

Coronavirus Job Retention Scheme

The essential contents of a furlough letter/email/agreement

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Preliminary

If you are reading this article with alacrity, chances are you are in charge of a business contemplating adoption of the Government's Coronavirus Job Retention Scheme (the Scheme) in preference to laying-off or making redundant some or all of your workforce; that, or you will be looking to advise such people on what to include within a furlough letter.

This article aims to set out the author's assessment of what are considered to be essential paragraphs or clauses to secure agreement with the workforce intended to be furloughed. It comes with its own health warning: some of the opinions expressed herein differ from other reputable and established employment law advisers which is not in the least surprising. The Scheme appears to have no legislative base and its working methods must be deduced from guidance issued by HMRC and elsewhere which is being updated frequently, and likely to be updated even further before the Scheme is open for claims. This article should be regarded, therefore, as a guide only, and not as definitive legal advice. As a guide it is intended to steer a course considered safest by its author under the current Government guidance as at 7 April 2020.

Finally, by way of opening, this article does not intend to provide a detailed legal analysis of the Scheme or where the Scheme may be wanting. That has been adequately undertaken by others.¹

¹ To name but two: <https://uklabourlawblog.com/2020/03/23/legislating-in-times-of-crisis-the-coronavirus-job-retention-scheme-by-alan-bogg-and-michael-ford/> and <https://www.ier.org.uk/news/lord-john-hendy-qc-briefs-on-the-gaps-in-the-coronavirus-job-retention-scheme/>

Format

The essential basis of any furlough event is agreement. It requires a record of consent to vary significant contractual terms such as wage/salary and obligations to provide (if contractual) and perform work. It is a matter of preference as to how the agreement is to be recorded whether through email with electronic signature; letter with signed declaration, or separate drafted agreement. If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment. This article contemplates clauses within a letter to be signed by each individual furloughed employee, but the clauses could equally find themselves in an email or drafted agreement to vary.²

Draft Letter

The following is a draft letter aimed at assisting the small business that simply cannot afford to pay wages in the interim before receipt of payments under the Scheme on account of forced closure and an inability to procure the borrowing also made available by the Government. It also contemplates an inability to top-up payments to 100%. Other businesses may be in a more fortunate position and would be aware of the significant goodwill that is engendered by both paying the 80% at regular payroll intervals in advance of receipt of funds from HMRC and/or topping-up to 100%. Where it has been considered necessary, explanatory notes to the paragraphs of the letter are provided as footnotes.

² To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. A record of this communication must be kept for five years.

Private & confidential

[Employee Full Name]

[Employee Full Address]

[Insert date of sending]

Dear [Employee],

As you are aware, due to the impact that Coronavirus and the Government's measures to address the crisis have had on our business and the UK economy as a whole, we are no longer in a position to continue to offer you work.³

The situation would ordinarily require us to consider embarking upon compulsory redundancy and/or laying-off processes, however, following our discussion⁴ on [date of meeting/discussion in March/April], you have agreed to become a 'furloughed employee' temporarily as from the date of [insert the date which is agreed to be the furlough commencement date]⁵.

The term "furloughed employee" means that you remain an employee but on temporary leave of absence which, ordinarily, is unpaid. However, at the current time of writing and in response to the Coronavirus crisis, the Government has agreed to fund up to 80 percent of your regular wage, at a cap of £2500 per month for an initial period of up to 3 months, provided we agree to furlough (The Coronavirus Job Retention Scheme). This will be subject to the usual Income Tax and National Insurance Deductions. Current Government guidance for your benefit about the Scheme is provided at:

<https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme>

³ The Scheme applies only to those employees/workers on PAYE employed/engaged on or before 28 February 2020 who, due to the impact of Coronavirus, would otherwise be facing redundancy/lay-off.

⁴ A discussion/meeting explaining the anticipated direction of the organisation and seeking agreement prior to the issue of the letter/agreement is advised, not least because it can set the ball rolling on furloughing straightaway assuming verbal agreement thereby enabling claims under the Scheme to be made from the earliest opportunity.

⁵ Claims under the Scheme may be started from the date that the employee finishes work and starts furlough, not when the decision is made, or when they are written to confirming their furloughed status.

The Scheme is anticipated to be up and running by the end of April 2020, and requires us, as your employer, to claim the monies under the Scheme on your (as our employee) behalf, and then forward to you as soon as it is received by us. For as long as the Scheme is in operation and you agree to remain a furloughed employee we are very happy to undertake the task of claiming the monies promised by the Government for your benefit, and we shall do this as soon as possible after the Government portal has opened enabling us to claim. Currently, we understand that we will only be able to make one claim every three weeks for the monies available under the Scheme for our furloughed employees.

You should be aware that the monies we shall be claiming on your behalf will be 80% of your regular wage⁶ and, if this has varied weekly/monthly [*delete where applicable*], we shall base it on a weekly/monthly [*delete where applicable*] average since you started with us (unless you started working with us before the last tax year 2019-20, in which case we shall base it on the higher of either the wage received in the same period the previous tax year or your average weekly/monthly [*delete where applicable*] earnings for the tax year 2019-20). The Scheme provides a right for HMRC to retrospectively audit the claim(s) we make on your behalf and you appreciate that, ultimately, the monies that we will be able to claim for you will be those approved by HMRC albeit we shall, in the first instance, claim the monies in the way described above.

As the Scheme is not yet up and running, you are aware that in the meantime you will not be receiving any weekly wages or other monies from us as we are simply not in a position to make such payments. However, we shall be claiming on your behalf for the monies promised by the Government for the complete period that you remain a furloughed employee – i.e. as from the date above when you agreed to become a furloughed employee. We appreciate, however, that in the short term there will be some hardship for you being unpaid while we wait for the Government Scheme to become operational⁷. We anticipate that, even after the Scheme is operational, for employees who are normally paid weekly, there will be further periods of waiting for monies from the Government as we understand we shall only be able to claim every three weeks. We regret but we will not be in a position to pay the remaining 20% of your wages or off-set in any

⁶ This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments are excluded from the Scheme and separate agreement would have to be sought to secure suspension of these.

⁷ More so for employees used to weekly wage payments.

other way any hardship caused by waiting for payments from the Government as the Scheme operates.

The Government are continuing to update the rules regarding the Scheme and we will, accordingly, be required to keep up-to-date with the guidance issued by the Government in relation to furloughed employees. We reserve the right to make any changes to comply with any new Government guidance, and we shall notify you in the event that any changes are required.⁸

We are very pleased that you have agreed to become a furloughed employee in these circumstances, because it remains our intention to bring you back to work at the end of this challenging time, and it enables us to claim on your behalf in the interim under the Government Scheme. It also means that we will not at this stage have to embark upon compulsory lay-off or redundancy processes which, as we say above, the current situation would otherwise compel us to do.

Your furlough period commenced/will commence [*delete where applicable*], therefore, on [*insert commencement date as above*] and will last, in the first instance, for one month⁹. I anticipate that at least one further month will be necessary, subject to the Scheme rules at the time, but will update you at least every three weeks.

From [*insert same commencement date*], therefore, you are no longer required to undertake any work for us. As stated above, there is currently no work available for you, and you would not, in any event, be eligible for the Government Scheme if you carry out any paid work for us or if you provide any valuable service to us. You will, however, remain an employee, and you and we are both bound by those employment terms, save as to remuneration and the obligations to provide (our obligation) and carry out (your obligation) work. You will retain your continuous employment with us and keep your other statutory rights as an employee. If you wish to carry out any paid work during this time elsewhere, we ask that you check with us first before doing so, unless you already carry out employment elsewhere to our knowledge. In any event, we would wish to know if you are undertaking any work elsewhere, whether voluntary or paid, as this may have an impact on our ability to recall you for duty with reasonable notice.

⁸ A further agreement to vary may be necessary in this eventuality.

⁹ Minimum period of three weeks.

We understand that your holiday entitlement will continue to accrue during your furlough leave, and we will not require you to take any holiday during this period. As your furlough period must last for a minimum of three weeks before you are eligible to benefit under the Government Scheme, we recommend that you do not yourself choose to take holiday during at least the first three weeks of your furlough leave, and currently we recommend that you do not take holiday during any part of the furlough leave.¹⁰ As Government guidance becomes more certain on this issue, we may change our position in this regard, but will give you reasonable notice if we consider a change is necessary.

If you remain content to agree to be a furloughed employee, please sign below to confirm acceptance of this variation to your employment terms as detailed above, and return to me as a matter of urgency.

In the meantime, we will continue to review and be in touch as events unfold.

Thank you for your understanding in these difficult times.

Yours sincerely,

[Employer's Name]

[Employer's Title]

Employee Name:

Declaration: I agree to the variation of my employment contract as detailed above which is consequent upon my agreeing, which I also record herein, to become a furloughed employee as from [*insert commencement date*]. I also understand

¹⁰ The author is of the view that workers should not be disadvantaged in taking annual leave through losing a large part of the leave year due to the COVID-19 crisis. Likewise, employers should not be disadvantaged by being required to give workers the balance of their accrued annual leave in the much-reduced leave year that remains once the crisis ends, but that disadvantage is met by the Government initiative enabling spreading the entitlement over the following two leave years. It would render otiose much of the initiative behind both the Scheme and carry-over initiative if employers were permitted to run down annual leave during furlough.

that my employer is having to take additional measures, including claiming under the Government Coronavirus Job Retention Scheme, aimed at safeguarding the retention of my employment during these extraordinarily challenging times brought about by the Covid-19 crisis, and I accept that this amounts to valuable consideration in exchange for my agreement to temporarily vary my contract of employment in this way.

Signature:

Date:

Whilst every effort has been made to ensure the accuracy of this article as of the date of writing (7 April 2020) it should not be relied upon as legal advice in respect of any particular case and no liability is accepted in respect of the same.



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