

Covid 19: Employment Pass Notes

Name: Furlough (n.); to furlough (v.)

Age: A few days old

Appearance: Difficult to describe. Somebody not doing very much.

Hold on, is this something to do with the Coronavirus: Isn't everything? Yes.

I've never heard the word before. Where does it come from? It comes from the early 17th century Dutch word *verlof*, meaning a leave of absence.

Isn't that a lay off? Don't be silly. A lay off has a particular meaning under S.147 of the Employment Rights Act 1996 and, although it also describes a situation where someone is not working, the crucial difference is that, under a lay off, the person is not paid.

So, a furloughed employee is someone who is paid for doing nothing? Yes.

Sign me up! Who suggested that? Some sandal-wearing, yoghurt-knitting, loony-left dreamer? The Chancellor of the Exchequer. On 23 March 2020.

Why? Well, it may have escaped your notice but things are a bit quiet at the moment ... The Guardian has described the economic impact of Covid 19 as the "fastest, deepest, economic shock in history." The government has set up the Coronavirus Job Retention Scheme in response and furlough leave is part of that.

Do you think it will catch on? Yes – the furlough idea is spreading quicker than the virus that inspired it and it is fast becoming one of zeitgeistiest words of 2020! Everyone likes the idea of free money!

How much free money is available? Up to 80% of an employee's wages up to a maximum of £2,500 per month which is reimbursed by HMRC in the form of a grant via a new (as yet to be set up) online portal.

Hang on, isn't that the IT equivalent of a replacement bus service? It's a hastily-assembled, complex, government-run, IT project. What could possibly go wrong?

Who applies for it? The employer.

When does it start? The payments will be available from an unspecified date in April (although it is possible to backdate the furlough leave to 1 March) and the furlough scheme will continue to run for 3 months until the end of May.

Do say: Furlough, schmerlough, whatever: just pay me!

Don't say: All history is the history of class struggle.

Post Script: The Government's Coronavirus Job Retention Scheme

1. Furlough leave is the name for a leave of absence created by the government's new Coronavirus Job Retention Scheme introduced on 20 March 2020 (the "**Scheme**"). There are still no regulations about the Scheme – only government tweets, press releases and short policy statements. What appears below is a summary of what can be divined from this along with the emerging consensus about what it all means from employment lawyers.

2. The basics of the Scheme are:
 - a. **All** UK businesses will be able to recoup from HMRC 80% of the monthly wage costs of employees on furlough leave up to a maximum of £2,500 per calendar month. The £2,500 figure is likely to be a gross figure and represents a yearly salary of £37,500 (80% of that figure is £30,000). Employees who earn more than this will not be compensated under the Scheme: it is up to the employer if they want to 'top up' the employee's wages beyond this limit. For those employees who have irregular earnings there is likely to be some sort of averaging mechanism.
 - b. The Scheme will be backdated to 1 March 2020 and will operate for 3 months (ending on 31 May 2020).
 - c. The furloughed individuals must be an "*employee*" and must be paid by the PAYE system as it stood at 28 February 2020. It will not cover independent contractors, or self-employed people or off-payroll workers.
 - d. The Scheme is intended to cover employees "*that would otherwise be laid off during this crisis*".
 - e. There are no limits to the definition of "*employer*". The employer can be any UK employer of any size and operate in any sector.
 - f. During furlough leave, employees must be not working.
 - g. The Scheme remains subject to existing employment laws and existing contractual obligations with employees.

3. There are 10 commonly-raised questions arising out of what we know about the Scheme so far.
4. First, what if an employee refuses to be furloughed? In theory, an employer cannot force an employee to go on to furlough leave unless it has a pre-existing contractual right to do so (which is very unlikely). The consequence of an employer forcing an employee to go on to furlough leave could be that, potentially, the employee may have a claim for unpaid wages for the relevant period or even a claim for constructive unfair dismissal. In practice, however, it is unlikely that an employment tribunal would consider (a) that an employee was entitled to their un-furloughed wages and, (b) that it was unreasonable for an employer to place an employee on furlough leave *provided that* the employee was otherwise going to be made redundant. Ideally, the employer should get the written consent of any employee that it proposes to put on furlough leave.
5. Second, what if the employer wants to furlough some employees and not others? There is no legal impediment to furloughing some staff rather than others *providing that* employers do not discriminate because of a protected characteristic. What is unclear is whether employees can be 'rotated' so that some are on furlough leave and some are not at different times with employees being furloughed and de-furloughed at different times. It is unlikely that furloughing and then de-furloughing will be considered appropriate by the Revenue because, properly speaking, a furloughed employee is someone who would otherwise be redundant and is not working and the idea that there may be work for them to do sits uneasily with that concept.
6. Third, what about those employees already working their notice period (for example because they were made redundant in response to this crisis before the announcement of the Scheme)? For employees that are already working out their notice period, it should be possible to switch them to furlough leave. For those that have already been made redundant because of the crisis before 20 March, as the scheme is back-dated to 1 March, it should, in theory, be possible to bring those employees back in order to furlough them but this is unclear.

7. Fourth, can furloughed employees be made redundant in due course? Yes, if employees are furloughed it does not mean they can never be made redundant. Obviously normal redundancy laws still apply. However, it is sensible for employers not to jump straight to redundancy when they could, in the first instance, consider furloughing the employee because employment tribunal judges are likely to take the view that a redundancy now, rather than furloughing under the Scheme, may appear to be premature and, therefore, unreasonable when applying S.98(4) of the Employment Rights Act 1996. If, at the end of the Scheme, it is necessary to make employees redundant, then normal redundancy laws (including obligations to consult) apply. Where employers are proposing to make fewer than 20 employees redundant within a 90-day period this is relatively straightforward but where greater numbers are involved the collective consultation process may be triggered and, at the moment, it is difficult to understand how the furloughing process sits within the collective consultation rules.
8. Fifth, does furloughing mean that the affected employees cannot do anything? Yes. Employees cannot do any work whilst on furlough and this is likely to include checking work emails and administrative tasks but is not likely to include checking in with Human Resources and any periods of work-related study.
9. Sixth, who pays the employees during furlough leave and is the payment a grant or a loan? The business pays the employees and recoups the money from HMRC. The payment is likely to be a retrospective refunding of the business. The payment itself is a grant and not a loan. To the extent that businesses need to borrow money to cope with the crisis, the government has devised a Coronavirus Business Interruption Loan.
10. Seventh, are employer obliged to top up wages under the Scheme? No. They can choose not to top up furlough leave wages beyond the 80% covered by the government 100% or beyond the monthly limit of £2,500. However, it is important to get the employee's consent to this reduction because of the employee's contractual rights to their full wages (which claims are 'live' for 6 years) and any potential constructive unfair dismissal claims (although it is very unlikely that an employment tribunal judge would consider it unreasonable to place an employee who would otherwise be made redundant on furlough leave). Market practice is still emerging about employer's responses to the 'top up' issue.

11. Eighth, what about employees returning from maternity or other family leave? Employees coming back from maternity or other family leave are likely to rely on their “normal” pre-leave salary.

12. Ninth, is the £2,500 taxable and what does it cover? The £2,500 is taxable and it covers “wage” costs or “employment” costs. What this means is uncertain but it will certainly cover basic salary costs. There is a question mark over whether this includes other normal monthly costs such as pension contributions and regular car allowance (although it is likely that it will do so). Other benefits will continue to apply and accrue unless otherwise agreed with the employees. Furloughed employees will continue, for example, to accrue holiday.

13. Tenth, are there any anti-avoidance measures? Yes, the government says it will retain the right to audit the scheme. It is likely to raise suspicion, for example, if an employer suddenly has a lot of extra people on the payroll and their contracts are back-dated to before 28 February or if an employer puts employees on furlough without them knowing and asks them to do the odd job, or, if an employer artificially moves employees from sick leave to furlough leave or artificially giving employees a pay rise. All these tactics are likely to be considered fraudulent.

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