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# FURLOUGH UPDATE - THORNY ISSUES AS WE COME OUT OF LOCKDOWN

**Mike Cole**  
**Partner**



# Returning to Work

- The Government is now encouraging those who cannot work from home, to return to work.
- That does not mean the Furlough scheme has ended.
- The Furlough scheme has been extended to the end of October.
- It will remain the same until the end of July.
- From 1 August the Chancellor has said that employers “will have to contribute to the cost”.



# How will the Scheme be run down?

- June and July: The government will pay 80% of wages up to a cap of £2,500 as well as employer National Insurance (ER NICs) and pension contributions. Employers are not required to pay anything.
- ***BUT***
- The scheme is now closed to new entrants.
- Employees who have been furloughed before 10<sup>th</sup> June, can be furloughed again.
- N.B. Special rules for those on family leave.



# How will the Scheme be run down?

- August: The government will pay 80% of wages up to a cap of £2,500. Employers will pay ER NICs and pension contributions – for the average claim, this represents 5% of the gross employment costs the employer would have incurred had the employee not been furloughed.

# How will the Scheme be run down?

- September: The government will pay 70% of wages up to a cap of £2,187.50. Employers will pay ER NICs and pension contributions and 10% of wages to make up 80% total up to a cap of £2,500. For the average claim, this represents 14% of the gross employment costs the employer would have incurred had the employee not been furloughed.



# How will the Scheme be run down?

- October: The government will pay 60% of wages up to a cap of £1,875. Employers will pay ER NICs and pension contributions and 20% of wages to make up 80% total up to a cap of £2,500. For the average claim, this represents 23% of the gross employment costs the employer would have incurred had the employee not been furloughed.

# “Flexible Furlough”

- From **1 July 2020**, in the biggest change to current scheme rules, the CJRS can be accessed more flexibly.
- From that date, Furloughed employees can be brought back to work part-time, *“for any amount of time and any shift pattern”*.
- Employers must pay in full, as normal, for any hours the employee works.
- The CJRS will continue to fund the remainder of their normal hours which are not worked.



# Flexible Furlough

- To make this work in practice, employers will be required to report hours worked, as well as the usual hours an employee would be expected to work in a claim period.
- Importantly, from 1 July 2020, claims to the CJRS are no longer permitted to straddle different calendar months.





# Flexible Furlough

- Government guidance states that “*the cap will be proportional to the hours not worked*”. For example, in July, where the cap is £2,500, the maximum claim for some one who works 2 days in a week would be £1,500. More specific detail on this is expected today!
- Any new flexible furlough arrangements must be agreed with the employee and confirmed in writing.



# How do we end Furlough?

- Most employers will have a written agreement setting out the terms of the furlough.
- Some of those will have included terms regarding reviewing furlough or giving notice to come back to work.
- Review the terms of the agreement and follow those terms.
- In the absence of any written terms regarding returning to work, try to give as much notice as possible.
- Avoid discriminating on grounds of any protected characteristics when deciding who should come off furlough.



# How do we end Furlough?

- Furlough must have lasted for at least 21 days to entitle employer to claim grant back from HMRC.
- Return to work will be at normal pay and benefits (unless agreed otherwise).
- If seeking to agree other changes to contract, or make redundancies after furlough, it should be possible to consult with employees whilst on furlough.
- Consultations can be done remotely if necessary, but more difficult if consulting collectively



# Reducing costs

- Employment costs are fixed.
- An obvious cost to seek to reduce in periods of low demand.
- Can be done by:
  - Making redundancies
  - Agreeing temporary (or permanent) changes with employees.
- The Furlough scheme is a “Job retention scheme”.
- However, this does not preclude employers from making other changes (including redundancies).



# Redundancies

- Risks:
  - Claims (unfair dismissal, discrimination, protective awards)
  - Cost of redundancies (enhancements and settlement agreements).
  - Morale
  - Publicity
- Benefits:
  - Longer term “right sizing”.
  - Reducing cost base – certainty of no claims is using settlement agreements.
  - productivity

# Redundancy

- Employees with more than 2 years employment will be able to claim unfair dismissal.
- Employees dismissed for raising “health and safety” concerns or because of “whistleblowing” do not need 2 years employment and compensation will be unlimited.
- Have a well thought through business case in writing before announcing any **proposals**.
- Ensure that no “decisions” are taken before the end of consultation.



# Redundancy –unfair dismissal

- Defence of any claims will depend on:
  - Was it a genuine redundancy?
  - Was the procedure reasonable?
    - Did you seek ways of avoiding compulsory redundancy?
    - Did you consult with affected employees before giving notice? (2-3 meetings at least)
    - Did you consider the “pool” of employees.
    - Did you select fairly from that pool.
    - Did you use non-discriminatory criteria for selecting.
    - Did you consider alternative employment?
    - Did you consider furlough?



# Redundancy – protective awards

- Collective consultation required if more than 20 redundancies are “proposed”.
- Form HR1.
- Consultation with “appropriate representatives” (can be furloughed employees).
- Time for election.
- Must be meaningful consultation with a view to reaching agreement.
- Must last for 30 days (if up to 100) or 45 days if 100 or more are proposed.





# Redundancy – protective awards

- Employees can claim up to 90 days pay.
- Awards are “punitive” and not compensatory.
- ET’s are supposed to start at the maximum and determine how far the default went.
- Arrive at a “just and equitable” amount.



# Changing Terms

- Contracts cannot be changed by 1 party.
- “variation clauses” cannot be used for fundamental terms like pay, hours etc.
- Options:
  - Impose change and wait to see what happens (risky).
  - Seek to agree changes – reach agreement and vary.
  - Dismiss and re-engage after seeking to agree.
  - Consultation obligations where you may dismiss more than 20 are the same as for collective redundancies.



# Holidays

- Accrue as normal during Furlough.
- The problem of not taking holidays.
- Can employees use holidays for “rest and relaxation” whilst on Furlough?
- Options:
  - Refuse requests to cancel already booked holidays.
  - Request that employees take a % of their holidays by certain dates.
  - Refuse requests to take holidays (contractual term).
  - Require employees to take holiday under WTR rules.



# Vulnerable and Extremely Vulnerable Employees

- Government guidance has changed for those who are extremely vulnerable:
- <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#work-and-employment-for-those-who-are-shielding>

# Vulnerable and Extremely Vulnerable Employees

- Vulnerable Employees:
  - <https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing>.
  - What if vulnerable employees don't want to return to work?
  - Furlough not now available for new entrants.
  - Have you followed Government guidelines?  
(<https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>)
  - Reallocation of tasks to enable working from home?
  - Possibility of sick leave.
  - Unpaid leave?
  - Is it unauthorised absence?
  - **Beware unfair dismissal claims for raising protected disclosures/raising Health and Safety concerns.**





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