

# BRIEFING NOTE

## FURLOUGH – PRESERVING JOBS DURING COVID19 OR A HUGE FRAUD ON THE TAXPAYER?

THIS BRIEFING NOTE IS WRITTEN UNDER ENGLISH LAW & IS A GUIDE TO THE LAW AS SEEN BY US. IT DOES NOT CONSTITUTE LEGAL ADVICE & NO LIABILITY IS ACCEPTED FOR THE CONSEQUENCES BY ANY PARTY RELYING UPON THIS NOTE. READERS ARE STRONGLY RECOMMENDED TO SEEK FORMAL LEGAL ADVICE AND REPRESENTATION ON ANY MATTER COVERED OR REFERRED TO IN THIS PAPER.

20<sup>th</sup> April 2020

### WHAT IS THE SCHEME?

The Government's Coronavirus Job Retention Scheme was announced on 20 March 2020 and went live a month later. Details can be found at

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

(Short address <https://tinyurl.com/COVID19Furlough>)

The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at least 3 months starting from 1 March 2020, designed to support employers whose operations have been severely affected by coronavirus (COVID-19).

Employers can claim for 80% of furloughed employees' (employees on a leave of absence) usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers can use this scheme anytime during this period.

The scheme is open to all UK employers that had created and started a PAYE payroll scheme on 28 February 2020. More detailed Government guidance on the Scheme was published on 26 March 2020 (last updated 9 April 2020) and is available at Claim for wage costs through the Coronavirus Job Retention Scheme.

### 1. DO NORMAL EMPLOYMENT LAW RULES APPLY TO THE SCHEME?

The Government has made it clear in the guidance that it does not plan to make any changes to any employment law rules in dealing with the Covid19 crisis, so normal rules in relation to, for example,

5<sup>th</sup> Floor, 131-133 Cannon Street, London EC4N 5AX  
COLF COLP Gerardo Aprovitolo

(Mail service may not be effective for 72 working hours after delivery to this address unless personally signed-for by a partner of the firm).

All work subject to subject to terms and conditions of engagement and limitations set out in client handbook and at [adlegal.com/Terms.pdf](http://adlegal.com/Terms.pdf).

Authorised and Regulated by the Solicitors Regulatory Authority (ADL Solicitors Ltd # 564278). | Directors: see Companies House | "Partner" represents the seniority of a lawyer as commonly used in the legal profession. Designated partner list available on request at the offices of the firm. | Our liability is limited to £3M being the limit of our insurance policy and it is a condition of business that Directors &/or Partners are not individually liable; however this limitation does not apply to fraud by a Partner or for death or personal injury caused directly by our negligence which the law does not permit to be excluded). Higher insurance limits can be arranged for additional cost but are subject to written contract in that respect. | Meetings normally will be, & telephone calls may be, recorded for training, compliance & record keeping purposes. | Insured by OMNYY | Although solicitors owe a primary duty to clients to disclose all relevant facts, ADL reserve the right to enter into "counsel-to-counsel" discussions with barristers or solicitors & information disclosed on a counsel to counsel basis will not be disclosed to clients, but may influence advice given. | \*non-practising as a barrister since 1998.

ARTIFICIAL INTELLIGENCE LAW | BRAND PROTECTION & INFRINGEMENT | BUSINESS LAW | COMMERCIAL LAW | COMMUNICATIONS LAW | COMPETITION LAW | CONFIDENTIALITY | CONTRACT LAW | COPYRIGHT | CORPORATE LAW | CORPORATE RESTRUCTURING | DATA PROTECTION LAW | E-COMMERCE LAW | EDUCATION LAW | E-MONEY & CRYPTOCURRENCY LAW | EMPLOYMENT LAW | FRANCHISING LAW | IDENTITY LAW | INFRINGEMENT LAW | INSURANCE LAW | INTELLECTUAL PROPERTY | ITALIAN LAW | IT & COMPUTER LAW | LITIGATION (COMPLEX) | MEDIATION | MEDICAL NEGLIGENCE | MERGERS & TAKEOVERS | MOTOR SPORT LAW | PATENT LITIGATION | PRIVACY LAW | PROFESSIONAL NEGLIGENCE | SOFTWARE LAW | TECHNOLOGY LAW | TRADEMARKS | TRADE SECRETS

ADL SOLICITORS

**ADL SOLICITORS, CANNON STREET LONDON**  
**ADLSOLICITORS.COM**

## **FURLOUGH – PRESERVING JOBS DURING COVID19 OR A HUGE FRAUD ON THE TAXPAYER? BRIEFING PAPER**

1 statutory sick pay, maternity and parental leave, unfair dismissal, contract law, unlawful deduction  
2 of wages and discrimination continue to apply and apply to any employer who makes use of the Job  
3 Retention Scheme.

### **4 2. WHAT IS THE AIM OF SCHEME?**

5 It is an alternative to making employees redundant.

6 In order to assist businesses during the coronavirus pandemic and reduce the numbers of  
7 employees whose employment would otherwise be terminated, **employers will be able to ask**  
8 **employees and workers to stop working while keeping them on their payroll.**

9 Employees and workers who agree to this course of action will be “furloughed”. The Government  
10 will pay employers 80% of the wages of furloughed employees and workers, up to a cap of £2,500 a  
11 month, for as long as the furloughed employee or worker remains engaged by the employer during  
12 the furlough period.

### **13 3. WHICH EMPLOYERS ARE ELIGIBLE?**

14 All UK employers are eligible for the Scheme. This includes employees of businesses, charities,  
15 recruitment agencies and public authorities. It also includes individuals who employ others.

16 Such employers, however, MUST

17 (1) have created and started a PAYE payroll scheme on or before 19<sup>th</sup> March 2020 (originally 28  
18 February 2020)

19 (2) enrolled for PAYE online and

20 (3) have a UK bank account.

21 • If any employer satisfies criteria (1) and (3) but not (2) they can enroll now for PAYE online.  
22 This can take up to 10 days. The relevant link is PAYE online.

23 • The guidance does not identify any other criteria that has to be satisfied in order to be  
24 eligible for the Scheme so employers have to show that they have been detrimentally  
25 affected by the coronavirus.

26 • The guidance states that “all employers are eligible to claim under the scheme and the  
27 government recognises that different businesses will face different impacts from  
28 coronavirus”.

29

### **30 4. WHO CAN BE FURLOUGHED?**

31 You can only claim for furloughed employees that were on your PAYE payroll on or before 19

**ADL SOLICITORS, CANNON STREET LONDON**  
**ADLSOLICITORS.COM**

**FURLOUGH – PRESERVING JOBS DURING  
COVID19 OR A HUGE FRAUD ON THE TAXPAYER?  
BRIEFING PAPER**

1 March 2020 and which were notified to HMRC on an RTI submission on or before 19 March  
2 2020.

3 This means an RTI submission notifying payment in respect of that employee to HMRC must  
4 have been made on or before 19 March 2020.

5  
6 Originally employees and workers who were made redundant or have stopped working for the  
7 employer on or after the 28 February 2020 could be reemployed by the employer who can then  
8 place them on furlough and claim their wages under the Scheme. This has now been updated  
9 so that employees that were employed as of 28 February 2020 and on payroll (i.e. notified to  
10 HMRC on an RTI submission on or before 28 February) and were made redundant or stopped  
11 working for the employer after that and prior to 19 March 2020, can also qualify for the scheme  
12 if the employer re-employs them and puts them on furlough.

13  
14 The guidance makes it clear that qualifying employees and workers can be on any type of  
15 employment contract including: full-time; part-time; agency; flexible; or zerohour contracts.  
16 Foreign nationals are eligible to be furloughed and grants under the Scheme are not counted as  
17 'access to public funds' so there are no state aid or competition rules to worry about.  
18 Employers can, therefore, furlough employees on all categories of visa.

19  
20 Employers can only claim for employees or workers who started **unpaid leave** after 28 February  
21 2020.

22  
23 Employees and workers who are, pursuant to Government guidance, shielding for (currently)  
24 12 weeks at home because they are in the very high-risk need to stay home with someone who  
25 is shielding) may be furloughed.

26  
27 Similarly, employees and workers who are unable to work because they have caring  
28 responsibilities resulting from the pandemic can be furloughed.

29  
30 Employees/workers who have to stay at home to look after children are identified in the  
31 guidance as an express example.

32  
33 Employees on fixed term contract are eligible to be furloughed.  
34

**ADL SOLICITORS, CANNON STREET LONDON**  
**ADLSOLICITORS.COM**

**FURLOUGH – PRESERVING JOBS DURING  
COVID19 OR A HUGE FRAUD ON THE TAXPAYER?  
BRIEFING PAPER**

1 Employers can renew or extend fixed term contracts during the furlough without breaking the  
2 terms of the Scheme.

3  
4 Where the fixed term contract ends because the contract is not extended or renewed, the  
5 employer will no longer be able to claim the grant for that employee.

6  
7 New employers are eligible to claim under the Scheme in respect of employees of a previous  
8 business transferred after the relevant date if either the TUPE or PAYE business succession  
9 rules apply to the change in ownership.

10  
11 **The guidance makes it clear that the grant can be claimed for certain groups who are not, as a**  
12 **matter of law, employees. These groups are: a. office holders (including company directors);**  
13 **b. salaried members of Limited Liability Partnerships (LLPs); c. agency workers (including**  
14 **those employed by umbrella companies); d. limb (b) workers.** The guidance identifies specific  
15 considerations in relation to individuals who fall within any of these four groups and who are  
16 paid via PAYE.

17  
18 Unless that specific guidance in relation to those groups explicitly varies from the general  
19 guidance, the general guidance is applicable.

20  
21 **Company Directors**

22 As office holders, salaried company directors are eligible to be furloughed and receive support  
23 through this scheme. Company directors owe duties to their company which are set out in the  
24 Companies Act 2006. Where a company (acting through its board of directors) considers that it  
25 is in compliance with the statutory duties of one or more of its individual salaried directors, the  
26 board can decide that such directors should be furloughed. Where one or more individual  
27 directors' furlough is so decided by the board, this should be formally adopted as a decision of  
28 the company, noted in the company records and communicated in writing to the director(s)  
29 concerned.

30 Where furloughed directors need to carry out particular duties to fulfil the statutory obligations  
31 they owe to their company, they may do so provided they do no more than would reasonably  
32 be judged necessary for that purpose, i.e. they should not do work of a kind they would carry  
33 out in normal circumstances to generate commercial revenue or provides services to or on  
34 behalf of their company.

**ADL SOLICITORS, CANNON STREET LONDON**  
**ADLSOLICITORS.COM**

## **FURLOUGH – PRESERVING JOBS DURING COVID19 OR A HUGE FRAUD ON THE TAXPAYER? BRIEFING PAPER**

1 This also applies to salaried individuals who are directors of their own personal service  
2 company (PSC).  
3

### 4 **5. WHAT IS THE POSITION IN RELATION TO EMPLOYEES OR WORKERS WHO** 5 **ARE ON SICK LEAVE OR SELF ISOLATING?**

6 The most recent Government guidance has substantially amended the approach on this issue.  
7

8 Employees who are on sick leave or self isolating as a result of Coronavirus will be able to get  
9 Statutory Sick Pay subject to other eligibility conditions being met. The guidance states that the  
10 Coronavirus Job Retention Scheme is not intended for short term absences from work due to  
11 sickness. The guidance also states that short term illness and/or self isolation should not be a  
12 consideration in deciding whether to furlough an employee.  
13

14 The guidance, however, now makes it clear that employers can furlough employees who are  
15 currently off sick. If a currently sick employee is furloughed, they must not continue to receive  
16 sick pay. Employers are also entitled to furlough employees who are being shielded or are off  
17 on long term sick leave. The decision as to whether to furlough such employees lies with the  
18 employer.  
19

20 Employers can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate  
21 scheme<sup>1</sup> for the same employee but not for the same period of time. When an employee is on  
22 furlough, the employer can only reclaim expenditure through the Coronavirus Job Retention  
23 Scheme and not the SSP rebate scheme.  
24

25 If a non furloughed employee becomes ill, needs to self isolate or be shielded, the guidance  
26 refers to the fact that they might qualify for the SSP rebate scheme 1 (available to an employer  
27 with 250 or less employees) enabling the employer to claim up to 14 days of SSP per employee.  
28

### 29 **6. WHAT HAPPENS WHEN A FURLOUGHED EMPLOYEE BECOMES SICK?**

30 Furloughed employees retain their statutory rights, including the right to SSP when sick.  
31 Furloughed employees must, therefore, be paid at least SSP. The guidance makes it clear that it  
32 is for the employer to decide whether to move furloughed employees onto SSP or to keep them  
33 on furlough, at their furloughed rate. If an employer moves a sick furloughed employee onto

**ADL SOLICITORS, CANNON STREET LONDON**  
**ADLSOLICITORS.COM**

## **FURLOUGH – PRESERVING JOBS DURING COVID19 OR A HUGE FRAUD ON THE TAXPAYER? BRIEFING PAPER**

1 SSP, it can no longer claim for their furloughed salary. If employers keep the sick furloughed  
2 employee on the furloughed rate, they remain eligible to claim for the furlough costs from the  
3 Coronavirus Job Retention Scheme.  
4

### 5 **6. DO EMPLOYERS HAVE TO GIVE FURLOUGHED EMPLOYEES HOLIDAY** 6 **LEAVE?**

7 The guidance does not currently address the issue of furloughed employees and workers  
8 holiday leave rights. (See our separate paper on this)  
9

### 10 **8. WHAT IS THE POSITION IN RELATION TO EMPLOYEES OR WORKERS** 11 **WHO HAVE MORE THAN ONE JOB?**

12 The guidance states that if the employer's employee has more than one employer he or she can  
13 be furloughed for each job.

14 Further each job is separate and the cap applies to each employer individually.

15 The guidance goes on to state that employees can be furloughed in one job and receive  
16 furloughed payment but continue working for another employer and receive their normal  
17 wages. **This is a significant exception to the general rule that furloughed employees or**  
18 **workers cannot continue to work whilst furloughed and for the fleet of foot opens scope for a**  
19 **seriously abusive set of circumstances** (see below).  
20

21 The guidance also states that, if contractually allowed, employees are permitted to work for  
22 another employer whilst on furlough. The guidance states that for any employer that takes on a  
23 new employee, the new employer should ensure that they complete the starter checklist form  
24 correctly. If the employee is furloughed from another employment, they should complete  
25 Statement C. It is arguable that Government guidance on this issue could lead unscrupulous  
26 employers and employees to abuse the Scheme.  
27

### 28 **9. Can a furloughed employee/worker continue to work whilst** 29 **furloughed for the claiming employer?**

30 The short answer to that question is **NO**.

31  
32 The guidance is very clear on this clearly states that a furloughed employee cannot undertake

**ADL SOLICITORS, CANNON STREET LONDON**  
**ADLSOLICITORS.COM**

## **FURLOUGH – PRESERVING JOBS DURING COVID19 OR A HUGE FRAUD ON THE TAXPAYER? BRIEFING PAPER**

1 **any** work for or on behalf of the employer’s organisation (although Directors can fulfil the  
2 statutory duties).

3 The employer cannot ask a furloughed employee to do any work that:

4 a. makes money for the employer’s organisation or any organisation linked or associated with  
5 the employer’s organisation; and/or

6 b. provides services for the employer’s organisation or any organisation linked or associated  
7 with the employer’s organisation.

8  
9 The guidance does not provide a definition of a ‘linked’ or ‘associated’ organisation.

10  
11 Further, the guidance also makes it clear that an employee or worker who is working but on  
12 reduced hours and/or on reduced pay will not be eligible for the Scheme.

13  
14 Employers are free to consider allocating any critical business tasks to staff who are not  
15 furloughed.

16  
17 **IT IS HIGHLY LIKELY THAT EMPLOYERS WHO FURLOUGH EMPLOYEES BUT CONTINUE TO GET**  
18 **THEM TO WORK, EVEN AT A REDUCED LEVEL, WILL FACE CIVIL CLAIMS FOR RECOVERY OF**  
19 **GRANTS PAID AS WELL AS, POTENTIALLY, OTHER PENALTIES AT HMRC’S DISPOSAL. IT IS**  
20 **POSSIBLE THAT SERIOUS ABUSES OF THE SCHEME WILL LEAD TO CRIMINAL PROSECUTIONS.**

21  
22  
23 **EMPLOYEES WHO AGREE TO BE FURLOUGHED AND WHO ALSO AGREE TO DO WORK FOR OR**  
24 **PROVIDE SERVICES TO THE EMPLOYER MAY ALSO FACE PROSECUTION FOR CONSPIRACY TO**  
25 **DEFRAUD THE REVENUE AND OTHER CRIMINAL CHARGES AS WELL AS LIABILITY TO**  
26 **REIMBURSE HMRC AND THE TREASURY AND PENALTIES. SIMILAR SANCTIONS WILL APPLY TO**  
27 **DIRECTORS AND OTHER OFFICERS WHO CONSPIRE IN THE DEFRAUDING OF THE SCHEME.**

28  
29 There are two limited exceptions to the no work prohibition, where the employee or worker  
30 undertakes training or does voluntary work.

31 Training: The guidance states that employers should encourage furloughed employees to  
32 undertake training. Furloughed employees can engage in training so long as in undertaking the  
33 training the furloughed employee does not provide services to, or generate revenue for or on  
34 behalf of the employer’s organisation ( and this intended to ensure that employers do not

**ADL SOLICITORS, CANNON STREET LONDON**  
**ADLSOLICITORS.COM**

**FURLOUGH – PRESERVING JOBS DURING  
COVID19 OR A HUGE FRAUD ON THE TAXPAYER?  
BRIEFING PAPER**

1 circumvent the prohibition on furloughed employees or workers working for the employer by  
2 disguising such work as training).

3 Where training is undertaken by a furloughed employee at the request of the employer, he or  
4 she is entitled to be paid at least their appropriate national minimum wage for the time  
5 involved in training.

6 In most cases, the furlough payment of 80% of an employee's regular wage up to the £2,500  
7 monthly cap will provide sufficient monies to cover the training hours involved.

8  
9 Where, however, the time spent training attracts a minimum wage entitlement in excess of the  
10 furlough payment, the employer will need to pay the additional wages.

11 Voluntary work: Furloughed employees can take part in volunteer work so long as it does not  
12 provide services to or generate revenue for or on behalf of the employer's organisation. The  
13 employer can agree to find furloughed employees new work or volunteering opportunities  
14 whilst on furlough if this is in line with public health guidance, but this cannot be disguised  
15 work for the employer.

16  
17  
18 **SEE ALSO PART II OF FURLOUGHED EMPLOYEES**

19  
20

21  
22  
23  
24  
25  
26  
27  
28

Provided by  
ADL Solicitors Ltd  
www.adlsolicitors.com  
Dr Nick Lockett  
English Barrister (NP30499)  
English Solicitor Advocate 213086  
Contract us: solicitors@adlsolicitors.com  
Contact us: 0200 888 0300

ADL SOLICITORS