



Constantine Law  
Employment solutions at work

## FAQ – CONSTANTINE LAW’S FACTSHEET ON FURLOUGHING: WHAT IT MEANS AND HOW TO IMPLEMENT IT

**1. WHAT IS THE SCHEME?** The Coronavirus Job Retention Scheme has been implemented to allow employers to access a grant to pay towards the employment costs of retaining employees who “would otherwise have been laid off during this crisis”. The scheme allows employers to place employees on furlough leave, to avoid redundancies. The scheme was announced on 20 March 2020 and has been backdated to 1 March 2020. We await guidance from the government and will update this document as necessary.

**2. WHO IS ELIGIBLE?** The scheme is applicable to all PAYE employees who were on payroll on 28 February 2020 (including those on zero hours contracts) and all UK businesses are eligible. The Chancellor has on 26 March 2020 announced a similar scheme for self-employed people known as the Self-Employed Income Support Scheme (“SEISS”). We will provide a separate update shortly.

### **3. WHAT HAPPENS DURING FURLOUGH LEAVE?**

- a) The employee remains employed by the employer, but they **cannot work** for the employer. They should not attend the workplace or work remotely. The scheme is designed to pay staff who would otherwise have been laid off so they should not be directed to do any work during this time. If employees continue to answer emails and routine calls then HMRC may see this as abuse of the scheme and could well seek repayment from the employer of part or all of the funding. The employee should not engage with third parties e.g. clients.
- b) The employee can however, volunteer or train, “provided that this does not involve the manufacture or creation of an item or part thereof that can yield revenue for the company, the provision of services to the company, or the provision of any service that can yield revenue for the company”. The employer can require employees to undertake training from home, provided it meets the above.

**4. CAN FURLOUGHED EMPLOYEES WORK FOR ANOTHER EMPLOYER?** Almost certainly not. We say that because this scheme is expressly designed to

avoid redundancies, employees are not allowed to work and are being kept on the payroll. We expect that a furloughed employee taking alternative employment elsewhere would be seen as abuse of the scheme. We also expect the employee to be in breach of contract to their original employer if they do this surreptitiously. Employees may be asked to repay these earnings.

**5. HOW LONG WILL THE SCHEME LAST?** The scheme is open for initial period of 3 months after which it may be extended. It is good practice to inform employees the scheme will be kept under review.

**6. HOW IS IT IMPLEMENTED?** The guidance states that placing employees on this scheme “remain subject to existing employment law and, depending on the employment contract, may be subject to negotiation”. Furlough leave must be seen as a change of status and will therefore require consent or a contractual right. As such, the employer should notify and agree the leave with the employee and confirm their new status in writing. Once the new portal is open (see 10, below), the employer will report this status to HMRC.

**7. IS THERE A REQUIREMENT TO CONSULT WITH EMPLOYEES?** If the employee is proposing to furlough 20 or more employees in circumstances where they would have otherwise made redundancies, then the requirement to collectively consult seems likely to have been triggered. The special circumstances defence may be available to employers if there is insufficient scope to consult properly with employees, given these extraordinary times.

**8. WHAT ABOUT NEW STARTERS AFTER 28 FEBRUARY 2020?** The scheme does not apply to them.

**9. WHAT ABOUT THOSE ALREADY ON NOTICE?** The scheme was backdated to 1 March 2020 in order to provide for those who had been put on notice of redundancy due to the crisis. It also allows employers to rehire and furlough employees who were made redundant since 28 February 2020.

**10. CAN EMPLOYEES REQUEST FURLOUGH LEAVE AS AN ALTERNATIVE TO REDUNDANCY?** An employee can ask to be placed on furlough leave but the employer does not have to agree. However, the purpose of the scheme is to avoid redundancies and we expect that many employers will see the scheme as preferable because, in the short term, it will avoid payments of notice, accrued holiday and any statutory redundancy entitlement payable in the event of redundancy and allow access to a grant.

**11. WHAT CAN THE EMPLOYER CLAIM BACK AND HOW?** The employer will be able to claim a grant of up to 80%, of an employee's regular wage (before tax) up to a cap of £2,500 per month. Fees, commission and bonuses should not be included within the regular wage. In addition, the employer will be able to claim the associated Employer NICs and minimum (3%) automatic enrolment employer pension contributions on that subsidised wage. Employees will be required to pay tax and NIC on payments received. Claims will be made via a HMRC portal which is being implemented and it is expected to be some weeks before this is up and running.

**12. CAN THE EMPLOYER "TOP-UP?"** The employer may seek to pay only at the rate recoverable from HMRC. The employer may opt to top up the employee's salary if the grant does not cover it in full, but this is not a requirement.

**13. HOW IS THE 80% OF EMPLOYMENT COSTS CALCULATED FOR THOSE WITH IRREGULAR EARNINGS?** The 80% grant will be applied to the higher of: (1) earnings in the same month in the previous year; or (2) average monthly earnings in the 2019/2020 tax year. If the employee has worked for less than a year, the employer can claim for an average of their monthly earnings for the time that they have worked. If the employee only started work in February 2020, a pro rata of their earnings so far should be taken to support the claim.

**14. WHAT IF 80% OF SALARY IS AN AMOUNT WHICH FALLS BELOW NATIONAL LIVING WAGE/NATIONAL MINIMUM WAGE?** Furloughed employees are not working therefore NLW and NMW do not apply.

**15. CAN EMPLOYEES BE MOVED ON AND OFF FURLOUGH LEAVE (OR ROTATED)?** There is nothing in the guidance which prohibits this, but an employee must be furloughed for a minimum of 3 weeks for their employer to be eligible to claim under the scheme.

**16. WHAT HAPPENS WITH ANNUAL LEAVE AND CONTINUITY OF SERVICE?** We have no confirmation, but we anticipate that this will continue to accrue. We are advising clients to hold the status quo on any leave which is already booked until we have clarity as to how this should be paid. Equally, employees coming up to two years' service are likely now to accrue this length of service.

**17. WHAT HAPPENS WITH FAMILY LEAVE?** Employees already on or due to go on any form of family leave (e.g. maternity leave) will remain on such leave and cannot be furloughed.

**18. WHAT HAPPENS WITH SICK LEAVE?** Those already on sick leave or self-isolating remain on sick leave until they are fit to work or out of isolation and paid at the relevant rate (SSP or contractual sick pay). Once they return to work, they may then be furloughed. Employees who are shielding in line with public health guidance can be placed on furlough. If employees do report as sick during furlough leave employers may be required to pay them at the relevant rate. However, we would expect some employees are unlikely to report as sick so as to avoid payment at a lower rate.

**19. WHAT ABOUT SPONSORED WORKERS UNDER TIERS 2 OR 5 OF THE POINTS BASED SYSTEM?** On this point guidance will also be needed from both the Home Office. The Home Office have strict rules as to minimum pay requirements for sponsored employees. If an employer elects to furlough sponsored employees, it should not reduce salaries below the minimum requirements unless the Home Office expressly permits this.

**20. WHERE CAN I FIND MORE INFORMATION?** The government has created a new website [www.businesssupport.gov.uk](http://www.businesssupport.gov.uk) which we anticipate will be expanded as information becomes available.

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See [www.constantinelaw.co.uk](http://www.constantinelaw.co.uk) for further information or contact John Hayes or Alan Lewis at Constantine Law on (0)203 696 8230.



[www.constantinelaw.co.uk](http://www.constantinelaw.co.uk)  
E: [mail@constantinelaw.co.uk](mailto:mail@constantinelaw.co.uk)  
T: 44 (0)203 696 8230

