

COVID-19 – Key UK Employment Issues Guidance Note

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Companies and their workforces are in unprecedented circumstances, with COVID-19 changing situations and advice on a frequent basis. In this alert, we have set out below the key issues faced by employers across the UK and the related measures taken by the Government.

Employees

Coronavirus Job Retention Scheme

- All employers in all sectors (including both profit and not-for-profit) will be eligible for the Coronavirus Job Retention Scheme (the “Scheme”). Under the Scheme, HM Revenue & Customs (“HMRC”) will reimburse employers for the following employment costs of “furloughed employees” (i.e. those employees placed on leave of absence):
 - the lower of (i) 80% of the usual monthly wage cost before tax as of 28 February; and (ii) £2,500; plus
 - employer’s National Insurance Contributions (“NICs”); plus
 - minimum auto-enrolment employer pension contributions (more guidance will follow on the employer’s NICs and pension contributions at a later date).
- For the purposes of calculating the wage cost, fees, commission and bonuses should be excluded.
- In order to be eligible for the Scheme, employers will need to write to each furloughed employee confirming that he or she has been furloughed and keep a record of the communication. If employers want to reduce a furloughed employee’s salary to the 80% level (and employer pension contributions to the minimum level, if they exceed this), there is nothing to stop them from doing this under the Scheme, but this will need to be agreed with employees under normal principles of contractual and employment law. Standard practice will be to seek the employee’s consent to being placed on furloughed leave and subject to a salary reduction. Selecting furloughed employees should also be done in compliance with equality and discrimination laws.
- The Scheme covers employees who:
 - were on the PAYE payroll on 28 February and those who have been made redundant since that date, if they are rehired; and
 - are on any type of contract, including full-time, part-time, agency, flexible and zero-hours employees (including those on contractual maternity / paternity leave).

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- An employee who is furloughed cannot perform any work for their employer. The Scheme does not cover employees who:
 - do any type of work (e.g. provide services or generate profit) for the employer whilst on furlough (with the exception of volunteer work or training), including those working on reduced hours, or for reduced pay;
 - are on unpaid leave (unless they were placed on unpaid leave after 28 February); or
 - are on sick leave or self-isolating (who should receive Statutory Sick Pay during this time, but can be furloughed after).
 - The minimum length an employee can be furloughed for is three weeks and employers can only submit one claim per employee in any three week period.
 - Where employees have variable pay, if they:
 - have been employed for less than one year, the reimbursement will be based on an average of their monthly earnings since they started work;
 - have been employed for more than one year, the reimbursement can be claimed for on the basis of either:
 - the same month's earnings from the previous year; or
 - average monthly earnings from the 2019-2020 tax year (i.e. 6 April 2019 to 5 April 2020); and
 - only started in February 2020, the reimbursement will be based on a pro-rata for their earnings so far.
 - Earnings that are not reimbursed, because they are above the amount set out above, will carry employer's NICs and pension contributions in the usual way. All employees' earnings will be subject to income tax, employee's NICs and pension contributions (unless the employee has opted out) in the usual way, whether or not it is covered by the Scheme.
 - The reimbursement amount applies per employer, where the employee has more than one employer, i.e. he/she can be furloughed for each job.
 - Reimbursements count as income for the purposes of the calculation of profits.
 - Given that the National Minimum Wage ("NMW") only applies to those that are working, furloughed employees can be paid at the 80% rate (or £2,500) even if, based on their usual working hours, this would be below the applicable rate of NMW. There are exceptions if furloughed employees are required to complete training courses while they are furloughed, in which case they must be paid at least the NMW for that time.
 - Claims for reimbursement, which must be made to HMRC, can be backdated until 1 March 2020, if applicable. The Scheme will apply until at least 31 May 2020 and there will be no limit on funding.

Statutory Sick Pay

- Generally, employees who earn over £118 per week (or £120 from 6 April 2020) are entitled to receive statutory sick pay ("SSP") if they are absent from work due to sickness. SSP is paid at £94.25 (or £95.85 from 6 April 2020) per week.
- Employees will now be entitled to SSP if they are self-isolating due to COVID-19 in accordance with official guidance. SSP will now be payable from the first day of absence, rather than the fourth, for absences on or after 13 March 2020.
- Employers with fewer than 250 employees may be able to claim a refund of up to two weeks' SSP for each employee who is off work due to COVID-19 symptoms or self-isolation. The Government will work with employers to set up a repayment mechanism.

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- Employers should not require a GP note from employees off work due to COVID-19 and such a note will not be required to obtain an SSP refund. From Friday 20 March 2020, an alternative “isolation note” from NHS 111 is now available online at the following link <https://111.nhs.uk/covid-19>

Holiday

- Employers may require employees to take annual leave at certain times, if their employment contracts do not prohibit this and provided sufficient notice is given. They should receive holiday pay as normal, unless they have agreed otherwise.
- Employers must generally give employees at least twice as many days’ notice as the number of days’ annual leave they are being required to take (for example, 10 days’ notice for five days’ annual leave). It is recommended for this to be in writing and, where possible, to specify relevant dates.
- Employers may also in certain circumstances cease providing employees with work or reduce employee hours for a period, without the employee taking annual leave (see below for further detail).
- The Government will amend regulations that will allow employees to carry over up to 4 weeks of unused annual leave into the next two leave years, if it is not reasonably practicable for them to take some, or all, of the holiday to which they are entitled, due to the coronavirus.

Temporary lay-offs

- Employers may require employees to cease work with or without pay for a temporary period (a “Lay-off”). A Lay-off without pay is permitted only if provided for in an employment contract or a trade union agreement, or if an employer receives the employee’s consent. Legislation may be introduced to allow Lay-offs without express contractual provision or consent.
- If provided for in their employment contracts, employees may be entitled to receive “Contractual Guarantee Pay” during a Lay-off period. If the Lay-off is unpaid, employers may have to pay “Statutory Lay-off Pay” of £29 per day if certain criteria are met (including one month’s continuous employment) for up to five days in any three-month period.
- If a Lay-off period continues for four consecutive weeks or six weeks within a period of 13 weeks (of which no more than three are consecutive), employees may be entitled to claim statutory redundancy pay if certain conditions are met (including two years’ continuous service).

Short-time Working

- Employers may reduce an employee’s contractual hours and corresponding pay (“Short-time Working”) only if this is permitted in their employment contract or a trade union agreement or if they receive the employee’s consent.
- During a Short-time Working period, employees should receive full pay unless their employment contracts provide for unpaid Short-time Working or Contractual Guarantee Pay of a different amount. If the Short-time Working arrangement is unpaid, employers may have to pay Statutory Lay-off Pay in relation to days on which no hours are worked.
- If a Short-time Working period continues for four consecutive weeks or six weeks within a period of 13 weeks (of which no more than three are consecutive), employees may be entitled to claim statutory redundancy pay if certain conditions are met (including two years’ continuous service).

Time off to care for dependants

- Employees are entitled to reasonable time off to care for dependants. This will apply, for example, to time off to care for a child whose school has closed or another dependant who is sick.
- Employers are not required by law to pay employees for time off to care for dependants unless this is provided for in employment agreements or contractual workplace policies.

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- Employers should consider whether special arrangements can be made for employees whose caring responsibilities temporarily affect their availability for work, for instance flexible hours, to enable them to continue to work.

Emergency Volunteer Leave

- A temporary new form of statutory unpaid leave for employees and workers wishing to volunteer to support essential health and social care services during the outbreak of COVID-19.
- Employees who sign up to take part in the Emergency Volunteer Leave programme must give their employer three working days' notice and produce an emergency volunteering certificate stating that they have been approved as an Emergency Volunteer.
- Employees on Emergency Volunteer Leave are afforded certain rights and protections, such as, the maintenance of terms and conditions of employment during any period of leave and protection from detriment for taking the leave.
- Employers (apart from those with a headcount of staff of less than 10) cannot refuse a request from their employees to take a leave of absence to take part in the scheme.
- The total consecutive amount of Emergency Volunteer Leave an individual can take is limited to four weeks in any volunteering period of 16 weeks.
- A compensation scheme will be established to compensate eligible volunteers for some loss of income and expenses incurred during the period of Emergency Volunteer Leave.

Termination of employment/redundancies

- Employees with two years' continuous service (subject to certain exceptions where such qualifying service is not required) may have a claim for unfair dismissal where employment is terminated, unless there is a fair reason (as defined by statute) and the employer acted reasonably (i.e. followed a fair process).
- Dismissal on grounds of redundancy may be fair where an employer has reduced need for work of a particular kind or where a business or premises is shut down. In light of Government guidance, employers should be mindful of permitting flexible working wherever possible, in particular for those defined as high risk individuals, before considering terminations.
- Employers must follow a fair redundancy procedure, including informing/consulting with employees or, in collective redundancies of certain sizes, consulting with employee representatives over 30 or 45 days, depending on the number of employees. Employers should consider voluntary redundancy and ensure they provide adequate notice or payment in lieu of notice where applicable. For now, COVID-19 may be viewed as a "sudden disaster", constituting special circumstances under which full consultation requirements need not be complied with, in the context of the complete closure of a business, as long as the employer has taken all reasonable steps to comply.
- Employees will be entitled to statutory redundancy pay where they have worked for more than two years. Employers should check whether employees are entitled to enhanced redundancy pay.
- Employees who are dismissed on the grounds that they refuse to attend the workplace because they believe there is a danger to their health and safety, are likely to have a claim for automatic unfair dismissal, for which there is no requirement for two years continuous service.
- Equally, where an employer seeks to rely on "some other substantial reason" for termination, it seems likely that a tribunal would consider dismissing an employee on the grounds of absence, where this absence was on the basis of Government advice, as outside the range of reasonable responses, even if the employee was not legally obliged to stay at home.

Pensions

- Employers cannot generally unilaterally reduce their pension contributions. Any such reduction will generally require employee consent and, even with this consent, employers contributions cannot be below the minimum level under the auto-enrolment rules. However, as set out above, employers of furloughed employees will be entitled to be reimbursed for the minimum employer contribution under the scheme.
- When, whether and how employees can reduce their pension contributions or opt out of a scheme altogether will depend on the rules of the relevant scheme and auto-enrolment legislation.
- In relation to defined benefit schemes, the Pensions Regulator (“TPR”) has issued new Guidance to employers and pension trustees stressing that where employers who have defined benefit pension schemes are in financial distress, the schemes should be treated fairly in comparison to other creditors and shareholders. The Guidance requires trustees to focus on risks which might have significant consequences for the scheme and assess whether business continuity plans remain adequate.
- When considering any requests from the employer to delay contributions to the scheme, TPR expects trustees to ensure that any requests are part of a coordinated and fair response across key stakeholders. Employers will need to demonstrate the need for the delay and that payments will also not be made to related entities or shareholders. TPR states that trustees should consider putting in place agreements to prevent new dividends or intra-group loans.
- According to the Guidance, trustees should be given a fair share of any new security being put in place for other creditors.
- Any suspensions to contributions are expected to have an end date and include triggers to restart if trading returns to normal. Where timescales are short, any concessions by trustees to employers should be short term to enable information to be provided later for a more considered decision.
- TPR encourages employers and trustees of both defined benefit and defined contribution schemes to contact it if they have any immediate concerns about their scheme or cannot pay contributions.

Employer’s NICs

- Employers with furloughed employees are entitled to reimbursement of employer’s NICs payable on the capped 80% of wage costs covered by the Government under the Job Retention Scheme.
- Employer’s NICs remain payable on the earnings of any non-furloughed employees, as well as any amount that employers continue paying to furloughed employees for which they are not reimbursed under the Job Retention Scheme. If employers experience difficulties paying their employer’s NICs, they may be eligible to receive support on a case-by-case basis through HMRC’s “Time to Pay” arrangements. Those concerned about being able to pay their taxes due to COVID-19 should contact HMRC through a dedicated helpline: 0800 0159 559.

Self-Employed Persons

Self-Employed Income Support Scheme (the “Self-Employed Scheme”)

- Self-employed individuals or members of a partnership can apply for a taxable grant of 80% of average monthly profits measured over the last three years, up to £2,500 for the next three months under the Self-Employed Scheme.
- The Self-Employed Scheme is available for self-employed individuals or members of a partnership: (i) with trading profits / partnership trading profits of less than £50,000; or (ii) with average trading profits / partnership trading profits for the previous three years of less than £50,000, and in both cases, where such profits constitute more than half of total taxable income.

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- Self-employed individuals or members of a partnership must: (i) have traded in the previous tax year; (ii) be currently trading when an application is made (unless unable to as a result of COVID-19); (iii) intend to continue trading during this tax year; (iv) have lost trading / partnership trading profits due to COVID-19; and (v) have submitted their Income tax Self-Assessment tax return for the previous tax year. Those that have missed filing their tax return will have until 23 April 2020 to do so.
 - The Self-Employed Scheme is not yet open and HMRC will contact individuals if they are eligible for it.

HMRC time to pay

- If self-employed individuals experience difficulties paying their taxes, they may be eligible to receive support on a case-by-case basis through HMRC's "Time to Pay" arrangements. Those concerned about being able to pay their taxes due to COVID-19 should contact HMRC through a dedicated helpline: 0800 0159 559.

Deferral of Income Tax

- Separately, income tax payments due on 31 July 2020 through the "self-assessment" system do not need to be paid until 31 January 2021. Individuals do not need to be self-employed to be eligible for the deferral, but it is likely to be of most significance for self-employed people, given that almost all employees have their employment tax withheld from payroll through the PAYE system. The deferral is optional and automatic. No application is required and no penalties or interest for late payment will be charged if individuals defer the payment.
- The Government has deferred from April 2020 until April 2021 proposed changes around the treatment of self-employed contractors disguised as employees under "IR35".

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