

## **Furlough Leave/Special Categories**

### **A. Employees in receipt of Statutory Sick Pay (SSP)**

Employees in receipt of SSP cannot be furloughed but they can be furloughed when their entitlement to SSP has ended. This would cover employees who are themselves sick or who are self-isolating for 14 days because a member of their household has symptoms of coronavirus.

It should be noted that employees who are shielding in line with public health guidance (those have received letters from NHS advising them to remain at home for at least 12 weeks due to complex underlying health conditions) and vulnerable employees (over 70s, pregnant women and people with less severe health conditions such as asthma or diabetes) are not entitled to statutory sick pay. This was clarified very recently.

### **B. Employees unable to work due to childcare requirements**

These employees can be furloughed under the scheme if they are unable to work because of caring responsibilities because of coronavirus and this appears to be irrespective of whether you would otherwise have furloughed them or had work for them to do.

### **C. Employees who are shielding or caring for someone who is shielding**

Employees who are shielding (those who have received in NHS letters advising them to stay at home for at least 12 weeks) can be furloughed, and those who are staying at home with someone because they are shielding can also be furloughed but only if they are not able to work from home and would otherwise have to be made redundant.

### **D. Employees who are vulnerable or otherwise reluctant to come to work for a coronavirus reason where the employer would otherwise have work for them to do but who do not fall within A or B above**

This group may include vulnerable employees adhering strictly to social distancing and therefore feel unable to come to work, or employees who live with someone who is, and wish to stay away from work to protect that person, or even other employees who are simply unwilling to come in to work because they are nervous about being infected.

The government guidance does not explicitly deal with these situations so whether or not you can furlough those employees where you would otherwise have work for them to do **depends on the interpretation of references in the government guidance about the circumstances in which employers can access the scheme.**

It may also be the case that employers have been treating vulnerable employees or those who live with someone who is vulnerable as if are on sick leave and paying them SSP and/or contractual sick pay, on the basis of government guidance to employers on sick pay.

However regulations now in force that make clear that, strictly speaking, such employees are not legally entitled to SSP. Employers may now wish to take a different approach and seek to agree with these employees that they will no longer be treated as on sick leave but will instead be placed on furlough. Alternatively, employers who have until now required these employees to take unpaid leave may also prefer to agree with them that will instead be placed on furlough.

### **E. Long Term Sick employees**

An employer might want to furlough employees who are in receipt of company sick pay but employees are unlikely to agree as they would lose money. Further it would not be

permissible under the scheme as the guidance states that those who are on sick leave should receive SSP and can only be furloughed once this has ended. Alternatively, employees who have been on sick leave for a lengthy period and who are no longer in receipt of any payment may wish to be furloughed even though they are still sick. Could an occupational health report be used to support this? However, if an OH report indicates an employee is still too unwell to return to work, seeking to move them on to furlough could be viewed as an abuse of the scheme. There is always the possibility of an HMRC audit further down the road and the employer would also have to consider whether moving to furlough would 'reset the clock' in relation to sick pay so that if the employee went off sick again at the end of the furlough leave they may be entitled to sick pay again.

#### **F. Maternity Leave, etc**

The guidance states that the normal rules for maternity and other forms of parental leave and pay continue to apply. If an employee gives birth while on furlough leave, earnings may have been reduced which will in turn affect her statutory maternity pay.

Employees already on maternity leave and in receipt of SMP or no pay for the final 13 weeks maybe be better off if they were placed on furlough leave instead, and receiving 80% of pay. The employee would have to give notice to end maternity leave which normally requires 8 weeks' notice, but this can be reduced by agreement. The employer could then agree with the employee she will be furloughed, but it would be prudent to ensure the employee understands that once maternity leave has ended it cannot be restarted at the end of furlough leave. The guidance states that an employee on unpaid leave cannot be furloughed unless they were placed on unpaid leave after 28th February but it is not clear whether this restriction applies to all types of unpaid leave including the unpaid part of maternity leave, or only to unpaid lay offs. Employers can already claim most of the cost of SMP back from HMRC so there is no need for these costs to be covered under the job retention scheme. For employees receiving **enhanced contractual** maternity pay the position is different. The guidance states that a claim can be made via the scheme for enhanced (earnings related) contractual pay for women on maternity leave, which seems to allow employees to be on both maternity leave and furlough leave at the same time. However, the position is not entirely clear and appears to apply a different rule about what furlough pay these employees would receive when compared with other furloughed employees, as it is not based on their salary as at 28 February /average previous earnings but on their contractual maternity pay entitlement.

The same principles are said to apply to adoption, paternity or shared parental pay.