This information is correct as of 1st September 2020

UPDATE 1st September 2020 – taken from UK Government guidance:

https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

From 1 September, the government will pay 70% of wages up to a maximum cap of £2,187.50 for the hours the employee is on furlough. Employers will top up employees' wages to ensure they receive 80% (up to £2,500). The caps are proportional to the hours not worked. You can read more information about the changes.

Unless you're making a new claim for an employee who is a military reservist or is returning from statutory parental leave, you can only continue to claim through the scheme if:

- you have previously furloughed the employee for 3 consecutive weeks between March 1 and 30 June
- you submitted your claim before 31 July

We continue make this Coronavirus Job Retention Scheme – Part 2 guidance note available as a reference tool. This second part of our Job Retention Scheme series of guides was originally commissioned in May 2020. We have made a few additions below, to bring this guide up to date. For the latest information and guidance please always refer to the UK Government site: https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme.

Introduction

The Wales Co-operative Centre has commissioned HCHR Limited to produce a second report on the changes to the furlough scheme, key issues for employers to consider when an employee is on furlough,

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what considerations businesses need to make when considering re-opening and in the worst case scenario, what to do when contemplating having to make redundancies.

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, with the scheme 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".

Further details on the scheme, eligibility and how to claim can be found here:
https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

Since the introduction of the Scheme, there have been numerous amendments and alterations to the scheme's guidance notes.

HM Revenue & Customs has confirmed that a total of 6.3 million jobs had been furloughed by 800,000 businesses, with claims amounting to £8 billion pounds as at 3rd May 2020.

Extension to the Furlough Scheme

The Scheme was originally due to end on 30th June 2020, however on 12th May 2020, the Chancellor announced that the Scheme will be extended to the end of October 2020 across all regions and sectors in the UK. The Chancellor also confirmed that there would be no changes to the Scheme in its current format until the end of July 2020.

Update 1st July 2020: Here is the UK Government's July update which details the timetable of changes to the scheme and confirms that it will close on the 31st October 2020:

https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme

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Changes to the Furlough Scheme from 1st August 2020

The press release issued on 12th May 2020 stated that from August 2020:

- Employees will be able to return to work on a part-time basis.
- Employers will be required to pay a percentage towards the salaries of their furloughed employees.
- The employer's payments will substitute the 80%/£2,500 contribution under the CJRS.

The *Employers' CJRS guidance* and the *Employees' CJRS guidance* were updated on 14th May 2020 to confirm that the Scheme will continue in its current form until the end of July and then "From August, employers currently using the scheme will have more flexibility to bring their furloughed employees back to work part-time whilst still receiving support from the scheme.

This will run for three months from August through to the end of October. Employers will be asked to pay a percentage towards the salaries of their furloughed staff. The employer payments will substitute the contribution the government is currently making, ensuring that staff continue to receive 80% of their salary, up to £2,500 a month. More specific details and information around its implementation will be made available by the end of May."

Update 1st July 2020: you can now find these details here:
https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme

We consider that the words "From August, employers currently using the scheme" is likely to mean that employers cannot claim for the first time after 1 August 2020. As employees will be able to return to work on a part-time basis from August, we expect this is intended to prevent potential abuse of the scheme to include employees who had continued to work for their employer through the pandemic.

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Update 1st July 2020:

you can only continue to claim through the scheme if:

- you have previously furloughed the employee for 3 consecutive weeks between March 1 and 30 June
- you submitted your claim before 31 July

It is unclear whether employers will be required to pay a different proportion of capped furlough pay for furloughed employees who return to work part-time as opposed to those who do not.

Q: Will new furlough agreements be required if employees are to be furloughed after the end of July 2020?

As furloughed employees could begin to work on a part-time basis and employers would be required to contribute towards their 80% of salary (capped at £2,500) furlough pay from 1st August 2020, the question has been posed as to whether furlough agreements would need to be updated.

As employees have been prohibited from working for their employer while on furlough since the Scheme commenced, a properly drafted furlough agreement entered into since the commencement of the Scheme and to date will prohibit employees from carrying out any work for the employer during their furlough period. It may therefore be necessary for the furlough agreement to be amended by a side letter, or for a fresh furlough agreement to be entered into, which permits the employee to work during furlough and deals with the circumstances in which the employer can require the employee to work.

The difficulty for employers at this stage is that the government has not yet announced the detail of the changes to the Scheme that will take effect from 1st August 2020. Those changes are due to be announced by the end of May 2020.

Update 1st July 2020: Here is the UK Government's July update which details the timetable of changes to the scheme and confirms that it will close on the 31st October 2020:

https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme

However, employers should ensure that the employee's consent to any variation of their furlough agreement is obtained in advance of the changes taking effect to ensure that there has been a valid

variation of contract. In addition, the new rules may set specific requirements in terms of accessing the Scheme where an employee is working part-time, and these will also need to be complied with in implementing any contractual changes.

Q: Can an employer rotate furlough between its employees?

The *Employers' CJRS 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. The *Treasury direction* clarifies that three weeks means 21 calendar days (*paragraph 6.1(b)*).

Since employers are likely to receive many requests or volunteers to be placed on furlough, it is likely to assist employee relations for employers to be able to move employees on and off furlough, subject to that minimum three week period, so that no employee feels that they have been unfairly denied the opportunity to take furlough. The guidance confirms that employees can be furloughed multiple times, subject to the minimum three consecutive week period.

Q: Is there a specific amount of time an employee has to work before going back on furlough?

Currently, there is no guidance requiring an employee to return to work for a minimum period of time before being furloughed again. However, if an employer is rotating furloughed employees, those returning to work are likely to be back at work for at least three weeks (given that the minimum furlough period is three weeks).

An employer should also bear in mind the anti-abuse provisions relevant to the CJRS. A claim must not be made under the CJRS if it is abusive or otherwise contrary to the "exceptional purpose" of the CJRS (*paragraph 2.5, Treasury direction*), which is stated to be the payment of employment costs in respect of furloughed employees "arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease". This is a warning to employers that abuse of the CJRS will be open to scrutiny, if not immediately then certainly in any future audits. If an employee returns to work for only a very short period of time before being furloughed again, it is possible (although by no means certain) that this could suggest that the employee is being furloughed for some reason unconnected to COVID-19. This would, however, always depend on the facts of the particular case.

Q: How does an employer decide who to put onto furlough or come off furlough?

An employer could initially ask for volunteers. However, in some cases an employer may receive more volunteers than it wants, especially if asking for volunteers 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 furlough or ask to return 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. The *Employers' CJRS guidance* makes clear that equality and discrimination laws apply in the usual way in this context.

The *EHRC guidance* emphasises that decisions on which employees to furlough or ask to return should not be made based on protected characteristics. It gives the examples of an employer furloughing a pregnant employee in order to avoid its health and safety obligations towards that employee, or an employer furloughing a disabled employee without their agreement in order to avoid making reasonable adjustments. This would likely amount to direct discrimination.

Q: What information should an employer provide when it notifies an employee that their furlough leave is due to end?

In addition to confirming the date the employer wishes the employee to return to work, employers should consider whether the following information will need to be provided:

- The steps the employer has or is taking to ensure that it is safe for employees to return to work in the workplace (where applicable).

- Potential temporary contractual changes which the employer is required to impose due to government restrictions. For example, different working hours and break times in order to stagger arrival and departure times to prevent crowding in workplace and on public transport.
- Any potential temporary or permanent contractual changes the employer wishes to impose. For example:
    - temporary reduced hours and pay for a period of time to allow the business to recover;
    - new lay-off/short-time working provisions;
    - changes to job descriptions/duties and mobility clauses.
- Any policy changes the employer needs to make due to the circumstances of the pandemic. For example:
    - preventing annual leave being taken during a certain period after re-opening;
    - cost saving changes such as restricting recoverable expenses or a recruitment freeze.
- The employees' continuing terms and conditions that the employer may wish to remind them of. For example, the employer and employees' health and safety obligations and the employer's sickness policy.
- The temporary different ways of working that the employer needs to impose to comply with government requirements. This will vary depending on the employer and the industry concerned. However, these may cover:
    - minimising the use of public transport to travel to and from work;
    - measures to comply with social distancing requirements in the workplace;
    - measures to reduce the spread of the virus in the workplace;
    - minimising work-related travel and social contact;
    - the responsibilities of staff to those entering the workplace.
- The special provisions the employer is making for shielding and vulnerable employees and information on how an employee should notify their employer if they believe they fall into this category and what steps the employer will then take.
- Any allowances that will be made for time spent on furlough in relation to performance reviews, performance and capability procedures, and application of redundancy selection criteria.
- Where the employee has been on furlough for an extended period, it will be useful to remind the employee of their remaining annual leave entitlement for that holiday year, and, where appropriate, of their right to carry-over annual leave from the current holiday year to the next two holiday years.

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Employers should remember to also notify employees who have continued working on site throughout lockdown of the above matters where relevant.

How should an employer select which employees should return to work from furlough ahead of others?

Acas guidance states that employers should regularly review furlough agreements to decide when to bring furloughed staff back to work. Employers should consider:

- Which job roles and skills are needed in the workplace?
- If all furloughed staff are needed back at the same time.
- If any staff might be kept on furlough because they're temporarily unable to work, for example if they're caring for someone or are shielding.

When selecting which employees to return to work from furlough and which employees to keep on furlough, an employer should ensure that no discriminatory criteria are applied, except where this can be justified.

Q: Will employees continue to accrue holiday during furlough?

The *COVID-19 holiday guidance* published on 13th May 2020 confirms that employees continue to accrue annual leave during furlough. This reflects the position in the *Employees' CJRS guidance* since 17th April 2020. This is unsurprising and in accordance with the Working Time Regulations 1998.

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, but this may make it less attractive to employees. The *Employees' CJRS guidance* states "You can agree with your employer to vary holiday pay entitlement as part of the furlough agreement, however almost all workers are entitled to 5.6 weeks of statutory paid annual leave each year which they cannot go below." The guidance refers to varying holiday pay but we assume that it means holiday entitlement rather than pay given the subsequent reference to the statutory entitlement of 5.6 weeks.

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Q: Can employees carry over annual leave they have not used to the next leave year?

The government has passed emergency legislation relaxing the restriction on carrying over the four weeks' leave derived from the Working Time Directive (*2003/88/EC*) (WTD leave) with effect from 26th March 2020. The Working Time (Coronavirus) Amendment Regulations 2020 (SI 2020/365) amend regulation 13 of the Working Time Regulations 1998 (SI 1998/1833) (WTR 1998) to permit the carry-over of any untaken WTD leave where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)".

The *COVID-19 holiday guidance* first published on 13th May 2020 states that "workers who are on furlough are unlikely to need to carry forward statutory annual leave, as they will be able to take it during the furlough period (in most cases at least)". The only exception the guidance gives where it considers that it may not be reasonably practicable for a worker to take annual leave during furlough is where, "due to the impact of coronavirus on operations, the employer is unable to fund the difference [between the CJRS reimbursement and the employee's entitlement to full pay during annual leave]".

This does not accord with the Working Time (Coronavirus) Amendment Regulations which permit the carry-over of any untaken WTD leave where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus (including on **the worker**, the employer, **or the wider economy or society**)". Further, it ignores the fact that:

- Some employers and employees will have entered into furlough agreements before the *COVID-19 holiday guidance* was published that provide that an employee cannot take annual leave during furlough.
- The extension of the scheme to 31st October 2020 means that employees can be potentially furloughed for eight months.
- On return to work from furlough, employers may decide to suspend annual leave in order to have the full workforce available to focus on rebuilding the business following the pandemic.
- ACAS guidance still suggests that a worker could carry-over leave because they have been furloughed. Although the guidance is non-statutory, it may have been relied on by employers prior to the publication of the *COVID-19 holiday guidance*.
- If an employer simply says nothing about annual leave during furlough, their workers may reasonably assume that they are effectively on standby during furlough and not entitled to take annual leave (and it was therefore not reasonably practicable to do so). In that case, the principle that workers may be entitled to carry forward their WTD leave if their employer has not provided

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sufficient information about their holiday entitlement may be relevant. There may be a requirement to allow carry over of WTD leave in that scenario, regardless of the new regulations.

The *COVID-19 holiday guidance* states that, "If an employer requires a worker to take annual leave while on furlough, it should consider whether any restrictions the employee is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday." However, this point is not made in relation to whether it would be reasonably practicable for the worker to voluntarily take annual leave during furlough. It is arguable that a period of furlough which coincides with a period of full or partial lockdown would render it not reasonably practicable that the worker could take their leave at that time on the basis that they are unable to enjoy rest and relaxation, although it may be a stretch to argue that being confined to home is equivalent to not being able to rest and relax.

We consider that where such a contractual agreement has already been made that annual leave cannot be taken during furlough, the guidance will not require this to be varied. However, it should be borne in mind when entering into new furlough agreements and employers who previously made such provision in their furlough agreements may wish to reconsider this position if their employees subsequently remain on furlough for many months.

Q: Can you take annual leave during furlough?

The *COVID-19 holiday guidance* published on 13th May 2020 confirms that workers can take annual leave during furlough, and this reflects the position in the *Employees' CJRS guidance* since its 17th April 2020 update and ACAS guidance. It was previously unclear whether a period of annual leave would break furlough and affect the employer's application for reimbursement under the CJRS. The guidance is consistent with the position under the Working Time Regulations 1998 which allows workers to take annual leave in similar scenarios.

Although workers can take annual leave during furlough, employers may require them to defer taking annual leave because they will be entitled to their usual holiday pay during annual leave and employers will be obliged to pay the additional amounts due to the employee over the 80%/£2,500 cap.

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Q: Can an employer require a worker to take holiday whilst on furlough?

Employers looking at their short-term financial position, may decide not to instruct workers to take their annual leave during furlough as they will need to top up the furlough pay. The *COVID-19 holiday guidance* published on 13th May 2020 gives this as a reason why it may not be reasonably practicable for employees to take annual leave during furlough.

However, given that the 17th April 2020 update to the *Employees' CJRS guidance* advises that employers can recoup an employee's holiday pay via the CJRS up to the 80%/£2,500 limit, some employers may take the view that it would be cost effective to direct workers to take annual leave (giving the notice required under the WTR 1998 or the contract of employment).

The *COVID-19 holiday guidance* states that "If an employer requires a worker to take holiday while on furlough, the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday." This may be a difficult assessment for the employer to make and the guidance unhelpfully does not provide examples of what would, and would not, amount to preventing an employee from relaxing and enjoying their annual leave in accordance with the requirements of the WTD.

If the employer decides to request employees to take annual leave, the employer must provide the employee with at least twice as many days before as the amount of days they are asking them to take. For example, if an employer wants an employee to take 5 days' annual leave, they should inform the employee at least 10 days before.

Q: What pay is a worker entitled to where they take annual leave during furlough?

Statutory holiday pay entitlement depends upon whether the worker has normal working hours and how they are paid. The *COVID-19 holiday guidance* and the *Acas guidance* state that workers must receive their usual holiday pay in full.

The update to the *Employees' CJRS guidance* on 17th April 2020 confirmed that holiday taken during furlough should be paid in accordance with the WTR but an employer can only recover the 80%/£2,500 cap from the CJRS in respect of any annual leave taken so the employer will need to meet the shortfall.

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Q: If a worker has pre-arranged annual leave which falls during furlough, is the worker entitled to take that leave?

The employer may wish to cancel any annual leave which has already been booked, if there is enough time before the leave for the employer to give the required notice. The required notice to cancel pre-booked holiday is at least the same number of days' notice as the original holiday request.

Q: If a worker has pre-arranged annual leave which falls during furlough, is the worker entitled to cancel that leave?

The Working Time Regulations 1998 do not provide for cancellation of a notice to take annual leave by a worker. However, the contract of employment or the employer's holiday policy may provide a mechanism for workers to do so.

In either event, employers would need to ensure that they do not breach the implied term of trust and confidence in refusing to accept a worker's withdrawal of notice to take annual leave, or by issuing notice that the worker must still take annual leave on the days in question.

Q:What happens to bank holidays which fall during furlough?

The employer may wish to cancel any annual leave which falls within furlough (including bank holidays which have been designated as annual leave) if there is enough time before the leave for the employer to give the required notice.

If it is then not reasonably practicable for the cancelled annual leave to be taken in the remainder of the leave year, and if those days fall within the worker's statutory leave entitlement, the leave should be carried forward to the next holiday year.

If the employer decides to continue to treat the bank holidays as statutory annual leave then they should be paid accordingly.

The *Employees' CJRS guidance*, as amended on 17th April 2020, states that, if employees usually work bank holidays, their employer can agree that this is included in the CJRS grant payment. If the employee usually has bank holidays off, their employer will need to either top up their pay to their usual holiday pay or give the employee a day off in lieu. The guidance does not mention the requirement to give

notice where the employer wishes to cancel statutory annual leave, but the fact that the guidance is silent on the point does not detract from the employer's obligations to do so under the WTR 1998. The *COVID-19 holiday guidance*, first published on 13th May 2020, reflects this position.

Q: From a health, safety and well-being perspective, what are the employer's obligations about managing a return to work?

Employers have a contractual duty to take care of employees' health and safety and other statutory duties too including:

- Implied duty to protect the health and safety, of all employees.
- Duty to look after the mental health, as well as physical health, of employees.
- Duty to protect members of the public, clients, customers and contractors.
- Duty to manage the health and safety risks from the workplace itself including equipment such as hand driers and air conditioning systems which may circulate viruses although there has been little research on this. Other workplace issues include cleanliness and washing facilities.
- Provision of safe systems of work possibly including provision of PPE subject to availability.
- Information and training (including reminding employees of their responsibilities in meeting health and safety requirements).

UPDATE 1st Sept 2020

This guidance note was first published in May 2020 prior to the Welsh Government's publication of sector guidelines and the guidance on Test, Trace, Protect.

The Welsh Government has undertaken several reviews since this time and has published detailed guidance for various sectors. You can find all the latest and sector specific guidance here: https://gov.wales/your-responsibilities-employer-coronavirus

You can find guidance for employers on Test, Trace, Protect here: https://gov.wales/employers-coronavirus-test-trace-protect-guidance

The latest guidance from Public Health Wales can be found here: https://covid19-phwstatement.nhs.wales/

Welsh Government's latest coronavirus advice can be found here: https://gov.wales/coronavirus

Check the Welsh Government website for up to date guidance. You can also refer to our HR and Staffing guidance note for the latest information and links: https://wales.coop/covid-19-factsheets/

Q: How can employers plan and manage a safe return to the workplace?

Before restarting work, you should ensure the safety of the workplace by:

- carrying out a **risk assessment** in line with the HSE guidance
- **consulting** with your workers or trade unions
- **communicating** the results of the risk assessment with your workforce and on your website
- **ensuring staff well-being**
- **Developing** safe working practices

Risk assessment has a crucial role in ensuring a safe return to the workplace process Risk assessments need to be undertaken and reviewed on an ongoing basis and when there are environmental or government advice changes. The end goal is to adopt appropriate control measures which reduce or remove the risks of contracting Covid-19 when returning to work. The risks around visitors entering the workplace, such as customers should be assessed too as there is also a legal obligation to also ensure their health and safety.

Consultation, good **communication** and staff buy-in to the new infection control arrangements processes is essential. These discussions need to be part of a broader re-induction process that takes on board any adjustments or ongoing support that people may need following lockdown. Employee engagement will help identify support and ensure individuals feel more confident about returning. Where relevant employers should also seek union input for any return to work measures.

Health and safety duties extend physical infection control measures but also include mental health and **well-being.** Risk assessments should cover managing mental health and well-being aspects too.

New working arrangements in the workplace and working from home can cause stress or mental health issues. Employees should maintain contact and look for signs of problems signposting support that is available e.g. MIND, Occupational Health

If an employer becomes aware that particular employees are struggling with their mental health, they should conduct individual risk assessments for both home and workplace workers.

Don't forget to also include employees who have been furloughed and working from home.

Employers have the same health and safety responsibilities towards those working from home as for any other workers, including physical mental health.

Safe Working Practices

i. Develop cleaning, handwashing and hygiene procedures

You should increase the frequency of handwashing and surface cleaning by:

- advise workers to wash their hands frequently and effectively and restock facilities regularly.
- increase the regularity of deep cleaning especially desks, surfaces, door handles, tools and other surfaces that people touch regularly. Leave doors open (subject to fire risks).
- ensure waste bins are lined with plastic bags so that they can be emptied without touching the contents.
- enhancing cleaning for busy areas

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- setting clear use and cleaning guidance for toilets
- providing hand drying facilities – either paper towels or electrical dryers

ii. Safety equipment and facilities

- Provide anti-bacterial gel, PPE, masks, sanitation gel and wipes for all staff where possible and in appropriate sectors, in line with the latest Government advice. Train workers in correct use of PPE, facemasks and gloves if appropriate.
- Consider separating facilities such as toilets, cafeterias etc. for staff and visitors.

iii. Help people to work from home

You should take all reasonable steps to help people work from home by:

- discussing home working arrangements
- ensuring they have the right equipment, for example remote access to work systems
- including them in all necessary communications
- looking after their physical and mental wellbeing

iv. Maintain 2m social distancing, where possible

Where possible, you should maintain 2m between people by:

- putting up signs to remind workers and visitors of social distancing guidance
- avoiding sharing workstations
- using floor tape or paint to mark areas to help people keep to a 2m distance
- arranging one-way traffic through the workplace if possible
- switching to seeing visitors by appointment only if possible

v. Where people cannot be 2m apart, manage transmission risk

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Where it's not possible for people to be 2m apart, you should do everything practical to manage the transmission risk by:

- considering whether an activity needs to continue for the business to operate
- keeping the activity time involved as short as possible
- using screens or barriers to separate people from each other
- using back-to-back or side-to-side working whenever possible
- staggering arrival and departure times
- reducing the number of people each person has contact with by using 'fixed teams or partnering'

It is advisable that regular email reminders are sent to staff of the Safe working practices and display signs are put up around the workplace to raise awareness of measures adopted.

Make sure you read all the Government guides relevant to your workplace. Each guide has specific actions for businesses to take based on these steps. Further guidance is expected to be published as more businesses are able to reopen.

Q: Social distancing is going to be very difficult in our workplace, what should we do?

Safe work practices to limit exposure to Covid-19 at work include both overall control measures and minimising workers exposure to each other. Employers should consider who really needs physically to be in the workplace. Safeguarding the wellbeing of workers is paramount; homeworking should continue for every role that can be carried out remotely. It may be possible to reorganise any non-essential workplace-based work.

Employers should listen to people's concerns about returning to work and allow for a period of adjustment and planning. For many businesses, easing lockdown restrictions will be a more challenging, complex and drawn-out process than the original lockdown.

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If social distancing can't be done properly or safely, employers should act responsibly in line with their legal obligations to ensure the health and safety of both their employees and any visitors to their site. This could mean staying closed.

Flexible leave and remote working should still be encouraged wherever possible to limit presence at the workplace. The following are just some examples of control measures depending on the nature of the role and workplace.

As social distancing is likely to continue to apply for some time, to ensure that staff numbers allow for this employer can consider:

- Reducing staff numbers/ shift working in teams
- Office redesign; physical barriers / partitions put in place, empty desks, no hot desking
- home working
- adjust working hours and other atypical working patterns.

These methods will reduce the number of people in the workplace. Changes to contractually agreed working hours will usually need employees' agreement.

Q: What is the legal and moral position on encouraging vs mandating return?

For many employers balancing the legal and moral position on encouraging employees to return to work is a difficult decision to make. Whilst the government in England is 'actively encouraging' those who cannot work from home to return to work there is no legal obligation to do so. Different advice applies in Scotland, Wales and NI whose workers are encouraged to stay at home.

Employers have to undertake a balancing act taking into account:

- managing the health risks employees face in the workplace and travelling to work from potential exposure to the virus
- financial pressures of their business
- the fact that the furlough scheme may shortly have reduced payments before coming to an end
- the safety risks that new working practices may present to employees and others whilst the threat of infection from Covid-19 remains

- problems faced by those needing childcare*.

The CIPD is urging businesses to ensure they can meet three key tests before bringing their people back to the workplace:

1. Is it essential? If people can continue to work from home, they must continue to do that for the foreseeable future. If they cannot work from home, is their work deemed essential or could the business continue to use the Government's Job Retention Scheme for longer, giving them the time needed to put safety measures and clear employee guidance and consultation in place?
2. Is it sufficiently safe? Employers have a duty of care to identify and manage risks to ensure that the workplace is sufficiently safe to return to. Employers should take their time with gradual returns to work to test health and safety measures in practice and ensure they can work with larger numbers before encouraging more of their workforce back.
3. Is it mutually agreed? It's vital that there is a clear dialogue between employers and their people so concerns, such as commuting by public transport, can be raised and individual's needs and worries taken into account. There will need to be flexibility on both sides to accommodate different working times or schedules as ways of managing some of these issues.

**Following the UK Government press conference on 11th May it appears that children of parents working in for example manufacturing or construction cannot attend school with key workers' children. This means many employees will therefore have childcare issues before the schools start their gradual reopening.*

Q: What is meant by "redundancy""?

Redundancy is a potentially fair reason for dismissing an employee. However, an employment tribunal will not treat a dismissal as a redundancy dismissal unless it is caused by:

- the closure of a business;
- the closure of a particular workplace; or
- a diminished need for employees to carry out work of a particular kind.

Line managers should be aware that tribunals use a wider definition of "redundancy" for collective consultation purposes.

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Many social businesses have been set up with the express purpose of creating employment opportunities within their communities. Making redundancies would be a very difficult but sometimes necessary choice to allow the business to survive. Within lots of social busineses workers are seen as key stakeholders, therefor using using formal and informal consultation may result in ideas and actions being formulated that could reduce the number of posts that need to be made redundant.

Q: What is the meaning of Collective consultation

If an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, it will be under an obligation to consult with appropriate representatives of the affected employees. This is known as "collective consultation". It will usually be easy to tell if the duty to consult collectively is triggered. If, for example, an employer is planning to close down its manufacturing site and dismiss all 40 employees who work there at the same time, it will have to carry out collective consultation with representatives of the affected employees.

The duty to consult collectively is in addition to the employer's obligations to consult individually with each of the potentially redundant employees.

Q: When should the employer begin collective redundancy consultation with employees?

If there are 100 or more affected employees at the same establishment, the consultation must commence at least 45 days before the first dismissal is to take effect. If 20 or more employees are affected, consultation must commence at least 30 days before the first dismissal. No obligation to consult collectively arises where 19 or fewer employees are affected.

The collective consultation should be completed before the employer serves any notices of termination of employment.

The relevant definition of redundancy for the purpose of collective consultation is a "dismissal for a reason not related to the individual concerned". This includes the situation where an employer proposes to dismiss and re-engage employees who do not agree to a proposed variation of their contract.

Q: What must consultation include?

Consultation with the appropriate representatives must include consultation about ways of:

- avoiding the dismissals, ie considering other options instead of dismissal;
- reducing the number of employees to be dismissed, eg suspending recruitment, redeployment and reducing overtime; and
- mitigating the consequences of dismissal, eg severance payments and outplacement counselling.

The consultation must be undertaken with a view to reaching agreement with the appropriate representatives. Employers must approach the consultation with an open mind and be prepared to consider any representations made by the appropriate representatives. If alternatives to the proposal are put forward i.e. ways of avoiding or reducing the number of redundancies, these should be properly considered and not dismissed out of hand, in order to reduce the risk of allegations that the employer has already made up its mind about the dismissals.

The employer is required to disclose certain information to the appropriate representatives in writing. It must disclose:

- the reasons for its proposals;
- the numbers and description of employees it proposes to dismiss as redundant;
- the total number of employees of that description employed at the establishment in question;
- the proposed method of selecting the employees who may be dismissed;
- the proposed method of carrying out the dismissals, including the period over which the dismissals are to take effect;
- the proposed method of calculating the amount of any redundancy payments - other than statutory redundancy pay - to be made to employees who are dismissed; and
- the number of agency workers working temporarily for and under its supervision and direction, the parts of the business in which they work and the type of work that they perform.

The information must be given to the appropriate representatives personally or posted to the address that they specify to the employer. In the case of trade union representatives, the information should be posted to the main or head office of the union.

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If the employer invites the affected employees to elect employee representatives and they fail to do so within a reasonable time, the employer is required to give each of the affected employees the information.

An employer proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less is obliged to notify the Secretary of State of its proposal at least 45 days before the first of the dismissals takes effect (and in any event before giving notice to terminate any employee's contract. Where the proposals concern between 20 and 99 employees at one establishment, the notice period is 30 days.

A failure to comply with this requirement is a criminal offence punishable by a fine and it is therefore imperative that it is not overlooked.

Many social businesses have been set up with the express purpose of creating employment opportunities within their communities. Making redundancies would be a very difficult but sometimes necessary choice to allow the business to survive. Within lots of social busineses workers are seen as key stakeholders, therefor using using formal and informal consultation may result in ideas and actions being formulated that could reduce the number of posts that need to be made redundant.

Q: Can an employer make employees on furlough redundant?

The *Employees' CJRS guidance* confirms that an employee can be made redundant while on furlough or afterwards, and that an employee's redundancy rights will not be affected by being furloughed. However, an employer cannot claim reimbursement of redundancy payments under the scheme.

While the government has put many measures in place to assist struggling employers, including the CJRS, and has extended the scheme to 31st October 2020, some businesses will still be forced to close, particularly if the pandemic is protracted, making redundancies inevitable. However, where the business is continuing, there is the potential for the dismissal to be unfair.

Employee and trade union representatives, who may need to be consulted on redundancy during furlough, can perform their duties without breaking their furlough.

Q: Can you undertake redundancy consultations with furloughed employees?

The usual obligation to consult staff about any redundancy proposals and allow them to comment on these before they are finalised, and rules about what a fair consultation should entail, will continue to apply irrespective of whether staff are furloughed or not. Though the question of what a fair process will look like in the circumstances may be slightly different.

One of the primary issues to bear in mind when undertaking redundancy consultation processes with staff who are furloughed, will be the obvious logistical issues from consulting with staff remotely. Redundancy consultation meetings will still need to take place individually and/or collectively, as appropriate, but these will have to be arranged and carried out remotely; for example, via video call or conference call or in writing. Employers may need to build extra time into the consultation process to allow for any logistical issues which may arise.

Employees should still be given the right to be 'accompanied' to redundancy meetings (if that is your normal practice), even if such meetings are carried out remotely or virtually. Employers will therefore have to consider how best to enable this – the most likely solution being via video call or similar. Where video calls are not possible telephone or written consultation will be required.

Employees and staff representatives will still be allowed to 'accompany' colleagues to redundancy meetings even if they themselves are furloughed, as the latest edition of the employer's guidance on the coronavirus job retention scheme confirms that 'whilst on furlough, employees who are union or non-union representatives may undertake duties for the purpose of individual or collective representation of employees or other workers.'

However, the effect of the pandemic may mean that there are practical difficulties with appointing representatives in the normal way and/or undertaking full consultation. These issues could be more pronounced where there is no recognised Trade Union or existing staff representatives (meaning an election has to take place before consultation can begin).

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Q: What happens if an employer fails to consult?

If an employer fails to comply with its obligation to consult collectively, the employee representatives, the trade union representatives or the individual employees affected can complain to an employment tribunal.

As a general rule, a complaint must be made within three months of the date on which the last of the dismissals took effect. If the complaint is upheld, the tribunal will make a declaration to that effect and may make an award of compensation to be paid to those employees who have been dismissed as redundant, or whom it was proposed to dismiss as redundant (even though ultimately they were not), in respect of whom the employer failed to comply with its obligation to consult collectively. This is called a "protective award".

The protective award can be up to 90 days' actual pay for each employee. The amount awarded will depend on what the tribunal considers to be just and equitable, taking into account the seriousness of the employer's failure to comply with its duties. A failure to comply with the collective consultation obligations can therefore be very costly.

Q: Could a redundancy be argued as being unfair if the employer can place the employee on furlough or extend their 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 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 could not afford to furlough employees in March and pay the 80% of salary until HMRC opened the scheme on 20th April and reimbursed it. While those employers could have asked for the employees to agree to defer payment until reimbursement was received from HMRC, some employees may have been unwilling to agree to this, or may not have not been in a financial position to do so. In those circumstances, it may have been fair for an employer to dismiss for redundancy.

Although the CJRS has now been extended to 31st October 2020, the government has made it clear that it will expect employers to make a financial contribution towards furloughed employees' furlough pay

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from 1st August 2020. Furloughing employees beyond that date will therefore come at a cost to employers and the extent of that cost is not yet known. There may therefore still be fair reasons for employers to make furloughed employees redundant despite the extension of the scheme.

In the current climate, some jobs have been genuinely eliminated and workplaces closed. The fact that there may be a possibility that an employer may need employees in similar roles sometime in the future does not mean that an employer must continue to furlough employees. However, employers should be able to show that they have considered furloughing as an alternative to redundancy for each type of role they consider redundant, and document their reasons why it would not be suitable in the particular circumstances of the case.

Q: What notice would an employee be entitled to if made redundant whilst on furlough leave?

In the event of an employee being made redundant, their notice pay would be based on their entitlement under their contract of employment, and the statutory right to notice pay.

The rules on statutory notice pay are complex and depend on whether the employer is required to give only statutory notice, or at least a week more than statutory notice, and whether the employee has normal working hours or not.

If an employee is entitled to statutory notice only, i.e. 1 week for every full year of service, up to a maximum of 12 weeks, an employee would have to have their notice pay increased to 100%, although 80% of this can be recovered through the CJRS.

If an employee has contractual notice which is at least a week more than what they would be entitled to under statute, there is no requirement to pay an employee the full 100% of their notice pay, and the 80% under the CJRS would be acceptable. As such, some employers are extending an employee's notice if they are only entitled to statutory notice by at least 1 extra week in order to avoid having to top up their notice pay to 100%.

Employers in a redundancy context may often be inclined to pay in lieu of notice. However, there does not appear to be any mechanism for employers who dismiss and pay in lieu of notice to reclaim the PILON payment under the CJRS. It may therefore be financially preferable from the employer's perspective to keep employees on furlough for their notice period so that at least part of their notice pay can be recovered.

Q: Can you undertake disciplinaries and grievances whilst an employee is on furlough?

Although they are not able to work, staff who have been furloughed can take part in a disciplinary investigation or hearing if they are under investigation themselves; have raised a grievance; are chairing the hearing; are taking notes at a hearing or investigation interview; are being interviewed or are a witness; or are accompanying a colleague at a hearing.

However, they must agree to do so voluntarily and hearings and interviews must only take place in line with public health guidance and social distancing regulations.

Where the staff involved are working from home or on furlough, employers need to think about the circumstances of the case and whether it is urgent, or whether it could be investigated at a later date.

If the employer uses video software to conduct interviews, it needs to ensure everyone involved has access to the technology needed and make any reasonable adjustments necessary for individuals with disabilities.

Q: Changing terms and conditions of employment

Due to Covid-19 employers may wish to change employees' terms and conditions of employment for a number of reasons. For example, it might be necessary to reduce pay or levels of benefits to cut costs, or to change employees' duties to reflect the fact that the employer's business has moved on.

No matter how valid or important the reasons for the change might be, varying employment contracts can be problematic, particularly in the face of opposition from employees. Where the change is clearly beneficial to the employees, the variation of contract is unlikely to result in any challenge from them, but the employer should still understand the legal implications of varying contracts.

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