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Coronavirus (COVID-19)

Guidance on flexible furlough

*With very grateful thanks to Stephen Jennings
of BH&HPA National Advisers, Tozers*

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Whilst every care has been taken in compiling this guidance, only the Courts and Tribunals can authoritatively interpret the law and HMRC may apply its own interpretation of the furlough scheme. These are unprecedented circumstances upon which we are trying to provide the best advice.



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Flexible Furlough Scheme

The government has now published more details of the flexible furlough arrangements which will apply. The information is not particularly easy to access and is scattered between a number of existing guidance notes, which have been updated, and some new ones.

However, the new rules that will apply are now fairly clear and are summarised below.

When does flexible furlough start?

From 1 July 2020.

How does it work?

From this date, employers can bring furloughed employees back to work for any amount of time and any shift pattern, while still being able to claim under the furlough scheme for the hours not worked.

Who is eligible for flexible furlough?

Only employees who have been furloughed for 3 consecutive weeks by the end of June 2020 are eligible for flexible furlough.

This means 10 June 2020 was the last day to commence furlough for someone who has not previously been furloughed for at least 3 weeks and who you wish to furlough after 1 July.

The exception to this rule is that that parents on statutory maternity, paternity, adoption, shared parental and parental bereavement leave who return to work after the 10 June 2020 cut-off date will be eligible for the furlough scheme, provided you have previously furloughed other employees.

Are there any minimum periods?

Any periods of furlough up to the end of June 2020 must last for at least 3 consecutive weeks.

This is the case **even where** the period of furlough goes into July, e.g. a furlough period starting on 22 June must continue for at least 3 consecutive weeks ending on or after 12 July.

From **1 July**, employers will need to report and claim for a minimum period of a week.

This doesn't mean an employee needs to be furloughed (off work) for the entirety of that week; it means that the furlough arrangement (which may include some time at work and some time off work) must last for at least a week.

This is a minimum period and those making claims for longer periods such as those on monthly or two weekly cycles will be able to do so.

Documentation

To be eligible for the grant, ***employers must agree the new flexible furloughing arrangement with their employee and confirm that agreement in writing.***

This can be done either through a new furlough agreement setting out the flexible working terms or, if there is an existing furlough agreement already in place, through a separate letter setting out the flexible working arrangements.

The letter can be very simple; all it needs to say is:

- it records an agreed variation to the existing furlough agreement, and
- what the new arrangements are and when they will apply from.

Ideally you should get the employee to sign to confirm their agreement to the new arrangement; although this is not a legal requirement, it makes it less likely there will be any subsequent dispute about what has been agreed.

You'll need to keep records of how many hours your employees work and the number of hours they are furloughed (i.e. not working).

Numbers of employees

The number of employees an employer can claim for in any claim period cannot exceed the maximum number they have claimed for under any previous claim. This could be relevant where the employer has been operating rotating furlough arrangements under the current scheme.

Pay

Employees on a flexible furlough arrangement should be paid as follows:

- Whilst working, they are of course entitled to full pay
- For any time on holiday, they are entitled to full pay.

This includes any part of the holiday which is taken during furlough, though a claim can be made under the furlough scheme in the normal way.

- Whilst on furlough, pay is with whatever has been agreed with the employer provided this does not fall below 80% of normal pay (capped at £2,500 / month).
- If employees are dismissed, the position re pay is complex.

Full pay is likely to be payable if contractual notice is *not* more than a week longer than statutory minimum notice. Statutory minimum notice is nothing in the first month, 1 week up the second anniversary of service and, thereafter, one week for each complete year of continuous service up to a maximum of 12 weeks.

How much will the government pay?

The government contribution for furloughed employees is winding down over the next few months:

- **June / July** (no change): The government will pay 80% of wages for time on furlough 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.
- **August**: The government will pay 80% of wages for time on furlough up to a cap of £2,500. Employers will pay ER NICs and pension contributions.
- **September**: The government will pay 70% of wages for time on furlough 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.

- **October:** The government will pay 60% of wages for time on furlough 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.
- After that, the furlough scheme will end.

Case Study

Jane works for 40 hours a week for a monthly salary of £3,000, paid monthly.

She has been on furlough since April but agrees to return to work working half days every working day from 1 July. Assuming she has agreed to be paid at 80% of pay for time on furlough, this means she is entitled to:

1. full pay for the half days she is working, plus
2. 80% of her pay for the other half of each day.

Calculating the amount that can be claimed under the furlough scheme is a little more complicated.

Assuming the employer claims for the period 1 to 31 July, the steps are as follows:

1. Work out the number of working hours in the month if the employee works full time. In this case the employee works 40 hours/week. 40 divided by 7, multiplied by 31 (there being 31 days in July) gives **178 hours** (rounded up to the nearest hour).
2. Work out the number of hours actually spent working in July. The employee will work 23 half days, each of 4 hours, so **working hours are 92**.
3. Use this to work out furlough hours. This is calculated by subtracting the figure in 2 above from the figure in 1 above. $178 - 92 = 86$ **furlough hours**.
4. Calculate the maximum wage amount. The employee is normally paid £3,000 / month. 80% is **£2,400**, which is under the monthly cap.
5. Work out the proportion claimable. £2,400 divided by the number of working hours in the month (178), multiplied by the number of furlough hours (86), gives a figure of **£1,159.55**.

In addition, the employer will be able to claim for employer national insurance and pension contributions. This example is based on a worked example published by the government which can be found [here](#).

Guidance on furlough and return to work for BH&HPA Members

Previously published on 8 June 2020

Furlough and the return to work

Upcoming deadline

There have been so many changes to the furlough scheme it can be hard to keep up. However, a key date, which is almost upon us, is **10 June**.

The furlough scheme closes to new entrants from 30 June. At the moment, any period of furlough must last for at least 3 weeks. **10 June is therefore the last date on which an employer can furlough an employee for the first time**, in order for the 3 week furlough period to be completed by 30 June.

This is a good point to review your furlough plans and your strategy for reopening your business. If you miss the boat, you are potentially missing out on very considerable government funding (detailed below) which can help carry you through the next few months (and beyond) as parks look to reopen and deal with what could be much lower numbers of customers.

You may need to act now if you wish to:

- Increase the number of employees on furlough, or
- Swap people at work with people on furlough. This may be *particularly important* in light of the new rules on flexibility, set out below

The deadline only applies in respect of individuals who have not already been furloughed for at least 3 weeks.

A template furlough agreement for you to use is set out below.

How much will the government pay?

The government contribution is winding down over the next few months:

- **June / July** (no change): 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.
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- **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.
- After that, the furlough scheme will end.

Flexibility

A major change to the scheme is due to come into force from 1 July. The government has introduced this change following lobbying about the difficulties of keeping parks maintained and basic services running when every possible employee is on furlough and this is a very welcome improvement.

From 1 July, employers can bring back to work employees, ***who have previously been furloughed***, for any amount of time and any shift pattern, while still being able to claim under the furlough scheme for their normal hours not worked.

This is likely to be particularly helpful for parks with ongoing maintenance or other work which does not justify bringing an employee back on their normal hours.

It will also help parks react to changing numbers of customers following reopening. This extra flexibility means employees who agree to reduced hours won't be unpaid for the hours they are not able to work. This change should benefit both employer and employee greatly.

Also from 1 July the minimum period of furlough is reducing from 3 weeks to 1 week.

Further guidance on flexible furloughing and how employers should calculate claims is expected on 12 June and we will then publish case studies working through different scenarios.

While we know the rough shape of what is coming, the rules around furlough are complex and the detail can often make the difference between being able to claim or not. Rules change as well, so it is important to keep abreast of developments to see how they may affect your plans.

Return to work

Under the terms of most furlough agreements employers are entitled to require employees to return to work on reasonable notice (our template says 24 hours' notice).

We set out a template letter you can use for this below.

However, some employers are reporting reluctance on the part of employees to return to work, ranging from a general disinclination to give up binge-watching Netflix through to more serious concerns about health and safety and childcare.

Your starting point is that you are not obliged to keep an employee on furlough if you want them to return to work.

However, your response should reflect an employee's reasons for not wanting to return to work.

A common reason for reluctance is concern about health and safety. You should ensure that you have read and complied with published government guidance ([here](#)) about working safely.

Your legal obligations are likely to include consulting with employees (or employee representatives) about workplace safety and it is a good idea to listen carefully to employee concerns to see if you can address them. It may be that you can set the employee's mind at rest by explaining the measures you are taking to protect them and persuade them to return.

Consider alternatives where feasible. A minority of employees may be able to do some work from home and risk assessments may identify other steps you can take to keep employees safe, e.g. limiting customer access to some working areas.

There may be other practical steps you can take to allay concerns, such as:

- Offering extra car parking to avoid the need to use public transport
- Offering more flexible working (if possible) to avoid peak time travel
- Changing work arrangements (e.g. place of work) to minimise any risk
- Keeping someone on furlough or agreeing a period of unpaid leave and asking a colleague to provide cover
- Allowing an employee to take holiday or other time off

Ultimately if an employee unreasonably refuses to return to work you can discipline them, but this should be a last resort and employers need to be careful to avoid unlawful discrimination where an employee's refusal is connected with a disability.

Other options

Sadly, furlough is not a sufficient answer for every employer and, especially as furlough funding is phased out, employers may need to look at other options to save money. This may also arise sooner if an employee refuses to be furloughed.

Park owners may need to look at options such as reducing pay and / or (with employees' agreement of course) or other measures such as not filling vacancies. Ultimately redundancy may be the only solution.

Redundancy is a complex topic and it can be easy to make an expensive mistake. However, where a business does need to make savings in employee costs, it is perfectly possible to make low-risk redundancies. Key points are:

1. Where 20 or more redundancies are proposed at one site within 90 days, special rules and timescales apply around collective consultation.
2. 'Redundancy' has a particular legal definition but will apply in most cases where you need to reduce employee numbers either because there is insufficient work or because you need to save money. It may not apply though if you are simply trying to enforce a change to contract terms, such as lower pay.
3. You will need to follow a fair procedure and this can take some time (typically 2 to 4 weeks, sometimes longer). This includes steps such as a period of consultation with individual employees, a formal meeting to consider their feedback and a right of appeal. Rules around fair process, especially if you are choosing between employees for redundancy, can be complex.
4. Employees with at least two years' continuous service will be entitled to a statutory redundancy payment, which can be calculated [here](#). This is in addition to notice (or notice pay) and a payment for any accrued but untaken holiday at the termination date.

Furlough Agreement

Model text

Dear [NAME]

In line with the government's Coronavirus Job Retention Scheme, and by reason of circumstances arising as a result of coronavirus, we wish to change your employment status to that of a 'furloughed worker' to avoid the need to make your role redundant or lay you off. This will mean a temporary change to your terms and conditions of employment. Those changes will be:

1. Your employment status will be changed to a 'furloughed worker' from [DATE];
2. You will remain a furloughed worker until advised otherwise by the business. We anticipate this to be until at least [DATE], although we will advise you if we expect this to change;
3. We may require you to return to work on a flexible basis from 1 July 2020 with a mixture of working time (in line with your contract) and time on furlough as we may direct. If this happens, you will of course be entitled to full pay for any time spent working. The terms that follow will continue to apply for time spent on furlough.
4. Subject to this, you must not carry out any work for us whilst being designated a furloughed worker;
5. **EITHER** For time on furlough you will be paid whichever is the lower of:
 - a. 80% of your regular wages or salary only; or
 - b. £2,500 per month (gross)supported by the Coronavirus Job Retention Scheme. Regular wages or salary means unconditional wages or salary which are contractually due. All other payments or other contractual and discretionary benefits shall temporarily cease during a period of furlough save as set out below;

OR

You will continue to receive full pay and benefits whilst furloughed. As the government will only pay 80% of these costs to us, that means we will continue to pay 20% of these ourselves even though you are not working, which reflects the value we place on our staff;

6. [Your holiday entitlement shall continue to accrue during any period of furlough at the statutory rate of 5.6 weeks per annum (or the pro-rata equivalent for part-time employees);]
7. **SUBJECT TO CONSULTATION WHERE REQUIRED** [If you are eligible for pension auto-enrolment, we shall pay the employer's pension contribution at the current statutory auto-enrolment rate (currently 3%) and shall deduct the employee's contribution at the current statutory auto-enrolment rate (currently 5%) from your pay in the usual way];
8. Save as set out in this letter, all other terms and conditions of your employment are unchanged. You must remain in contact with the business and be ready to have your employment status changed from a furloughed worker back to a working employee, or to any combination of work and furlough, with 24 hours' notice;
9. You will be subject to the details, updates and changes the government makes to the Coronavirus Job Retention Scheme and the definition of a furloughed worker during the period of

time you are designated a furloughed worker. We reserve the right to change this arrangement once further details of the government's proposals are known;

10. At the end of the period of furlough you will return to work on the terms and conditions that applied immediately before the start of furlough.

In order to indicate your acceptance of the above contractual changes to your terms and conditions of employment please sign and return this letter by email. Please also let us have a copy of your personal contact details (email and telephone) if we do not already have these so we can stay in touch.

Yours sincerely
[NAME]

I accept this contractual change to my terms and conditions of employment on a temporary basis, and recognise it is subject to change.

Employee Name: _____

Employee Signature: _____

Date: _____

Return from Furlough letter

Model text

Dear [NAME]

Thank you for having agreed to become a 'furloughed worker' in order to help the business take advantage of the government's Coronavirus Job Retention Scheme. We are pleased to tell you that we now need you to return to work as from [DATE].

EITHER: You will return to work on your contract terms and you will of course be entitled to full pay from the date of your return. We may require you to become a 'furloughed worker' again if the needs of the business require this; we will discuss this with you if this looks likely.

We may, from or after 1 July 2020, have to require you to work reduced hours on the basis that you will be a 'furloughed worker' for the remainder of your contract hours. In this case the terms (including pay) of the furlough agreement you have previously signed will apply for time spent as a furloughed worker and you will be paid full pay for time spent working. We will give you reasonable notice if we need you to work reduced hours, or if we need to make any further changes which may increase or reduce the number of hours spent working or as a furloughed worker.

OR, FOR A RETURN ON OR AFTER 1 JULY 2020: We would like you to return on reduced hours, to allow us to take full advantage of the Coronavirus Job Retention Scheme. Your working pattern will be [DETAILS] which we may change on reasonable notice. Changes may include increasing or decreasing the numbers of hours you are required to work up to the full number of hours provided for by your contract of employment. The terms (including pay) of the furlough agreement you have previously signed will apply for time spent as a furloughed worker and you will be paid full pay for time spent working.]

You are required to ensure that you comply with our procedures about safe working and we will explain these to you on your return **[OR INCLUDE HERE]**.

Welcome back.

Yours sincerely
[NAME]

[IF YOU ARE PROPOSING CHANGES TO WHAT HAS ALREADY BEEN AGREED] Please sign and return this letter to confirm your agreement to the above.

Employee Name: _____

Employee Signature: _____

Date: _____

This is general guidance on general questions, as at the date of publishing. It does not deal with your specific circumstances or constitute professional legal advice. You should not act upon the guidance without obtaining professional legal advice specific to your circumstances. You also should take into account that things change. No representation or warranty (express or implied) is given as to the accuracy or completeness of the guidance, and, to the extent permitted by law Tozers LLP, its members, employees and agents do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on this guidance or for any decision based on it.

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