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COVID-19 BUSINESS SUPPORT

Job Retention Scheme

1 - Introduction

This report covers the introduction and implementation of the Coronavirus Job Retention Scheme.

The full details can be found at: https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention- scheme

Our summary of this scheme is not a replacement for reading the full guide and is not a substitute for tailored advice.

Addressing first the most popular question that we have had about the scheme to date, how do you pronounce the word furlough? Our take on this is 'fur low'.

Coverage of the Scheme

The Chancellor, Rishi Sunak, announced details of the scheme during a live broadcast to the nation on Friday 20th March 2020. The scheme is described as being "designed to support employers whose operations have been severely affected by coronavirus (COVID-19)." Introduced to help UK businesses cover employee costs due to the anticipated downturn in work as a result of COVID-19, in an attempt to avoid businesses having to implement lay-offs and/or redundancies – "any employer in the country – small or large, charitable or non-profit".
The scheme is temporarily running from 1st March 2020 and will run for a minimum 3 months. It may be extended. It is confirmed that all UK businesses with a PAYE scheme are eligible to benefit from the scheme, to access support to continue paying part of their employees' salary for those that would otherwise have been laid off. The guidance from the government currently states that for a business to access the scheme, it needs to:

- designate affected employees as 'furloughed workers,' and notify their employees of this change - changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation
- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal. HMRC are working urgently to set up a system for reimbursement. Existing systems are not set up to facilitate payments to employers.

The scheme states that HMRC will reimburse 80% of furloughed workers' wage costs, up to a cap of £2,500 per month. This will apply to employees who have been asked to stop working, but who are being kept on the business' payroll, and they will be described as "furloughed workers". This has been implemented specifically to safeguard workers from being made redundant.

It is likely that many employers will be able to demonstrate that their operations have been 'severely affected'. We do not know how closely the scheme will look at the extent of such disruption as a precursor to qualification.

There is no reference to the employer's affordability to pay wages being linked to qualification of the scheme.

2 - The Legal Position

The term “furloughed” is not currently defined as part of employment law legislation. The term “furloughed” is being used in a similar sense to “lay-off”, which is an already established term within current employment law legislation. Lay-off allows an employer to provide no work to an employee, and therefore no pay.

For an employee to enforce a lay-off, an express clause within the employee’s contract of employment is required. In the absence of this, an agreement between both parties will need to be reached. The government guidance reflects this principle with reference to furloughing workers as it would mean the employer changing the status of an employee and would therefore be subject to existing employment law.

If an employee does not agree to being furloughed, it is unclear what would happen if the business continues to unilaterally imposed a "furlough", as this in effect amounts to a change in contractual terms. Traditionally, given such a change would involve providing no work and potentially reducing pay, this would give an employee the option of resigning and claiming constructive unfair dismissal. Alternatively, the employee could remain in employment but 'under protest' and pursue an ‘unlawful deductions’ claim to recover the balance of their pay. It is unclear what the practical risks of such a claim would be. However:

- if a business is seeking to furlough employees there are likely to be critical business reasons why this decision is being taken.
- it is not yet clear what might be fair or unfair in these circumstances, and the position will depend on the specific circumstances. However, if there has been a reasonable process of identifying furloughed workers and there has been an attempt to consult and reach agreement, a business may have a viable defence to a claim of constructive unfair dismissal.

3 - The Relationship between Furlough Leave and Other Forms of Absence

Sick leave
The guidance suggests that employees who are on sick leave or self-isolating should receive statutory sick pay (SSP), but can be furloughed once they have recovered or are no longer self-isolating.

We assume that this is intended to also cover employees who are on long-term sick leave and have exhausted SSP, but the position is not clear. However, the purpose of the scheme is to reimburse pay that the employee would otherwise have received, and it would seem to be consistent with that purpose if employees who were on nil pay due to sick leave did not qualify until they are fit to work.

The guidance also clarifies that those employees that are "shielding" are eligible to be placed on furlough leave.

Unpaid Leave
Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28th February 2020.

'Family Friendly' Leave
Being on furlough leave will not reduce or change any other employment rights, beyond any contractual variation. Employees who are due to go on family leave will retain their right to do so and be paid accordingly, although eligibility for and amount of statutory pay for that family leave may be based upon their temporarily reduced rate of pay depending on the timing.

In some circumstances, employees may refrain from exercising their rights to family leave because they will be entitled to more pay, and have time off to care for their child, on furlough leave. For example, an employee on furlough leave who is due to go on paternity leave may decide not to assert their right to do so because they will be financially better off on 80% of pay than they would be on statutory paternity pay.

Furlough leave will not affect the two-week compulsory maternity period. In any event, most employees will prefer to take at least six weeks' maternity leave given that the first six weeks of statutory maternity pay is paid at 90% of normal weekly earnings. Although there may be a short term financial benefit for an employee who is only entitled to statutory maternity pay in taking only six weeks' maternity and then being on furlough leave, the Coronavirus Job Retention Scheme is currently only due to run for three months (although it may be extended). An employee who cuts their maternity leave short on this basis could be required to return to work earlier than they anticipated.

However, the guidance states that an employer can claim enhanced contractual maternity (and other family friendly) pay through the scheme. This suggests that employee can simultaneously be furloughed and on maternity (or other family) leave. This seems contrary to the position on sick leave, and normal employment law principles that an employee cannot be on maternity leave and another type of statutory leave at the same time. However, it is something that employers who have employees on maternity (or other family-related) leave and in receipt of pay in excess of statutory will clearly be interested in doing if possible, so we await further guidance or legislation on this point.

Garden Leave or working notice

following being made redundant Employees made redundant since 28th February 2020 can be re-engaged and put on furlough leave. This would therefore appear to include employees who were given notice of redundancy before 28th February 2020 for a reason unconnected with the pandemic.

Furlough Leave and Holiday Leave

It is clear from the guidance that employees cannot be on both furlough leave and holiday leave.

If an employee no longer wants to take time off on annual leave, the employer may still tell them to take the time off.

Employers have the right to tell employees when to take holiday if they need to. An employer could, for example, instruct employees to use a week of their holiday entitlement.

If the employer decides to do this, they must inform the relevant employees with at least twice as much notice as the amount of days they are instructing them to take e.g. 1 week's holiday shall require 2 weeks' notice.

The government has announced it is allowing workers to carry over up to four weeks (not 5.6 weeks) annual leave into the next two leave years.

The legislation seeks to amend regulation 13 of the Working Time Regulations to allow workers to carry over EU holiday into the next two leave years, where it is not reasonably practicable for them to take some, or all, of the holiday they are entitled to due to coronavirus. This will only apply with the four weeks' leave provided by EU legislation. The balance of 1.6 weeks' statutory leave will not be affected (although it can be carried over for up to a year by agreement under existing law).

The change is aimed at allowing businesses under particular pressure from the impacts of COVID-19 the flexibility to better manage their workforce, while protecting workers' right to paid holiday.

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4 - The Claiming Procedure

Employers need to make a claim for wage costs through the online system once it is up and running.

At a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month.

It is at the employer's discretion whether they choose to top up an employee's salary in excess of the 80% or £2,500 cap. However, this reduction in entitlement to 80% needs to be agreed with the employee.

For full time and part time salaried employees, the employee's actual salary before tax, as of 28th February 2020 should be used to calculate the 80%. As indicated previously, fees, commission and bonuses should not be included.

There is a different approach where an employee's pay varies, for example a zero hours employee. In this instance where an employee has been employed for 12 months prior to a claim it is calculated as the higher figure of the average monthly earnings for the 2019-2020 tax year or the same month's earnings for the previous year.

If the employee has been employed for less than a year, an employer can claim for an average of their monthly earnings since they started work.

NMW and NLW does not apply with regards to this calculation as the employees will not be currently working.

Further details are given in the Government guidance with regards to calculation for pension and employer's NI.

The Government reserves the right to retrospectively audit all claims.

Only one claim can be submitted at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1st March 2020, if applicable. This means that employers cannot claim weekly for weekly paid employees.

There is nothing express in the guidance to prevent employees dipping into and out of the scheme as long as they are in the scheme for a minimum 3 weeks at a time. If this is correct, employers will be able to rota employees on furlough leave in appropriate circumstances which may make furlough selection easier.

What to do after you've claimed

The payment will be paid to employers direct to a UK bank account.

The advice states that 'You should make your claim in accordance with actual payroll amounts at the point at which you run your payroll or in advance of an imminent payroll.' It does not expressly link qualification to making payment to employees, merely running the payroll. This also does not seem to square with weekly payroll runs, if claims can only be made every three weeks.

It may be that those employers who do not have the funds to make payment to employees can agree with employees to defer payment until receipt of the scheme funds. By doing so, the employer is then committed to make payment, even if the scheme for whatever reason refuses the claim.

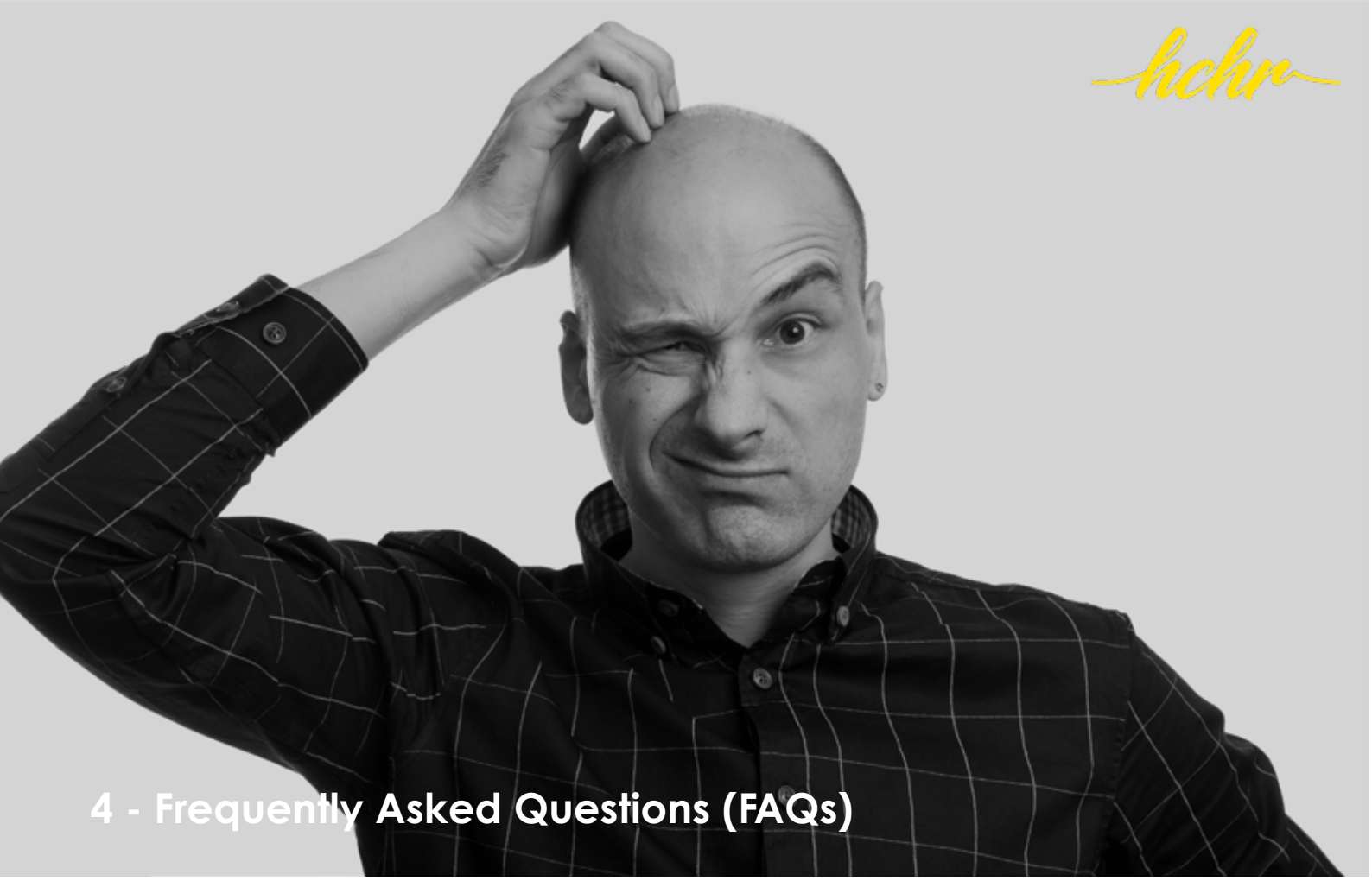
You must pay the employee all the grant you receive for their gross pay, no fees can be charged from the money that is granted. You can choose to top up the employee's salary, but you do not have to.

When should employees on Furlough Leave be paid?

It is unlikely that the government scheme will be in a position to sanction payments in line with each business' payroll date and it is therefore expected that businesses will firstly need to pay employees themselves, with the grant not being received from the government till such later date.

In the event that the employer does not have the financial ability to afford the payments until receipt of the grant from the government, it is important that you advise your employees of this position and obtain their agreement.

Alternatively. Businesses may wish to consider applying for a Coronavirus Business Interruption Loan to assist with short term cash flow support.



4 - Frequently Asked Questions (FAQs)

What employees are covered?
The scheme covers the following individuals, provided that they were on the employers' PAYE payroll on 28th February 2020, regardless of their contract type:

- Full-time employees
- Part-time employees
- Employees on agency contracts
- Employees on flexible or zero-hour contracts

Employees who were made redundant since 28 February 2020 can qualify if they are re-engaged by their former employer.

Which employers are eligible for reimbursement?
The scheme is open to all UK employers who had created and shared a PAYE payroll scheme on 28th February 2020, and have a UK bank account. This includes businesses, charities, recruitment agencies with agency workers paid through PAYE, and public authorities.

Are public sector, local authority and charity employers covered?
Yes, although the government expects that the scheme will not be used by many public sector organisations, as the majority of public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.

Where employers receive public funding for staff costs, and that funding is continuing, the government expects employers to use that money to continue to pay staff as usual rather than put them on furlough leave. This also applies to non-public sector employers who receive public funding for staff costs.

Organisations who are receiving public funding specifically to provide services necessary to respond to COVID-19 are not expected to furlough staff.

In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the scheme may be appropriate.

Are new employees eligible for the scheme?
Only employees on the PAYE payroll as of 28th February 2020 will be eligible.

What about employees who have already been given notice of redundancy or placed on unpaid leave before furlough leave was announced?
The scheme is backdated to 1st March 2020. It would therefore be possible, in theory, for an employer to propose to employees who are still employed, but have been given notice of redundancy or placed on unpaid leave after 28th February 2020, that they be put onto furlough leave instead.

Employees made redundant since 28th February 2020 can be re-engaged and put on furlough leave. This would therefore appear to include employees who were given notice of redundancy before 28th February 2020 for a reason unconnected with the pandemic.

In contrast, the scheme does not appear to cover employees who were placed on unpaid leave on or before 28th February 2020.

Can an employer move employees who are already on reduced hours onto furlough leave?
Some employers have already placed employees temporarily onto reduced hours and pay due to the downturn in work as a result of the pandemic. The employer will not be able to seek reimbursement in respect of wages costs for employees who are still working on reduced hours. The scheme only applies where employees are put on furlough leave.

The difficulty with this point is that the scheme may financially disincentivise employers from keeping their business open. Keeping a business running with staff on reduced hours allows an employer to keep a revenue stream and retain customer loyalty. However, this is likely to be more expensive for the employer than putting all staff on furlough leave and have HMRC pay 80% of their wages.

Does the employee have to be at risk of redundancy to be covered by the scheme?
The precise circumstances in which an employer can put employees on furlough leave and claim reimbursement through the Coronavirus Job Retention Scheme remains unclear. The guidance states that it will cover those who "would otherwise have been laid off during this crisis" and that it can be accessed if the employer cannot cover staff costs due to COVID-19, in order to avoid redundancies.

It appears likely that it is intended to cover employers who would otherwise need to drastically cut their payroll as a result of the crisis, either through lay-off or redundancy. However, without further guidance, it is not possible at this stage to say with any certainty when the scheme will apply.

It seems unlikely that HMRC will undertake a forensic analysis of the circumstances of furlough leave. In the circumstances, it may be that no evidence of the employer's ability to continue paying its staff is required. However, it is important to note that the government has confirmed that they retain the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claims.

Can employees who elected to take unpaid leave to be able to look after their children home from school or nursery be put on furlough leave instead?
This depends upon whether HMRC imposes specific conditions on the circumstances in which employers can claim reimbursement of wages paid during furlough leave. For example, if there is a requirement that the reimbursement will only be made where the furlough leave was agreed as an alternative to redundancy (which appears to be the intention) then this type of situation may not qualify unless they were genuinely at risk of redundancy.

If further detail clarifies that there are no specific qualifying requirements for furlough leave, employees on unpaid leave could be put on to furlough leave if they agree to a temporary contractual variation in pay.

Can you put employees on long-term sick leave on furlough leave?
The guidance suggests that employees who are on sick leave or self-isolating should receive statutory sick pay (SSP), but can be furloughed once they have recovered or are no longer self-isolating.

We assume that this is intended to also cover employees who are on long-term sick leave and have exhausted SSP, but the position is not clear. However, the purpose of the scheme is to reimburse pay that the employee would otherwise have received, and it would seem to be consistent with that purpose if employees who were on nil pay due to sick leave did not qualify until they are fit to work.

Where an employer is selecting which employees to designate as furloughed, they must be mindful of the risk of discrimination if selection is linked to a protected characteristic such as disability.

Can employees who are 'shielding' be placed on furlough?
Yes

What steps must employers take to put employees on furlough leave?
Government guidance states that employers should discuss the proposal with staff and make changes to the employment contract by agreement. It is a condition of eligibility for reimbursement that furlough leave is confirmed to the employee in writing.

Employers will need to:

- Decide which employees to designate as furloughed employees
- Notify furloughed employees of the intended change
- Consider whether it needs to consult with employee representatives or trade unions
- Agree the change with the furloughed employees. Most employment contracts will not permit an employer to reduce an employee's pay, provide them with no work and change their employment status, without agreement. However, faced with the alternatives, which are likely to be unpaid leave, lay-off or redundancy, the majority of affected employees are likely to agree to be placed on furlough leave.
- Confirm the employees' new status in writing. This is an eligibility requirement for accessing the subsidy, and a record must be kept of this correspondence. Ideally, the employer should advise how long it expects furlough leave to continue, however, this may be difficult in the current climate. Employers may wish to put employees on furlough leave for an initial period, subject to review.
- Submit information to HMRC about the employees that have been furloughed and their earnings through the new online portal, expected to be operational by the end of April 2020.
- Ensure that the employees do not carry out any further work for that employer while they are furloughed.
- In addition to salary costs employers can claim the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage.
- All payments under the scheme are subject to the usual income tax and other deductions. Employers can use this scheme anytime during this period.

How does an employer decide who to put onto furlough leave: do they need to go through an equivalent redundancy scoring exercise?
An employer could initially ask for volunteers. However, in some cases an employer may receive more volunteers than it wants to furlough. The procedure an employer follows to decide which employees to furlough may depend on its current financial situation. If the employer needs to very urgently furlough employees or make them redundant in order to be able to continue to trade, a limited selection procedure carried out on an urgent basis is likely to be acceptable. However, where an employer does not have any immediate financial concerns, it is likely to be more reasonable for it to follow a more comprehensive procedure.

Employers could draw up a matrix of objective criteria in a similar way to redundancy scoring.

Employers should ensure that their decisions on who to select for furlough leave are not based on discriminatory criteria, except where such discrimination is likely to be justified. For example, it will be directly discriminatory for employers to use age as a criteria and select employees over 70. However, this could be justified as a proportionate means of achieving the legitimate aim of protecting the health and safety of vulnerable employees as identified in government guidance makes clear that equality and discrimination laws apply in the usual way in this context.

Can an employer rotate furlough leave between its employees?
The guidance states that employees must be furloughed for a minimum of three weeks. This is in keeping with the current requirements for as many people to avoid leaving their homes as much as possible.

However, since employers are likely to receive many requests or volunteers to be placed on furlough leave, it is likely to assist employee relations for employers to be able to move employees on and off furlough leave, subject to that minimum three week period, so that no employee feels that they have been unfairly denied the opportunity to take furlough leave.
Can an employee request their employer puts them onto furlough leave?
Yes, an employee can request this, but the employer does not have to agree. It is the employer's decision which employees to place on furlough leave, if any. It seems that it is also the employer's decision whether to place employees on furlough leave or make them redundant.

Potentially redundant employees do not have a right to require their employer to place them on furlough leave as an alternative to redundancy. However, it is hoped that many employers will see the new scheme as preferable to business closure and making redundancies. It is unclear whether refusing to place an employee on furlough leave and making them redundant could amount to an unfair dismissal.
Is the idea of furlough leave unfair on employees who have to continue working, particularly when many are going to have childcare difficulties?
It may seem unfair that some employees will be required to continue working, potentially increasing their risk of infection if they are unable to work from home, and others will be permitted to receive a substantial proportion of salary and not be required to do so. However, provided the employer has used appropriate, non-discriminatory criteria to choose who is granted furlough leave, it is possible for an employer to lawfully choose to furlough only part of the workforce.

Some employees may look at this issue the other way and prefer to continue to receive full pay so the employer may find that seeking volunteers for furlough identifies the preferences of individual employees and avoids a feeling of unfairness.

Will employers need to collectively consult if they intend to put 20 or more employees on furlough leave?
The guidance has confirmed that if sufficient numbers of employees are involved then it may be necessary to engage in collective consultation to procure agreement to change the employees' terms. It is therefore clear that there is no exception to the obligation to collectively consult in this context where the duty arises.

In what circumstances does the duty to collectively consult arise?
Where the employer intends to vary the contracts of 20 or more employees, and it intends to dismiss employees who do not consent to the change in their terms within a period of 90 days or less, those employees will be classed as dismissed by reason of redundancy for the purposes of section 188 of TULRCA.

In many cases where the employer intends to put an employee on furlough leave and reduce their pay to the level of reimbursement, this definition will be met. This assumes that the employer intends to dismiss employees who do not consent to the change, although arguably the duty does not arise at the initial stage where consent is being sought.

Although the circumstances in which the HMRC reimbursement can be claimed are not entirely clear at this stage, it seems likely that it is intended to apply in what would otherwise be lay-off or redundancy situations. This means that, in many (but not all) cases, an intention to dismiss underpins the furlough proposal. Even if the obligation to collectively consult were not triggered by the proposed variation of contract, it may be triggered if the employer is offering furlough leave in the context of a proposal to make 20 or more employees redundant within 90 days, whether or not the employer has actually started a redundancy process.

If so, the employer will have a duty to inform and consult appropriate employee representatives and notify the Secretary of State using form HR1.

If no contractual variation were intended (because the employer already has the right to suspend and does not intend to reduce pay to the level that can be reimbursed) then it is less likely that collective consultation would be required. However, even in that scenario, if the suspension were in the context of the employer proposing to make redundancies further down the line, the obligation could be triggered.

Is there any exception for furlough leave?
No – the guidance makes clear that collective consultation obligations are not altered by the scheme.

Can an employer use the special circumstances defence?
Employers could perhaps rely on the special circumstances defence if they do not consult. The employer would need to show that compliance was not reasonably practicable, and that the circumstances were "special".

In terms of reasonable practicability, the effect of the pandemic may mean that there are practical difficulties with appointing representatives in the normal way and undertaking full consultation, and also in terms of remaining solvent while that process is undertaken. These issues could be more pronounced where there is no recognised trade union or standing body of representatives meaning that an election has to take place before consultation can begin. However, it is arguable that the employer can conduct the collective consultation remotely. Whether a particular employer is entitled to dispense with collective consultation altogether because it was not reasonably practicable will very much depend on the circumstances and is subject to the two further points below.

Given the unique and unprecedented nature of the pandemic and the economic effects of the government response, there is likely to be mileage in the argument that circumstances are

"special". Insolvency, in itself, does not amount to a special circumstance, but where it arises from a sudden, out of the ordinary event, the defence may apply. Given that the pandemic is a sudden and out of the ordinary event, it is easy to see how that logic could apply in these circumstances.

However, where there are special circumstances, this does not absolve the employer absolutely from the obligation to consult on the matters referred to in section 188(2). The employer must still fulfil those obligations which it is reasonably practicable to comply, or which are unaffected by the special circumstances.

Where full compliance is not reasonably practicable, the employer is also obliged to take all steps towards compliance as are reasonably practicable in the circumstances of the case. In all but the most extreme cases, there is therefore likely to be an expectation that some form of consultation is undertaken, even if it is not reasonably practicable to meet all collective consultation obligations.

What should employers do?
We understand that the new scheme has the backing of the TUC and it is possible that employers will take the view that the risk of a collective consultation claim is low in the circumstances. An employer could proceed without undertaking collective consultation and take the risk that it is later found to be in breach. A middle ground could be for an employer to undertake a consultation for a shorter period on the basis that the change proposed is only a change to the employees' contracts of employment, and then only proceed to a formal collective redundancy consultation if full employee consent is not obtained. It is arguable that this is all that is required under section 188, on the basis that the employer does not propose to make any dismissals until the point that it becomes clear there is no employee consent.

In any event, collective consultation does not need to last for the relevant minimum period. Therefore, as furlough leave is a far better option for the majority of employees than lay-off or redundancy, it is possible that some employers will find that all employees agree to the proposal early on in the process and the full consultation period is not required.

Whatever action employers take, they should bear in mind that the furloughed employees will be returning to the workplace and so maintaining good employment relations is important.

Are employers obliged to top up the remaining 20%?
Employers are entitled to continue paying full pay during furlough leave, but they are not obliged to do so. If they do top up, they can only claim back employer national insurance contributions and minimum auto-enrolment payments up to the cap.

Withholding 20% of an employee's salary will, however, amount to breach of contract and unlawful deduction of wages unless the employee gives their consent. It is expected that the majority of employees will consent since furlough leave is a better alternative than unpaid leave, lay-off or redundancy.

How does an employer make a claim to HMRC for reimbursement?
To claim, the employer will need to submit:

- The employer's PAYE reference number
- The number of employees being furloughed
- The claim period (start and end date)
- The amount claimed
- The employer's bank account number and sort code (UK bank account)
- A contact phone number

Employers can only submit one claim at least every three weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated to 1 March 2020 if applicable.

Reimbursement will be paid via BACS payment to the nominated bank account.

The claim can only be made at the point at which the employer runs payroll or in advance of an imminent payroll because actual payroll amounts need to be submitted.

Will workers continue to accrue holiday during furlough leave?
Furlough leave is an entirely new concept to employment law in the UK. However, it seems likely that the 5.6 weeks' leave under the Working Time Regulations 1998 would continue to accrue during furlough leave. The position is analogous to an employee on sabbatical in this respect.

An employer could attempt to negotiate a change in contractual terms such that any annual leave over and above statutory leave does not accrue during furlough leave, but this may make it less attractive to workers and it is not clear whether the employer is entitled to add extra conditions to furlough leave, beyond a reduction in pay.

Can an employee work for another employer?
There is nothing in the current guidance that suggests the employer will only be able to access the reimbursement if it makes it a condition of furlough leave that the employee does not work elsewhere. It is, however, clear that the employee cannot do work for the employer seeking the reimbursement during furlough.

Also, the employee's contract of employment will continue during furlough leave so any enforceable restrictions on working elsewhere during employment will continue to apply. However, in the circumstances, employers may consider relaxing any such restrictions to allow employees to take up a role with a non-competing business with their prior consent.

Can employees on furlough leave do volunteer work?
Yes, the guidance has clarified this point. This assumes that the volunteering in question is not for the employee's employer and being used to circumvent furlough leave but receive reimbursement of wages. That would likely be regarded as fraud and the government has explicitly identified the right to retrospectively audit all aspects of the scheme with scope to claw back fraudulent or erroneous claims.

Can employees on furlough leave undertake training?
Yes, the guidance has clarified this point. This assumes that the training is not used by the employer to generate revenue as a way of circumventing furlough leave. If the employer requires the employee to complete training during furlough then this will not bring their furlough leave to an end, but they must be paid the national minimum wage in respect of the training. If the employer intends to require the employee to undertake online training during furlough leave, then this should be agreed with the employee and reflected in the correspondence confirming furlough leave.

What does the reimbursement cover?
Employers can claim up to the lower of 80% of usual monthly wage costs or £2,500 per employee, plus the associated employer national insurance contributions and minimum auto-enrolment employer pension contributions.

Fees, commission and bonuses should not be included in the calculation.

The 80% calculation is based on the employee's gross salary at 28th February 2020.

Does the reimbursement limit include auto-enrolment pension contributions and employer's NICs?
No. The guidance makes clear that these payments can be reclaimed in addition to the cap.

Is £2,500 the net amount the employee receives or is it subject to tax and NI?
The sum paid to the employee during furlough leave is subject to the income tax and national insurance in the usual way.

The reimbursement is made to offset those deductible revenue costs and should be treated as income in the business's calculation of its taxable profits for income tax and corporation tax purposes, in accordance with normal principles.

How does the cap work where the employee has more than one job?
The cap on reimbursement applies to each employer individually.

How is the 80% calculated for those with irregular earnings?
The guidance has clarified this point.

If the employee has been employed (or engaged by an employment business) for a full 12 months prior to the claim, the employer can claim for the higher of either:

- The same month's earning from the previous year; or
- Average monthly earnings from the 2019-20 tax year.

If the employee has been employed for less than a year, the employer can claim for an average of their monthly earnings since they started work.

If the employee started employment in February 2020, their earnings so far should be pro-rated.
The employer will need to do this calculation before it agrees furlough leave with the worker because they are agreeing to a contractual variation in terms of payment and will want to ensure that they do not commit to payment in excess of that which may be recovered from HMRC.

Some employers may take the view that those casual or zero hours workers and employees who are not guaranteed work from the employer do not need to be put on furlough leave at all because the employer can instead simply refrain from offering them work. However, this approach is not in the spirit of the scheme which intends to ensure that employees and workers retain a basic income during the crisis stages of the pandemic.

How is salary calculated for employees returning from or just about to go on maternity or other types of family leave?
Being on furlough leave will not reduce or change any other employment rights, beyond any contractual variation. Employees who are due to go on family leave will retain their right to do so and be paid accordingly, although eligibility for and amount of statutory pay for that family leave may be based upon their temporarily reduced rate of pay depending on the timing.

In some circumstances, employees may refrain from exercising their rights to family leave because they will be entitled to more pay, and have time off to care for their child, on furlough leave. For example, an employee on furlough leave who is due to go on paternity leave may decide not to assert their right to do so because they will be financially better off on 80% of pay than they would be on statutory paternity pay.

Furlough leave will not affect the two-week compulsory maternity period. In any event, most employees will prefer to take at least six weeks' maternity leave given that the first six weeks of statutory maternity pay is paid at 90% of normal weekly earnings. Although there may be a short term financial benefit for an employee who is only entitled to statutory maternity pay in taking only six weeks' maternity and then being on furlough leave, the Coronavirus Job Retention Scheme is currently only due to run for three months (although it may be extended). An employee who cuts their maternity leave short on this basis could be required to return to work earlier than they anticipated.

However, the guidance states that an employer can claim enhanced contractual maternity (and other family friendly) pay through the scheme. This suggests that employee can simultaneously be furloughed and on maternity (or other family) leave. This seems contrary to the position on sick leave, and normal employment law principles that an employee cannot be on maternity leave and another type of statutory leave at the same time. However, it is something that employers who have employees on maternity (or other family-related) leave and in receipt of pay in excess of statutory will clearly be interested in doing if possible, so we await further guidance or legislation on this point.

How is salary calculated for employees who are on or have been on sick leave and SSP?
Employees who are on sick leave and in receipt of SSP cannot be furloughed until their sick leave comes to an end.

If an employee who has variable earnings has been in receipt of SSP, this could affect how much the employer can recover (and therefore affect the terms the employer is willing to offer, and the employee's willingness to be furloughed), although their earnings from the same month in the previous year may result in a higher figure than the averaging of earnings from the 2019/20 tax year.

What is the position if 80% of pay is less than national minimum wage based on normal working hours?
The guidance has confirmed that employees on furlough leave do not need to be paid national minimum wage (NMW) with reference to their normal working hours. This is consistent with the National Minimum Wage Act 1998 (NMWA 1998) and National Minimum Wage Regulations 2015 (SI 2015/621) (NMW Regulations 2015). However, if they undertake any online training then they must be paid the NMW in respect of those training hours.

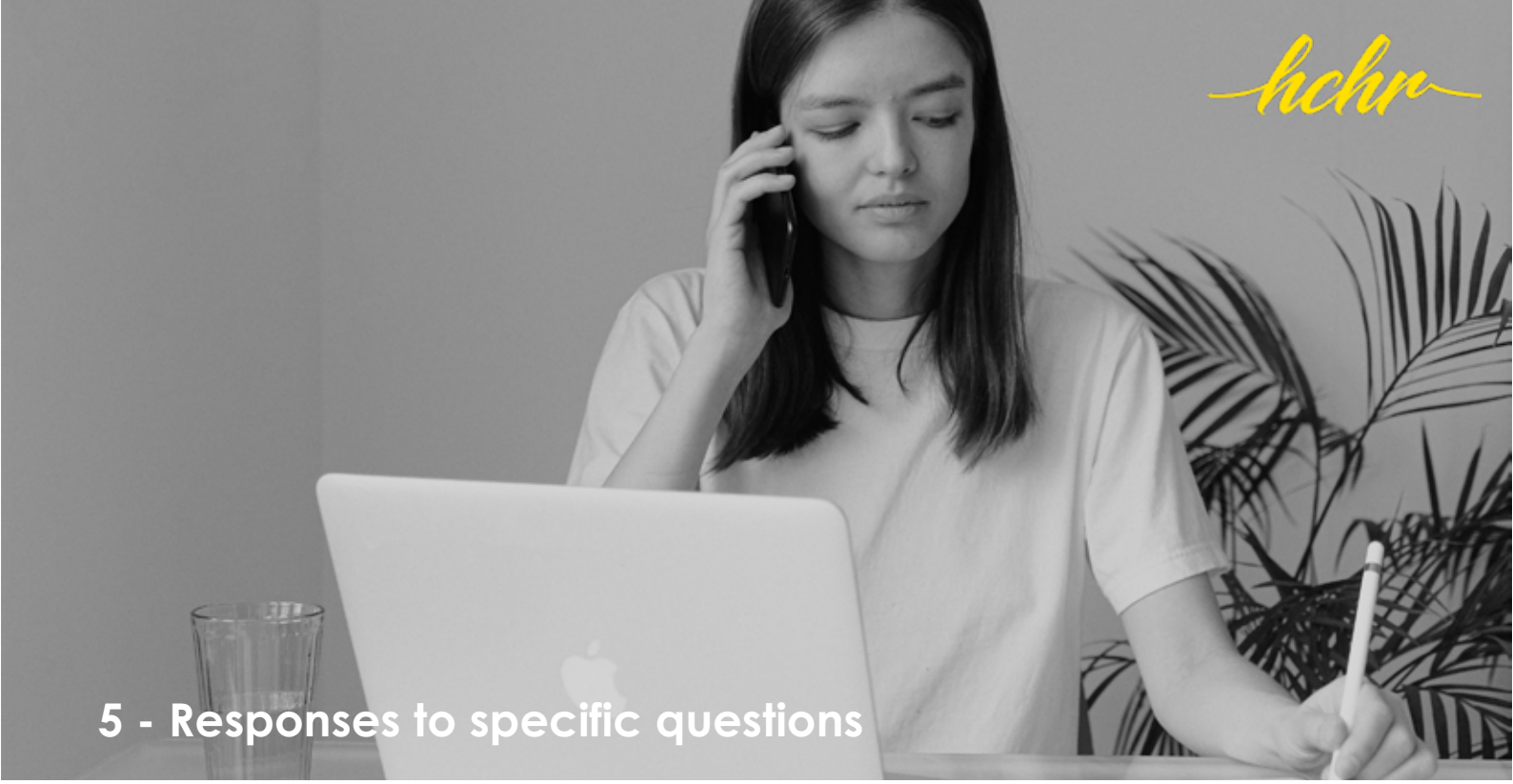
The NMWA 1998 provides that "a person who qualifies for the NMW shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage". The fact that the NMWA 1998 refers only to remuneration "in respect of his work" supports the argument that if no work is being carried out then the NMW does not apply. The detailed rules on the operation of the NMW regime in the NMW Regulations 2015 support this conclusion.

In each case, if (as will be the case for furlough leave) no work is being carried out, or in the case of a salaried hours worker they are absent from work with reduced pay, then the number of hours deemed to have been worked is zero. Payment during furlough leave therefore does not need to be at the rate that would be applicable if the worker were working their normal hours, subject to any further legislation.

Will it be an unfair dismissal if an employer makes someone redundant rather than placing them on furlough leave?
It is difficult to determine whether an employment tribunal would find such a dismissal to be unfair at this stage. In accordance with the test for reasonableness under section 98(4) of the Employment Rights Act 1996 (ERA 1996), it will depend on the particular circumstances of the case, including the size and resources of the employer. For example, whether the employer makes the decision to make the employee redundant rather than furlough them before or after the scheme has commenced, and the financial position of the employer, are likely to be relevant circumstances. There will be cases where an employer cannot afford to furlough employees at this stage and pay the 80% of salary until HMRC has set up the scheme and reimburses it. While those employers could ask for the employees to agree to defer payment until it is reimbursed by HMRC, some employees will be unwilling to agree to this, or not be in a financial position to do so. In those

circumstances, it may be fair for an employer to dismiss for redundancy.

What will happen when the government ends the scheme?
When the government ends the scheme, the business must make a decision, depending on their circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider transferring those employees from furlough leave to lay-off or termination of employment by way of redundancy.



5 - Responses to specific questions

Is the sports sector considered as 'Leisure'?
We presume this is asked to establish what businesses in the leisure industry have been ordered to close. If this is the case, the government has listed the following businesses to close under the subheading "Assembly and Leisure" and "Outdoor recreation":

- Museums and galleries
- Bingo halls, casinos and betting shops
- Spas
- Skating rinks
- Fitness studios, gyms, swimming pools or other indoor leisure centres Arcades, bowling alleys, soft play centres and similar
- Enclosed spaces in parks, including playgrounds, sports courts and pitches, and outdoor gyms or similar.

It's also not clear if or how you can either reduce hours or let people work, say, 1 day a week. Also, can you switch people on / off furlough on a week by week basis?
To place an employee on furlough leave, they must not undertake any work whatsoever, so an employee working on reduced hours will not be eligible to be furloughed.

To qualify for the payment, an employee must be furloughed for a minimum of 3 weeks. This indicates that you could look to rotate those employees that are placed on furlough leave, but each 'rotation' must be for a period of at least 3 weeks.

It's not clear if we furlough all our staff because the theatre is closed - can the marketing team still 'volunteer' to keep social media running or the accounts team 'volunteer' to run payroll?
A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf, of the organisation.

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

Can we furlough staff and then still divert our phone to them to handle bookings etc?
As above.

Would the whole workforce have to be furloughed, or can some areas still continue as normal i.e. support work stopped, office staff continuing?

It is not a requirement to furlough all of your workload.

If an organisation has just appointed someone with signed contract but this has happened right at the point of everything closing down. Can this new member of staff be furloughed as well or is there a certain amount of time a member of staff needs to have been employed?

Only employees on the PAYE payroll as of 28th February 2020 will be eligible.

How does furlough work if all employees are also directors of the company? (thinking specifically about worker coops or share based coops)

If a Director is an employee and paid a sum via the PAYE payroll, they can be furloughed on the basis of their basic salary, but not dividends.