



Chapter 17
The Coronavirus
(Covid-19) Pandemic

17.0 The Coronavirus (Covid-19) Pandemic

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17.1 Introduction

17.1.1 The coronavirus (Covid-19) disease, characterised as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), and the ongoing pandemic caused by the disease have impacted on the everyday lives of people worldwide.

17.1.2 This section outlines particularly important practical considerations from an employment law and workforce perspective.

17.1.3 As this situation develops, so too does the available information and guidance. Accordingly, Government guidance on the information in this section should be reviewed regularly to ensure the most up to date advice available is used.

www.gov.scot/coronavirus-covid-19

www.gov.uk/coronavirus

17.2 Coronavirus Job Retention Scheme (CJRS)

- 17.2.1 In response to the Covid-19 pandemic, the UK Government first introduced the CJRS in March 2020 in an attempt to support employers whose operations have been severely affected by the pandemic. Following a number of extensions, the current CJRS will be in operation until at least the 30 April 2021 (though this is subject to possible further extension).
- 17.2.2 The CJRS allows for employers to furlough employees and apply for a grant to cover a portion of their usual monthly wage costs. Currently, the portion that can be recovered by way of the CJRS grant is 80% of an employee's usual salary for hours not worked (up to a maximum of £2,500 per month). In terms of employees that can be furloughed, the CJRS is open to claims for any type of employment contract (such as full-time, part-time, agency, zero-hour contracts and so on), but excluding those who are self-employed or who are otherwise explicitly excluded by the guidance.
- 17.2.3 Covid-19 has been found to be more dangerous to those members of the population that are considered to be clinically extremely vulnerable or at the highest risk of severe illness. Accordingly, UK Government guidance notes that employers may furlough employees that would fall into the category, regardless of whether the employer is facing a wider reduction in demand. The same is true in relation to those employees that have caring responsibilities resulting from Covid-19 (for instance in respect of home schooling and childcare, or caring for a vulnerable individual in their household).
- 17.2.4 When an employee is placed on furlough, they retain all of their statutory rights (including their right to Statutory Sick Pay). In respect of any employees on maternity leave, should they wish to return early from leave to be placed on furlough (in agreement with their employer) they will need to provide their employer with at least 8 weeks' notice of their return to work.
- 17.2.5 In an effort to promote transparency and to deter fraudulent claims, from 1 December 2020, HMRC will publish information about employers who claim for periods starting on or after 1 December 2020.

17.3 Furloughing employees through the CJRS

- 17.3.1 Once an employer has decided that it needs to place an employee on furlough, the first step to facilitate this is to come to an agreement with the employee for being placed on furlough. If an employer neglects this step and does not confirm to the employee in writing that they have been furloughed, the employer will not be eligible for the grant.
- 17.3.2 It is open to employers to place employees on furlough on either;
- Full time furlough (meaning the employee cannot undertake any work while on furlough); or
 - Flexible furlough (meaning that employees can work an agreed amount of time and work pattern but they cannot do any work during times that they are recorded as being on furlough).
- 17.3.3 Regardless of what option is opted for in the circumstances, employers will need to agree this with the employee (keeping a record of the written agreement that confirms the arrangement) before being eligible for the grant available through the scheme.
- 17.3.4 Whilst employees are unable to work during furloughed hours, there is no restriction on employees taking part in training, or working (or volunteering) for another employer (if permitted contractually).

17.4 Holiday entitlement and pay during Covid-19

17.4.1 A range of practical issues have arisen in relation to holiday entitlement and holiday pay as a result of the Covid-19 pandemic and its impact on the economy. It has been made clear through UK Government guidance, that employees should not be furloughed purely because they are due to go on paid leave.

17.4.2 Accruing holiday entitlement

Furloughed employees will continue to accrue holiday entitlement in accordance with the provisions of their contract of employment.

17.4.3 Calculating holiday pay

17.4.3.1 Regardless of whether an employee is on furlough or not holiday pay should be calculated in accordance with current legislation, and that this should accordingly be based on a worker's normal pay. This means that where an employee is on furlough, and the calculated rate of holiday entitlement is above the rate that the employee is receiving on furlough, the difference must be made up by the employer.

17.4.3.2 In a situation where the employer cannot afford to pay the difference between the furlough payment being received for an employee, and that employees holiday entitlement pay, BEIS guidance notes that it is likely that such a scenario would make it not 'reasonably practicable' for the employee to take their leave. This would mean that the employee may be able to carry their annual leave forward (see opposite).

17.4.4 Carrying holiday entitlement forward

17.4.4.1 Employers are advised to ensure (so far as is possible in the circumstances) that employees are able to take as much of their leave entitlement as possible in the applicable leave year. With that said, in an attempt to provide employers with more flexibility during the Covid-19 pandemic, and in the recognition that many employees (particularly those considered front-line) would face practical difficulties in taking their holidays (or would simply be unable to take them), changes were made in relation to the way that 'basic holiday entitlement' (the first 4 weeks of leave – 20 days for the full-time 5 day per week worker) can be carried forward from one leave year to the next. Where it is not reasonably practicable for an employee to take some or all of their leave, such leave may be carried forward and taken in the two leave years immediately following the leave year in respect of which the original leave was due to take place.

17.4.4.2 No definition of what would be considered 'reasonably practicable' is provided for in the legislation. BEIS guidance provides that the following are examples of things that should be taken into account when considering whether it is not reasonably practicable for an employee to take holiday entitlement;

- › where the business has faced a significant increase in demand due to Covid-19 that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures;
- › the extent to which the business' workforce is disrupted by the coronavirus and the practical options available to the business to provide temporary cover of essential activities;
- › the health of the worker and how soon they need to take a period of rest and relaxation;
- › the length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year;
- › the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the coronavirus situation; and
- › the ability of the remainder of the available workforce to provide cover for the worker going on leave.

17.4.4.3 Those employees that are on furlough are perhaps unlikely to need to carry forward any of their entitlement, as they will be able to take leave during the furlough period. Where an employee takes leave during furlough, employers must ensure that they are being paid the correct holiday pay that they are entitled to.

17.5 Statutory Sick Pay (SSP) entitlement during Covid-19

In the event an employee is absent from work on sick leave, or they are required to self-isolate in accordance with Government guidance as a result of Covid-19, they may be entitled to SSP. If SSP is payable it can be paid from day 1 of the absence provided that the employee is off for 4 days or more.