Covid-19 Pandemic
Bargaining on Furlough and the Job Retention Scheme
Introduction

This short guide is intended to inform negotiators of the principal features of the Coronavirus Job Retention Scheme and highlight the bargaining issues to be raised with employers in order to achieve the maximum protection for our members during the operation of the scheme. Greater detail of the scheme is set out in the Legal guide Furlough, Annual Leave, Sickness and Redundancies.

The guidance is structured as follows:

Outline of scheme .................................................................3
Bargaining over the payment rate .................................................5
Bargaining over classification of furloughed employees ...............5
Ensuring appropriate procedure to achieve furloughed status ......7
Providing clarity to staff ..........................................................8
Further information ....................................................................8
Outline of scheme

The Coronavirus Job Retention Scheme was announced by the government on 20 March to reduce mass lay-offs across the economy in response to a collapse in revenue facing employers due to the coronavirus crisis.

The legislative basis for the scheme was confirmed in a Treasury Direction and schedule on 15 April 2020. The Treasury Direction was updated on 22 May 2020 and again on 26 June. Guidance produced by the Government was first published on 26 March 2020 and has been updated frequently since that time.

The scheme was made available to any employer that on 19 March 2020 had a PAYE scheme for automatic deduction of tax and National Insurance as part of wage payment. This is likely to include all organisations engaged in the delivery of public services. From 10 June 2020, the scheme was closed to new claims for employees who have not already been placed on furlough for a minimum of three weeks.

Under the scheme, if an employee is designated as "furloughed," HM Customs and Revenue (HMRC) will reimburse the employer for 80% of the wage costs relating to the employee, up to a maximum of £2,500 per month. However, the employer may choose to top up wages to their full level.

The scheme is not generally directed at employers receiving public sector funding. At the same time, certain types of staff set out in the “bargaining over classification” section of this guidance are specified as eligible.

A member of staff on furloughed leave ceases to perform work for the employer but remains an employee of the organisation.

The scheme allows employers to obtain back payment to 1 March for furloughed employees and has now been made available until 31 October 2020.

However, changes to the original scheme are set to take effect as follows:

- From 1 July 2020, employers can require employees to return part-time but must pay normal wages for days worked. The employer can continue to claim for 80% wages on days not worked up to the cap of £2,500 per month;
- From 1 August 2020, employers will be required to pay employer National Insurance Contributions and pension contributions on furlough pay;
- From 1 September 2020, employers will be required to pay 10% of furlough pay and can apply to recover the remainder up to £2,187.50 per month;
- From 1 October 2020, employers will be required to pay 20% of furlough pay and can apply to recover the remainder up to £1,875 per month;

The minimum period for which employees can be furloughed was three weeks until 30 June, but the minimum period for which an employer can claim has now been reduced to one week (which must not overlap calendar months).
**Which employees are covered?**

The scheme applies to employees on an organisation’s payroll at 19 March 2020 that are:

- full-time employees;
- part-time employees;
- employees on agency contracts;
- employees on flexible or zero-hour contracts;
- employees who were made redundant since 28 February 2020, if they are rehired by their employer

The scheme will not apply to the self-employed.

**What is included in the pay rate?**

Only an employee’s actual salary will be paid, and this includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded. Employers must calculate the costs for full-time or part-time employees to be paid 80% of their actual salary in the last pay period before 19 March 2020.

Where an employee’s pay varies by week or month, and they have been employed for 12 months before the claim, an employer can claim and pay the employee the higher of the same month’s earning from the previous year or the average monthly earnings from the 2019-20 tax year.

For employees whose pay varies but they have been employed for less than a year, the claim should cover the average monthly earnings since they started work.

Employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of furloughed employees and can claim for these costs in addition to the wage until 31 July.

**How are employees on National Minimum Wage/National Living Wage treated?**

The government has stated that employees on the National Minimum Wage (NMW) or National Living Wage (NLW) can be paid less than the legal minimum on the justification that the NMW/NLW does not apply to furloughed employees. However, if employees are required to engage in training activity such as completion of an online training courses whilst they are furloughed, they must be paid at least the NMW/NLW for the time spent training
Bargaining over the payment rate

The government has not placed any requirement on employers to top up the wages of employees who are paid through the scheme.

However, negotiators should make the case for full payment, given that the employer would only be providing 20% of the cost for any employee whose wage is £2,500 or less.

In the case of staff who are paid less than the NMW/NLW, that case can be strengthened by highlighting that employees are being left without funds to support that minimum standard of living.

Furthermore, it should be highlighted to employers that the time and cost of wrangling over what employees are classified as furloughed staff is likely to be significantly diminished by an agreement to pay staff in full.

Care should be taken that where staff take annual leave during furlough, in accordance with holiday pay rulings, they must receive the full pay that they would earn whilst normally working and not the 80% furlough pay which is limited to £2,500 per month.

Bargaining over classification of furloughed employees

The scheme is intended to support employers to continue paying staff who would otherwise be made redundant or put on an unpaid period of lay-off.

Therefore, in the context of the public sector, a case can be made that there can only be justification for utilising the scheme where an organisation’s revenue has been slashed or their costs have surged due to the crisis. In the absence of those triggers of falling revenue or rising costs, continued payments to contractors are vital to avoid commissioners pushing contractors into a situation that forces them to revert to the scheme.

The government guidance states that they do not expect public sector employers to resort to furloughing and this principle should also apply to “non-public sector employers who receive public funding for staff costs.”

Where it is necessary to draw on the scheme, care should be taken to ensure that it is not misused by applying it to categories of employees for whom it is not intended:

- Until the end of June, the scheme stated that in order to be classified as “furloughed” an employee could not perform ANY work for the employer over the period of their absence (although they could take part in volunteer work or training as long as it did not provide services to or generate income to their organisation). Therefore, all staff working from home on either a full or partial basis could not be included and should have had their status unchanged on full pay. From 1 July 2020 until 31 October 2020, the scheme changed to allow return to work on a part-time basis, though employees must still not work on days they are not required to under flexible furloughing.
• Similarly, employees who are self-isolating because they have coronavirus symptoms or a member of their family has symptoms should ideally be classified as medically excluded from the workplace (to prevent wider infection) on full pay, but if not they would have to be classified as in receipt of occupational or statutory sick pay.

Equally, negotiators should guard against any attempt by employers to exclude certain types of staff who are eligible:

• Employees who are shielding in line with public health guidance can be placed on furlough;

• Employees with caring responsibilities can be furloughed;

• Some employers may seek to reduce their expenditure on staff such as agency or zero hours employees simply by not renewing contracts or failing to offer employment. These staff are equally eligible for furloughed status.

Where the scheme is appropriate, the selection of the appropriate roles and employees to be classified as furloughed may be self-evident, since the entire demand for the services of a particular role has temporarily disappeared for example. However, in other cases, the roles may be the subject of greater debate and the continuation of some residual services may require selection of employees within roles for furloughed status.

In these cases, there may be some scope for seeking volunteers to opt in or out of furloughed status, though staff willingness to opt in either direction will clearly be influenced by whether furloughed employees are on full pay.

Where selection cannot be resolved through volunteers, establishment of a fair process to decide the employees picked could usefully draw on features of good organisational redundancy procedures remembering always that the decision to furlough is the employer’s decision and not one that is made jointly with UNISON:

• Define the groups of employees from which furloughed will be selected. For instance, it may be the case that a very limited number of managers and administrative staff are required for a residual staff and therefore the selection pool could constitute managers and administrative staff of a particular grade.

• Define the selection criteria that will achieve the fairest outcome and avoid any form of unlawful discrimination. The criteria may seek to allocate weighted scores for such factors as the skills of the employee against requirements or practical ease of fulfilling the role (such as access to IT facilities for staff working from home or availability of transport for staff who have to attend the workplace).

• An important criterion in the context of the coronavirus crisis may also relate to the circumstances of staff in their vulnerability to the virus. If there is no financial penalty for the employee in furloughed status, there may be grounds for seeking priority for employees who are recognised as facing grave dangers from contraction of coronavirus, such as pregnant women and staff with underlying health conditions. That case is particularly compelling for those subject to the government’s shielding measures that demand 12 weeks at home with no face-to-face contact. Government announcements of the scheme have specifically highlighted that employees who are shielding in line with public health guidance can be furloughed.
• A fair system for allocation of staff to furloughed status may also be assisted by rotating the status among staff.

• Establish a right to appeal by employees over their allocation in or out of furloughed status.

**Ensuring appropriate procedure to achieve furloughed status**

In general, it is unlikely that a collective agreement over the Job Retention Scheme will be binding on individual employees. Therefore, unless contracts allow for an employer to make the necessary change to an employee’s status as furloughed, the employer will need to obtain each employee’s agreement to be placed on furlough leave.

Providing all the issues set out above regarding the operation of the scheme have been addressed with the employer, staff should of course be encouraged to accede given that the alternatives would be redundancy or unpaid leave, but it will always remain each individual’s choice to decide.

The Treasury Direction states that the employer and the furloughed employee must have agreed in writing that the employee will cease all work in relation to their employment. The government guidance explains that to be eligible for the Job Retention Scheme, employers must write to their employee confirming they have been furloughed.

The Treasury Direction issued on 22 May 2020 specified that the agreement between employer and employee must specify “the main terms and conditions upon which the employee will cease all work in relation to their employment”; must be incorporated (expressly or impliedly) into the employee’s contract and must be made in writing “or confirmed in writing” by the employer. The employer is also required to retain the agreement or confirmation until at least 30 June 2025.

Care should be taken to ensure that, in the course of reaching a furlough agreement, employers do not seek consent to vary valuable terms of employment while seeking consent from employees to be furloughed.
Providing clarity to staff

In order to provide clarity and allay any fears among staff, negotiators should seek a statement from the employer explaining to furloughed employees the following:

- They remain an employee of the company;
- The pay that they will receive during furlough leave;
- Entitlement to other contractual benefits;
- Other terms and conditions of employment /continuity of employment remain unchanged;
- Leave will continue to accrue;
- Pension contributions will continue to be made;
- They will return to their current role when furloughed status ends at the conclusion of the crisis;
- Eligibility for sick pay.

Further information

The government’s latest announcements on the Job Retention Scheme are expected to be set out on this link: https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

Greater detail of the scheme is set out in the Legal guide Furlough, Annual Leave, Sickness and Redundancies

Furloughed staff may be vulnerable to employer attempts to move toward redundancy. Guidance on this issue is set out in Bargaining for Workplace Practices During the Easing of the Covid-19 Lockdown on this page - https://www.unison.org.uk/bargaining-guides/