v FW Goodyear & Sons [1975] IRLR 166*), a carpenter who could never work again due to an injury (*GF Sharp & Co Ltd v McMillan [1998] IRLR 632*), a fitter who was off work with dermatitis for 21 months (*Hart v Marshall & Sons [1977] IRLR 51*) and a teacher who was jailed for 12 months (*Harrington v Kent County Council [1980] IRLR 353*). In light of the statutory procedures which govern dismissals and the protection of discrimination law against disability discrimination, the doctrine has rarely been applied in recent years.

In particular, it would likely depend on something that we cannot presently assess; how long the present crisis will continue. To illustrate the point, an employer might feel that an instruction from the Government to close its shops is a clear example of a "frustrating event", but employees may feel that the existence of the Scheme itself allows for the employment relationship to continue for the present and saves the contract from frustration. Whilst there is no consensus in employment law one way in which to approach the question may be rephrase a sickness test that has stood the test of time[12] the question for the employer, employee and ultimately the courts may be

> *Was the effect of the pandemic of such a nature, or did it appear likely to continue for such a period, that further performance of the obligations in the future would either be impossible or would be anything radically different from that undertaken under the agreed terms of the employment?*

4.7. **Can a person who has left their employment be re-employed and then be put on furlough?**

**Short Answer**

Yes, provided that they were on the employer's PAYE system on 28 February 2020.

**Explanation**

The Revised Guidance provides:

> "*If you made employees redundant, or they stopped working for you on or after 28 February 2020, you can re-employ them on furlough and claim for their wages through the scheme*".

4.8. **If an employer re-employs and furloughs employees, can the employee receive backpay and can the employer reclaim it?**

**Short Answer**

Yes.

[12] *Marshall v Harland and Wolff Ltd (No 2) [1972] ICR 97*

**Explanation**

The Revised Guidance provides that:

> "*Claims can be back-dated until 1 March where employees have already been furloughed*".

The Chancellor suggested that it would be possible to re-employ dismissed employees and backdate the furlough when he first introduced the scheme. It appears, therefore, that backdated claims are possible. However, the scheme is a "reimbursement" scheme so that you cannot reclaim sums that have not been paid. Nothing compels an employer to re-engage and backdate pay but they should bear in mind that the Scheme requires that a furlough should last for a minimum of three consecutive weeks. If, therefore, they re-engage employees on 11 May 2020 and don't backdate and the Scheme ends on 31 May 2020 as presently planned, none of the sums paid to the employees will be reimbursed.

4.9. **Does the re-engaged employee have to re-pay any termination payment that they may have received?**

**Short Answer**

There is no legal obligation to do so. What should happen is a matter left for agreement between the parties.

**Explanation**

Employees who have been dismissed for redundancy may have received statutory or contractual redundancy payments. A dismissed employee may also have received pay in lieu of notice (a "PILON"). They may have received a payment to compensate them for accrued but untaken holiday pay. Less commonly, they may have received payments pursuant to long term incentive plans or employee share ownership plans. Do they have to give the money back? The Scheme does not require them to do so. Nor, is there any obligation to do so under Employment Law more generally.

The terms on which an employee is re-engaged is a matter for agreement between the employer and employee.

**4.10. Can an employee compel a former employer to re-engage them?**

**Short Answer**

No. The decision to re-engage and to furlough is for the employer.

**Explanation**

An employee cannot compel a former employer to re-engage them. However, employers should be aware that, like any recruitment decision, a refusal to do so may give rise to allegations of discrimination if some but not all former employees are taken back.

**4.11. What should be dealt with in a re-engagement agreement?**

As suggested above, the agreement should deal with whether the furlough will be "backdated" and what account should be taken of any termination payments. Broadly, the contents of a re-engagement agreement should match those of a furlough agreement (for a link to a free model agreement see Para 4.2 above).

Parties should bear in mind that, once re-engaged, employment will continue beyond the end of the Scheme, unless the agreement provides otherwise. The employer may wish to consider, therefore, a clause which provides for the term of the employment to be fixed by reference to the continuation of the Scheme, though the employee will benefit from his normal legal rights, including those applicable to fixed-term employees. Similarly, if the employer proposes that employees move in and out of furlough, potentially to spread the burden or benefit of furlough where the entire workforce is not furloughed, express provision to this effect will have to be agreed.

**4.12. If an employee is re-engaged will their continuity of employment cover both the original and the new period of engagement?**

**Short Answer**

Not necessarily. It will be lost if the gap is more than one week, unless one of the statutory bridges in s.212 of ERA applies.

**Explanation**

If more than a week has passed without there being a contract of employment, continuity is lost and it is not open to the employer and employee to preserve statutory continuity of employment by agreement[13]. The statutory provisions on continuity are highly complex and in the event of specific questions arising about whether it has been preserved or broken, specialist advice should be sought.

**Re-employment/engagement Clarification that would be helpful**

- *Can the Government confirm that if an employee is re-employed and their furlough back-dated, that the period of back-dating counts towards the minimum period of three consecutive weeks provided for in the Scheme?*
- *If an employee is re-engaged and agrees that any termination payment should be set off against the pay that would otherwise be due, does that count as pay for the purposes of:*
    - *the Scheme's requirement to pay at least 80% of regular pay or £2,500 whichever is the lower;*
    - *the employer's right to reimbursement?*

## 5. COLLECTIVE CONSULTATION

### 5.1. Is a duty consult under S.188 of TULRCA engaged where furlough is proposed.

**Short Answer**

No, but the duty may be triggered so long as the employer is considering ("proposing") making 20 or more employees redundant if furlough cannot be agreed.

**Explanation**

Assuming that there is only an intention to seek agreement from relevant workers to agree to the variations to their contracts in order to place them on furlough the duty in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) would not be engaged.

[13] Employment Rights Act 1996, ss. 210 and 212(1)

Inevitably, a furlough agreement will have to cover pay and hours. For that reason, if the employer recognises a trade union for the purposes of collective bargaining on those matters, the employer should open discussions and negotiations with the relevant trade union representatives. Even absent this, good industrial relations would dictate the involvement of the union or any employee representative forum.

In relation to the duty under s.188 TULRCA, the critical issue is what the employer is proposing as the strategy if furlough cannot be agreed. If its strategy would be to make more than 20 people at one establishment redundant, the duty to consult under s.188 would be engaged. As noted above, there is some ambiguity as to whether redundancy has to be the alternative for the furlough scheme to be engaged at all, and for this reason too it would be better if this were clarified as soon as possible.

If there is any uncertainty about whether redundancies are proposed, an HR1 form should be filed, and a covering letter can make the intentions clear.

Proposed redundancies can arise where there is a risk of no agreement so that dismissals may ensue[14]. The duty is to consult representatives "with a view to reaching agreement" about matters such as ways of "avoiding the dismissals". The possibility of furloughing may well be relevant to this duty.

Sometimes this may present practical problems. Assuming that there is a pressing, sudden and unexpected economic need to place the workers on furlough and the practicalities of consultation make elections unworkable this might amount to special circumstances rendering full compliance not reasonably practicable.[15].The question is inevitably fact-specific, however,

[14] *Hardy v Tourism South East [2005] IRLR 242*
[15] *Keeping Kids Company v Smith and Secretary of State [2018] IRLR 484*

and it remains necessary for the employer to take all the steps it reasonably practicably can to comply with the duty, even if full compliance is not possible. They may involve briefings to the workforce and their union or other representatives on platforms such as Zoom or Facebook or conference call.

Ultimately if workers agreed to furlough it is arguable they would not be entitled bring a claim for a protective award under S.188 although this raises issues which are beyond our consensus.

**Collective Consultation Clarification that would be helpful**

- *Does an employee's redundancy have to be proposed before they can be placed on furlough or need there be no need to make the employee redundant nor any proposal to do so before they can be placed on furlough.*

## 6. TUPE & FURLOUGH

### 6.1. Can employees be TUPE'd into an employer and be placed on furlough after the 28th February 2020?

**Short Answer**

The position is unclear and clarity may be forthcoming. On a literal reading of the Revised Guidance they cannot be.

**Explanation**

A requirement of the scheme is that the employees were on the employer's PAYE scheme on 28th February 2020. Although for the purposes of TUPE an employee is treated as if they were always employed by the transferee this is not the case for the purposes of PAYE. Under PAYE the transferred employee only comes onto the PAYE roll of the transferee at the point of the transfer.

On the face of Revised Guidance then the transferee would be unable to place them on furlough, even if they had been furloughed by the transferor.

If they had been furloughed by the transferor the transferee would take the employees subject to their varied terms and conditions so that they would be entitled to the varied pay and the transferee would be liable for this and would not be able to claim this back under the scheme.

On 6 April HM Treasury confirmed to David Johnston MP that employees who transferred after 28th February 2020 can be placed on furlough. The Revised Guidance does not yet confirm this.

**TUPE Clarification that would be helpful**

- *Confirmation in the Guidance that employees who enter onto an employer's PAYE after 28th February 2020 as a consequence of the transfer of an undertaking under the Transfer of Undertakings (Protection of Employment) Regs 2006 can be placed on or continue on furlough.*

## 7. OPERATION OF FURLOUGH

### 7.1. When does a claim start?

**Short Answer**

When the worker starts furlough, although the claim may, if the worker has agreed and was not working or providing services at that point, be backdated to include pay from 1st March 2020.

**Explanation**

A claim does not start until the employee finishes work. It does not start from the date that they were notified.

> "*Claims should be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they written to confirming their furloughed status."*

Whilst an employee can do no work for the employee who has furloughed them, they can do work for others as we set out below.

A claim can be backdated as long as the employee started furlough from the backdated date. The Revised Guidance says that

*"Claims can be backdated until the 1 March where employees have already been furloughed."*

7.2. **Does the employee lose any employment rights by being put on furlough?**

**Short Answer**

No, the worker only loses the ability to work, and depending on the contents of the agreement, the right to receive full pay.

**Explanation**

The Revised Guidance is clear and says

*"Your rights as an employee are not affected by being on furlough, including redundancy rights."*

7.3. **Can the employee do any work during furlough?**

**Short Answer**

No, the employee can do no work whatsoever for the employer who has put them on furlough save for training. The employee can work for others, however, and can receive training.

**Explanation**

This is an anti-abuse measure. The Revised Guidance is clear

*"Once you are on furlough you will not be able to work for your employer…[including]*

- *making money for your employer or a company linked or associated to your employer*
- *providing services to your employer or a company linked or associated to your employer*

*Employees must not work or provide any services for the business while furloughed, even if they receive a top-up salary."*

No "de minimis" exception has been included in the Revised Guidance to deal with trivial instances of actions which might, on a strict reading, constitute work. Further, HMRC has called for employees to report any abuse of the system by employers who make employees work.

7.4. **How much pay is the employee entitled to?**

**Short Answer**

That depends on what you have agreed, or what you have varied the entitlement to if you have a variation clause. Remember, the Scheme does not change employment law, so the existing contractual rights remain. The Scheme sets a minimum of the lower 80% of their regular wage or £2,500.

**Explanation**

The agreement / variation to furlough is between the employer and the employee. The Government is agreeing to refund the employer up to 80% of qualifying wages up to a maximum of £2,500 per month.

7.5. **Can the employer pay the full wage?**

**Short Answer**

Yes, and it may be required to do so as a matter of contract.

**Explanation**

The employer can pay full pay but it will only receive a refund from the Government of up to a maximum of the lesser of 80% of wages or £2,500 per month. The employer will have to fund the difference.

7.6. **Should the furlough agreement be in writing?**

**Short Answer**

Yes. This is a condition of the scheme.

**Explanation**

The Revised Guidance says that

> *"Once agreed your employer must confirm in writing that you have been furloughed to be eligible to claim. Contact your employer if you do not receive confirmation."*

This is a condition of the scheme. It is also sensible. There is less uncertainty as to that which was agreed. Both the employer and the employee know where they stand. The document shows what the agreement is.

A written agreement is also essential because, without an agreement in writing an employee may be able to claim that any reduction in salary is an unlawful deduction of wages. If the employee has signed an agreement or consented to a written agreement for the reduction of their wages then no deduction can be claimed.[16] The Guidance also makes clear that HMRC may retrospectively audit claims and records should additionally be kept for this purpose.

7.7. **What can the employer re-claim?**

**Short Answer**

80% of the employees' wages up to a maximum of £2,500. There is a method for addressing variable pay. The reimbursed sum includes the minimum automatic enrolment employer pension contributions on the subsidised wage and the employer's national insurance contributions .

**Explanation**

The employer can claim these amounts, it cannot claim additional amounts such as the top up to 100% or any additional pension contributions it makes.

If the employee's pay has varied in the previous pay periods then one looks, where the employee has been employed for 12 months or more, at the highest of:

- The same month's earnings in the previous year
- The average monthly earnings for the tax year 2019-2020.

If the employee has been employed for less than 12 months then their pay is based on their average monthly earnings since they commenced work.

If they only started in February then the Revised Guidance says one works out a pro-rata sum for their employment thus far. This must presumably be only to the point at which they have more than one month's pay before being placed on furlough, in order than an average can be determined.

[16] Sections, 23 & 13 Employment Rights Act 1996

The employer can claim the employer's national insurance but only on the furlough pay allowance, not on any top up.

The average process will embrace overtime, fees and what are described as compulsory commission payments. This appears to be contractually obligated commission. All of these are included if part of regular payments and the employer is obliged to pay them.

Discretionary payments such as bonuses (and discretionary commission) and, expressly, tips are not included in the calculation. The precise meaning of discretionary commission is unclear. Non-cash payments such as benefits which the employee receives such as free travel are not included, even though they are benefits the employee will be taxed on.

It clearly will be a matter for the consensual variation whether it is agreed that the employee will no longer receive these benefits. If those obligations are not varied the employee remains entitled to receive those benefits whilst on furlough and the employer will not be able to re-claim their cost.

If the employee has sacrificed salary to receive benefits then it is only the reduced salary which may be used for the purposes of the calculation of furlough. However, the Revised Guidance indicates that HMRC accepts that COVID-19 is a life event which would enable a valid variation on a salary sacrifice scheme outside the normal annual cycle. This would enable an employee to restore their salary to a higher level for the purposes of furlough, although they would lose the benefits. This would be in the interests of the employer as they can recover the increased salary but not the cost of the benefits.

Both the Apprenticeship Levy and Student Loans should continue to be paid as usual. Grants from the Job Retention Scheme do not cover these.

Whilst the sums that can be reclaimed are not entirely consistent (or necessarily logical) it would appear that the Treasury's concern is to ensure that sums being reclaimed can be properly audited after the event to prevent abuse. That may explain why only contractually certain sums that should be capable of being evidenced in writing can be claimed.

**Clarification on repayment**

- *What is meant by "discretionary commission"?*

7.8. **Can an employer undertake training on furlough?**

**Short Answer**

Yes.

**Explanation**

The scheme says that

*"Once you are on furlough….You can undertake training*"

Whilst an employee is training then they must be paid the statutory minimum way NMW even if this means that the employer has, themselves to top up the wages above the 80% level. The Revised Guidance says that

> *"If workers are required to, for example, complete training courses whilst they are furloughed, then they must be paid at least their appropriate minimum wage (NLW, NMW or AMW) for the time spent training, even if this is more than the 80% of their wage that will be subsidised.*

Records of the time the employees are required to undertake training will have to be kept. Note that providing training is likely to constitute work.

7.9. **Is the National Minimum Wage due in furlough?**

**Short Answer**

No, unless the employee is training as set out above.

**Explanation**

In some cases, the effect of the furlough scheme is that the employee will be receiving less than the amount of the NMW for the hours they previously worked.

However, it is central to the scheme that they are not working or rendering services to the employer and therefore there is no obligation to pay NMW. The position is different if the employer requires the employee to undertake training in the furlough period as set out above.

### 7.10. Can an employee volunteer to work elsewhere?

**Short Answer**

Yes.

**Explanation**

The Revised Guidance expressly addresses this question and confirms that an employee can volunteer elsewhere when on furlough.

> ***If your employee does volunteer work***
> *A furloughed employee can take part in volunteer work, if it does not provide services to or generate revenue for, or on behalf of your organisation. Your organisation can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance.*

The employer just needs to ensure that there is no disguised benefit to the them.

### 7.11. Can an employee work for another employee?

**Short Answer**

Yes.

**Explanation**

This was a surprise under the Revised Guidance which expressly allows for this if the contract allows it.

> *If contractually allowed, your employees are permitted to work for another employer whilst you have placed them on furlough.*

If a second business is taking on any employees furloughed by another business then the second business should ensure they complete the starter checklist form correctly which, in the case of an employee furloughed by another business would involve completing Form C.

There is uncertainty over what "contractually allowed" means. This part of the Revised Guidance might mean that an employee can be better off once furloughed by earning a second wage. If "contractually allowed" is an anti-abuse measure this would suggest that there should be no prohibition against working for another employee in the contract of employment which should be in writing. If "contractually allowed" is given its natural expression then, even if there is a prohibition against working for others in the written contract of employment then it would be capable of consensual variation by the employer. On balance we favour the second approach but acknowledge the uncertainty.

**Second Employment Clarification that would be helpful**

- *Does "contractually allowed" work for another extend only to a contract with no prohibition to work for another prior to 28 February 2020 or does it also extend to a contract which is varied by the employee and the employer to allow the employee to work for another after 28 February 2020?*

7.12. **Can an employee be rotated on and off furlough?**

**Short Answer**

Yes, if our view is correct as to a redundancy situation not being required and as long as each period of furlough is for a minimum of three weeks.

**Explanation**

The Revised Guidance says that

> *"If your employer chooses to place you on furlough, you will need to remain on furlough for a minimum of 3 consecutive weeks. However, your employer can place you on furlough more than once, and one period can follow straight after an existing furlough period,*

*while the scheme is open. The scheme will be open for at least 3 months."*

It is open to an employer and employee to agree that some employees go on to furlough as others continue to work and that staff can rotate on and off furlough. All that is required is that each period of furlough be for a minimum period of 3 weeks.

### 7.13. What if the employee is on one of the forms of statutory leave?

**Short Answer**

The normal rules for maternity and other forms of leave apply. Enhanced contractual payments to employees can be claimed under the scheme.

**Explanation**

The Revised Guidance expressly provides that

> *The normal rules for maternity and other forms of parental leave and pay apply.*
> *You can claim through the scheme for enhanced (earnings related) contractual pay for employees who qualify for either:*
> - *maternity pay*
> - *adoption pay*
> - *paternity pay*
> - *shared parental pay*

### 7.14. Does the Scheme Apply to Holiday Pay?

**Short Answer**

Probably, yes

**Explanation**

The Revised Guidance does not deal explicitly with the reimbursement of payments in respect of holiday, though it states that it will apply to those who started unpaid leave after 28 February 2020. In recent questions and answers HMRC referred to the ACAS Guidance[17] on coronavirus and holidays, which has no statutory force, but which in any event does not explain if the Scheme applies. It seems the logic of the Scheme is that it should reimburse payments in respect of annual leave (which are paid via

[17] See https://www.acas.org.uk/coronavirus/using-holiday

PAYE just like any other wages); but it would be helpful if this were clarified.

The intersection of rights to paid annual leave and furlough has already generated much controversy. It is important to emphasise that none of these rights is affected by the Scheme. Under the Working Time Regulations ("WTR"), implementing the EU Working Time Directive, every worker has a right to 5.6 weeks' annual leave. Payment in respect of that annual leave must comply with the complicated rules on a week's pay in ss 221-234 of ERA. Broadly, these rules depend on whether a worker has "normal working hours" or not. In addition, the CJEU and domestic courts have decided that pay in respect of the four-week entitlement in regulation 13 must correspond with a worker's "normal remuneration", which may be more than provided for under the statutory formula and so may include matters such as commission payments and overtime payments.[18] Finally, workers may have contractual rights to paid annual holiday which replicate or go beyond those in the legislation.

The Working Time (Coronavirus) (Amendment) Regulations 2020, SI 2020/365, now allow a worker to carry forward the four weeks' annual leave conferred by regulation 13 into the next two leave years where it was not reasonably practicable to take it owing to the effect of Coronavirus, "including on the worker, the employer or the wider economy or society".

There are continuing debates concerning (for example) whether or not an employer can direct a worker to take annual leave during furlough and, in some cases, how pay in respect of annual leave is to be calculated.[19] Employers and workers should be aware of these difficult legal issues, even though they are beyond the scope of the Scheme.

[18] See e.g. *Bear Scotland v Fulton* [2015] ICR 221, EAT; *Lock v British Gas* [2017] ICR 1, CA.
[19] See e.g. David Reade QC and Daniel Northall at https://www.lexisnexis.co.uk/blog/covid-19/the-coronavirus-job-retention-scheme-more-holiday-cancellations; Alan Bogg and Michael Ford QC https://uklabourlawblog.com/2020/04/06/furloughing-and-fundamental-rights-the-case-of-paid-annual-leave-by-alan-bogg-and-michael-ford/

***Holiday Pay Clarification that would be helpful.***

- *Does the Scheme reimburse payments made in respect of paid annual leave during 'furlough'?*

7.15. **What are the Mechanics of a claim?**

**Short Answer**

A claim will have to be submitted through an HMRC portal. The Chief Executive of HMRC that the portal will be open on 20 April and that payments will start on 30 April 2020.

The Revised Guidance sets out only the basic information that must be provided and the employees must have agreed to and been placed in furlough before the claim is made.

**Explanation**

The Revised Guidance sets out the basic information which will be needed:

- The employer's ePAYE reference number;
- the number of employees being furloughed;
- the claim period (start and end date);
- amount claimed (per the minimum length of furloughing of 3 consecutive weeks);
- the employer's bank account number and sort code, this must be a UK bank account;
- the employer's contact name;
- the employer's phone number.

The employer will have to do the maths on calculating the amount of the claim. It will be necessary to keep records of the calculation as the Revised Guidance indicates that HMRC may retrospectively audit a claim.

The claims can only be submitted once every three weeks, the implication is that this is per employer and the entirety of the workforce on their PAYE.

The Revised Guidance indicates that the claim should be made on the basis of the payroll which is to paid and the amounts included on the pay roll, on the basis that the variations have been agreed. This can clearly look back, on the first claim, as it is clear that the claim can be backdated to 1st March, if the employees were not working from that date.

The claims can only be made once every three weeks. Therefore in the case of weekly paid staff the employer will be covering the cost until the claim is submitted and further in all cases until payment (as is the case with monthly staff). Payment is made to the stipulated bank account but there is no indication of the time scale for payment other than that it is said that all claims will be processed before then scheme ends. In the first instance we know the scheme is intended to last for 3 months.

## 8. ISSUES ON WHICH CLARIFICATION IS SOUGHT

8.1. The Coronavirus pandemic has created uncertainty and worry. We understand the speed at which Government has moved to bring the Scheme forwards in such a short period of time. However, businesses, workers and advisers would benefit from the certainty that clarification of the following issues would bring in the next iteration of the Guidance:

8.1.1. *Are payments of via PAYE pursuant to the IR35 legislation treated as relevant income for the purpose of furloughing?*

8.1.2. *Can the Government confirm that it will not disallow (or later reclaim) reimbursement where an employer is unable to demonstrate that the employee would have been dismissed for redundancy had they not been furloughed?*

8.1.3. *Can the Government confirm that an employee whose fixed-term contract has been allowed to expire may, nevertheless, be re-engaged and furloughed?*

8.1.4. *Can the Government confirm that an employee who is absent sick but whose entitlement to SSP has been exhausted may be furloughed and, if so, that the HMRC will reimburse 80% of the pay they would have received had they been at work or £2,500 per month whichever is the lower?*

8.1.5. *Where an employee is absent sick and has an entitlement to contractual sick pay can they be furloughed? If so, is that only where they are not entitled to SSP? If they are furloughed will the HMRC reimburse 80% of contractual sick pay only or can they be paid at their regular rate?*

8.1.6. *Is it open to an employer and employee to agree that, where it is lower, contractual sick pay may be increased to the value of normal monthly income as part of any express furlough agreement?*

8.1.7. *If an employee falls ill and becomes entitled to SSP whilst on furlough does that bring the furlough period to an end?*

8.1.8. *Can the Government confirm that shielding employees (and those who live with them) can be furloughed even if they would not otherwise be at immediate risk of dismissal for redundancy?*

8.1.9. *Can the Government confirm that if an employee is re-employed and their furlough back-dated, that the period of back-dating counts towards the minimum period of three consecutive weeks provided for in the Scheme?*

8.1.10. *If an employee is re-engaged and agrees that any termination payment should be set off against the pay that would otherwise be due, does that count as pay for the purposes of:*

- *the Scheme's requirement to pay at least 80% of regular pay or £2,500 whichever is the lower;*
- *the employer's right to reimbursement?*

8.1.11. *Does an employee's redundancy have to be proposed before they can be placed on furlough or need there be no need to make the employee redundant nor any proposal to do so before they can be placed on furlough?*

8.1.12. *Can employees who enter onto an employer's PAYE after 28th February 2020 as a consequence of the transfer of an undertaking under the Transfer of Undertakings (Protection of Employment) Regs 2006 can be placed on or continue on furlough?*

8.1.13. *What is meant by "discretionary commission"?*

8.1.14. *Does "contractually allowed" to work for another extend only to a contract with no prohibition to work for another prior to 28 February 2020 or does it also extend to a contract which is varied by the employee and the employer to allow the employee to work for another after 28 February 2020?*

8.1.15. *Does the Scheme reimburse payments made in respect of paid annual leave during 'furlough'?*

8 April 2020 v.1

This document does not constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the Scheme but liability for reliance on the views expressed is excluded.