

THE IMPACT OF CORONAVIRUS ON EMPLOYMENT LAW

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It is fair to say that these are uncertain and stressful times for us all, and nothing has quite had an impact on so many of us. Businesses and people alike.

We have been inundated with information from news outlets, social media and the Government's daily updates over the last few weeks. It can be very confusing and daunting for both employees and employers.

The temporary initiatives, which included some employment-related changes, announced by the Government on 20 March 2020, now take legal effect in accordance with [The Coronavirus Act 2020 \(25 March 2020\)](#) and [The Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020 \(26 March 2020\)](#). We are still waiting to see the statutory instrument on the Coronavirus Job Retention Scheme.

Many affected organisations had started to put into place practices and measures to comply with the Government guidance prior to the legislation coming into force. The legislation now provides the legal framework and provides details to the general guidance, previously shared.

The legislation will not necessarily give you a clear guide on how to navigate some specific and complex circumstances that often arise within the employment relationship, but as with any employment legislation – it is the best place to start to understand what is required. We will have to wait to see how the courts will interpret the legislation in some circumstances, but in the meantime, you should deal with matters on a case by case basis and apply reasonableness within the decision-making process. Our specialist team of [employment lawyers](#) are available to advise you through these challenging times.

WHAT EMPLOYMENT LAW CHANGES HAVE BEEN MADE?

The Coronavirus Act 2020 ('CA, 2020') introduces temporary provisions which will automatically expire after two years (unless the House of Commons vote for the provisions to continue to have effect):

- The statutory sick pay (SSP) regime has been modified (Ss.39-41 CA, 2020)
 - I. SSP is payable from the first day of coronavirus-related incapacity or self-isolation, on or after 13 March 2020.
 - II. It is likely that funding from HMRC will be available to employers with fewer than 250 employees and would be limited to two weeks' SSP per eligible employee.

- ‘Emergency volunteering leave’ has been introduced (Ss.8 and 9 and Schedule 7, CA, 2020)
 - Volunteers for the NHS and social care sector can take unpaid time off work and receive compensation for loss of earnings.
 - Volunteers must give their employers three working days’ notice and produce a certificate from an appropriate authority.
 - The period of leave must be either two, three or four weeks in each 16-week ‘volunteering period’.
 - There is no obligation on the employer to pay wages during the period of leave.
 - The employee will be entitled to return their employment on no less favourable terms and conditions.
 - It would be automatically unfair to dismiss an employee for exercising their right to take emergency volunteering leave (Part 3, Sch. 7 inserts Ss. 47H and 104H into ERA 1996 and therefore is not temporary)

WHAT IS ‘FURLOUGH LEAVE’?

This term was introduced by the Government and is a scheme aimed at retaining jobs during the downturn in business resulting from the public health measures tackling Coronavirus. It essentially allows businesses to continue to employ staff during this downturn.

THE GOVERNMENT’S JOB RETENTION SCHEME – KEY DETAILS

(Guidance for employers on the Coronavirus Job Retention Scheme, 26 March 2020)

What is it?

- It is proposed that the temporary scheme will be live by the end of April 2020.
- It is designed to “support employers whose operations have been severely affected by coronavirus (COVID-19)”.
- It is available to all UK employers (including charities, recruitment agencies and public authorities)
- Only available to agency employees who are not working.
- The employer will need to notify HMRC via an online portal (not yet set up) of the details of the affected employees.
- It will protect employees who are registered on the employer’s Pay as You Earn (PAYE) system, as at 28 February 2020.
- For employees who started in February 2020, the employer will be required to pro-rate the employee’s earnings so far.

- Employees taken on after 1 March 2020 are excluded.
- Employers can re-employ people who had been made redundant since 1 March 2020, and then furlough them.

Salary

- Salary payment period for which sums can be claimed will run from 1 March 2020 for approximately 3 months (but may be extended if needed).
- Claims can only be made once every three weeks.
- To be eligible for payments, an employee must be furloughed for a minimum of three weeks.
- Employee should not work during the furlough period.
- Employers cannot, therefore, rotate employees on a weekly basis to deal with operational needs (but could possibly on a three-week rotation).
- Employers may reclaim up to 80% of salary for employees (up to a cap of £2,500 per month).
- Employer may also claim the associated employer NICs and minimum autoenrollment pension contributions on that wage.
- Employers may not claim for fees, commissions and bonus.
- It is likely that the 80% is based on (i) the earnings in the same period in the previous period; or (ii) the average earnings in the previous 12 months (or less, if they have worked for less), whichever is the higher amount.
- If the employee's pay varies, the employer can claim for (i) the same months' earnings from the previous year; or (ii) average of monthly earnings in the 2019/20 tax year.

KEY POINTS FOR EMPLOYERS

What you need to know

- The government proposals take legal effect as of 25 March 2020.
- The employer will need to designate affected employees as "furloughed workers" and notify them of this fact.
- This will result in a change of employment status and remains subject to existing employment law.
- The employer will need to seek the employee's agreement to this change (and accepting 80% pay). Normal employment law applies to these negotiations.

Deciding which staff go on furlough leave

- Employers must take care not to discriminate if deciding who to offer furlough leave.
- Given that age and certain disabilities will place certain staff at greater risk, preference can be given to these individuals on a potentially objective and non-discriminatory basis.
- Employees cannot insist on being placed on furlough leave.
- Employees on maternity, shared parental leave or paternity leave can continue to draw Statutory Maternity Pay (SMP) (or similar payment).

- The guidance does not prevent employers agreeing to employees on such leave to return to work early or electing to change to shared parental leave and then being furloughed.
- Employees on sick pay or those self-isolating should be furloughed once they are fit to return to work.
- Employees who are shielding can be placed on furlough leave. “Shielding is a measure to protect people who are clinically extremely vulnerable by minimising all interaction between those who are extremely vulnerable and others”.
- There is nothing specifically in the legislation that protects employees in the same household as a clinically extremely vulnerable individual. You should seek advice on how to proceed if you receive a request from an employee (remaining at work) in those circumstances.
- Affected employees should not carry out any work for their employer during this period.
- Furloughed employees can do volunteer work or undertake training, provided “they do not provide services to or make for their employer”.

Annual leave and salaries

- Employees will be allowed to carry over up to four weeks (not 5.6 weeks) annual leave into the next two leave years (The Working Time (Coronavirus)(Amendment) Regulations 2020 (Reg.3) which amends regulation 13 of the Working Time Regulation 1998 as of 30 March 2020).
 - Where it was ‘not reasonably practicable’ for the worker to take some of all of his/her leave as a result of the effects of COVID-19 (including effects on the worker, the employer or the wider economy or society)
 - Reg. 4 (amending regulation 14 WTR) –provides for payment in lieu of leave to be calculated where an worker leaves before they have taken the carried over leave.
 - New Reg. 13(12) WTR, the employer will only be able to require a worker not to take carried-over leave on particular days where the employer has ‘good reason’ to do so. (There is no definition of ‘good reason’)
- An employer can choose to top up to 100% during the furloughed period. Any reduction to 80% salary is subject to employment law and renegotiating any existing contractual entitlements.
- Employees are entitled to the national minimum wage for the hours they worked. If they are furloughed, they should not be working. Employees are entitled to NMW for any time spent training.

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