



**The Professional Trades Union for Prison,  
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## **POA Circular 058/2020**

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Dear Colleagues

### **COVID-19 BRIEFING UPDATES 5 AND 6 FROM THOMPSONS SOLICITORS**

Please find enclosed updates from Thompsons Solicitors in relation to employment matters during COVID 19.

Yours Sincerely

**STEVE GILLAN**  
General Secretary

Yours Sincerely

**MARK FAIRHURST**  
National Chair

**ENCLOSURE**

# Briefing on employer and employees responsibilities in the wake of Coronavirus no. 5

As part of our ongoing briefings for trade unions and workers we address some further questions arising from the Job Retention Scheme, as well as questions about the pay those who are shielding and/or who have child care responsibilities are entitled to.

## **What period of time does the Coronavirus Government Retention Scheme run between?**

The Coronavirus Government Retention Scheme is initially to run between 1 March 2020 and 31 May 2020. The scheme enables employers to retain workers on their payroll but instead of providing them with work they can be furloughed. An employer can utilise the scheme to claim for a grant to reimburse up to 80% of a furloughed employee's wage costs up to a maximum of £2,500 gross per month (plus employers' national insurance contributions and auto enrolment pension contributions) for each employee who has been furloughed. Employees who are furloughed cannot do any work for the employer. Therefore even though the scheme takes effect from 1 March 2020 the employer will only be able to claim a reimbursement of wages paid to a furloughed employee from the date they were furloughed. The exception to this is in respect of those employees who were made redundant or who stopped working for their employer on or after 28 February. The scheme permits an employer to re-engage them in order to then furlough them and claim a reimbursement of wages from the date they were made redundant or stopped working for their employer.

## **Does the employer have to continue paying the employee in accordance with obligations under the contract of employment up until they have been furloughed?**

The short answer to this is yes. As we made clear in our last Q & A concerned with the operation of this scheme, where placing an employee would involve a change to terms and conditions, it will require the employee's agreement. This will usually involve a negotiation on what an employee will be paid whilst furloughed. Some employers have agreed to pay the 20% so that workers continue to receive 100% pay. If an employer does reach an agreement about what it will pay an employee when it furloughs them and then does not pay this amount it is likely to be liable for a claim for unlawful deduction from wages as it will be acting in breach of contract. We envisage that an employer which is unable to make the payments that it has agreed as a result of a cash flow crisis will still be able to access the scheme but rather than getting a reimbursement for wages it has already paid out it will have to immediately use the money it receives to pay outstanding wages.

**What should I do if my employer has asked me to stop working and has stopped paying me but has not actively taken the step to Furlough me?**

Provided this situation has arisen after 28 February 2020 the employee should write to the employer and state that they understand they have been designated as furloughed from the date they were not provided with any work or pay, that they agree to being furloughed and can the employer confirm in writing that this is the case. The employee should also request clarification on what they will be paid for the period they are furloughed. If the employee does not receive a reply they should lodge a grievance and seek advice from their trade union. The employer is potentially acting in breach of contract by failing to pay wages if it has not lawfully brought the contract of employment to an end.

**What do I do if my employer has exercised an express lay-off clause in my contract rather than placing me on furlough**

You should write to the employer and state that in light of the introduction of the Government Job Retention Scheme you now consider you have been designated as furloughed rather than laid-off given the intention of the scheme is to deter employers from laying off staff off as a result of the Coronavirus pandemic. Our view is that employers can claim under the scheme for employees who have been laid off. You should then ask the employer to confirm that you are furloughed and as above ask for clarification on what you will be paid in accordance with the Job Retention Scheme from the date you were laid off. If the employer refuses to do this you should seek further advice from your trade union. Although in these circumstances there is an express term in the contract allowing the employer to lay off staff, there may be a potential legal claim as a result of the way the employer has applied the lay off provision.

**I am concerned as I am a Zero Hour contract worker and/or an agency worker and under the terms of my contract my employer is not obliged to provide me with work so will it need to Furlough me?**

The short answer to this question is that there is no absolute obligation on an employer to furlough an employee. This has already been identified as a potential shortfall in the scheme. This is a particular problem in a situation where an employer is not obliged to provide work, as it may decide to simply do nothing and “sit on its hands”. Even so we would advise any zero hour contract or agency worker who is on the employer’s PAYE payroll and who finds

themselves in this situation to write to their employer and assert that they consider themselves to have been furloughed from the last date of work that was undertaken (assuming this was on or before 28 February - as to have access to the scheme they need to have been on the payroll on or before this date), that they agree to be furloughed and ask the employer to confirm they also agree. They should also clarify what they will be paid for the period of furlough.

### **My employer is proposing pay cuts as well as furloughing staff? What should I do?**

The scheme does not cover this situation. Your pay can only be varied through a collective agreement reached with your trade union or if you consent. It is recognised that employees will be facing considerable pressure in some situations to accept pay cuts. The most important thing is where at all possible employees in this situation act collectively with assistance from their trade union so a way forward can be agreed. In any situation where the employer is proposing a pay cut which will affect 20 or more employees at one establishment the recognised trade union and employees should consider asserting that the employer is under a duty to collectively consult under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

### **Can I work for another employer if I have been furloughed by my own employer?**

There is nothing in the government guidance that suggests an employer is prevented from claiming under the Scheme for an employee who is undertaking work for another employer at the time they are furloughed. However, whether you can undertake work for another employer and not be in breach of your contract of employment with your employer will be determined by the contract itself which continues to apply throughout the period of furlough. You should also be aware that you can be recalled from furlough at any stage after 3 weeks.

### **Can a trade union representative carry out his or her duties in that capacity in the event they are furloughed?**

It is not permissible under the Government Scheme for any furloughed employee to undertake work for the employer once they are furloughed. However an employee can take part in volunteer work of training, as long as it does not provide services to or generate revenue for the organisation. We think that trade union duties and activities probably fall outside the definition of “work for the employer” set out in the guidance and therefore these individuals can continue to perform their duties even if they are furloughed although clarification on that point would be welcomed. In workplaces where Unions are recognised it may well be useful to

have express provision made in a collective agreement for the duties a trade union representative will continue to perform once furloughed.

### **Can Shielding Employees be furloughed?**

It is possible, according to the scheme, to furlough an employee who is shielding in line with public health guidance "...if they are unable to work from home and you would otherwise have to make them redundant. These two requirements are stricter than is the case for employees who are not shielding. However, with the initial suggestion that employees could only be furloughed if they were "otherwise to be made redundant" having been relaxed, we think the same would apply to shielding employees.

### **Can Employees with caring responsibilities be furloughed?**

Employees who are unable to work because they have caring responsibilities resulting from Coronavirus can be furloughed. For example, employees who need to look after children because schools have been closed can be furloughed.

### **In what circumstances can annual leave be carried over?**

Case law has already held that a worker on sick leave who has been unable to use some or all of the statutory four weeks annual leave can carry it over. The Working Time (Coronavirus) Amendment Regulations 2020 which came into force on 26 March 2020 provide for some or all of the four weeks statutory annual leave to be carried over for a period of two years where "*it was not reasonably practicable to take some or all of the statutory leave as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society)*". The circumstances where the right to carry over statutory annual leave would apply seem on the face of it to be fairly wide because they are not limited to the effects on the worker. The [ACAS guide](#) suggests that it might not be reasonably practicable for a worker to take annual leave due to the effects of coronavirus where a worker:

- Is self-isolating or too sick to take holiday before the end of their leave year
- Has been temporarily sent home as there's no work ('laid off' or 'put on furlough')
- Has had to continue working and could not take paid holiday

As can be seen from this it therefore appears to cover, for example, the situation where workers are unable to take the leave because of working commitments. This would apply to

those deployed in the NHS and others in the private sector such as delivery drivers who are working round the clock and have been unable to take annual leave. Under the regulations any untaken statutory four weeks leave can be carried forward into the following two leave years.

One of the difficulties is likely to be determining whether the leave to be carried over is the statutory four weeks leave, the additional 1.6 weeks leave and any additional contractual leave. There is case law which has held that an individual's holiday entitlement must be considered a "composite whole", which means that it can't be separated and on that basis a worker could assert that the annual leave which carries over relates to the four weeks statutory leave.

### **What rights does a worker have if the employer refuses to allow a worker to carry over annual leave?**

If the annual leave that the employer refuses to carry over is the statutory four weeks leave and the reason the worker requested that it be carried over was because it was not reasonably practicable for the worker to take it as a result of the effects of coronavirus, they can bring a claim in an employment tribunal for a declaration and may be able to claim any compensation which it is just and equitable in all the circumstances for a tribunal to make. The time limit for any claim is three months less one day of the day it is alleged that the right should have been permitted. It is anticipated in workplaces where there are recognised trade unions that collective agreements will be reached on how it is best for leave entitlement to operate over the lockdown period.

### **Does annual leave accrue during furlough leave?**

The Government's Job Retention Scheme is not underpinned by legislation and therefore there is only the Government guidance to assist. This states that "employees that have been furloughed have the same rights as they did previously". We interpret this to mean that the right to accrue statutory annual leave of 5.6 weeks (made up of 4 weeks statutory annual leave and 1.6 weeks additional leave) continues to accrue. This view is not shared by everyone and it will be interesting to see if anything else is published dealing specifically with this issue.

### **If a worker is off sick and wants to take annual leave what is the rate of holiday pay?**

According to the Government's guidance where a worker is off sick they cannot be put on furlough leave. However, there is nothing in theory (subject to the point we make about leave in a lockdown situation) that prevents a worker from deciding they want to take holidays when they are off sick. A worker may do this if they have exhausted contractual sick pay and want to continue being paid full pay. Where a worker worked normal working hours they should

receive full pay for the annual leave they take even if they were on half pay or no pay before they went on annual leave. Workers who do not have normal working hours are paid holiday pay based on a week's pay which is calculated by reference to average pay taken over a 12-week period (52 weeks on or after 6 April 2020). The amount they receive will be reduced if they were in receipt of sick pay which is at a lower rate than their normal pay (e.g. if on half pay or statutory sick pay) in the 12 week period (52 weeks from 6 April 2020). However if the worker has no earnings in the reference period (whether that be 12 weeks or 52 weeks) earlier weeks in which they have earnings will be taken into account when calculating the average. Where the reference period is 52 weeks, earlier weeks must be brought into account up to 104 weeks before the beginning of the period of leave. Where this gives fewer than 52 weeks to take into account, the reference period is reduced to that lower number of weeks.

## **9 April 2020**

# Q and A briefing on employer and employees responsibilities in the wake of Coronavirus no. 6

As part of our ongoing briefings for trade unions and workers we address some further questions arising from the Job Retention Scheme as a result of the updated guidance for [employers](#) and [employees](#) published by HMRC on Saturday 4 April 2020.

## **What is the position of employees who left their jobs before 28 February 2020?**

Employees who were made redundant or stopped working for their employer before 28 February 2020 cannot be re-engaged and furloughed. This is because the employee must have been on the employer's payroll as at 28 February 2020 in order for the employer to claim a grant through the Coronavirus Job Retention Scheme in respect of that employee.

## **What pay are employees entitled to receive when they are on furlough leave?**

The Scheme provides for employers to be reimbursed for each employee on furlough leave at a rate of 80% of the employees "regular payments" plus employer's NIC's and minimum automatic enrolment employer pension contributions up to a maximum of £2,500. The updated guidance sets out what is covered by regular payments. They include wages overtime, fees and compulsory commission payments. This means that an employee on furlough leave who is salaried should receive 80% of the salary they received on 28 February 2020 including contractual overtime, fees and commission. For employees, who are in receipt of variable pay the grant the employer can claim is 80% of the higher of the same gross month from the previous year or the average gross monthly earnings for the 2019-2020 tax year including overtime, fees and commission payments.

Importantly, the updated guidance states the following payments will not be included as "regular payments" and so not will not form part of the calculation of overall pay:

- Discretionary bonus payments (including tips)
- Discretionary commission payments
- Discretionary non-cash payments
- The cost of non cash benefits
- Benefits provided through salary sacrifice schemes (including pension benefits) which reduce an employee's taxable pay.

In general a failure to make a discretionary payment will not usually amount to an unlawful deduction from pay. However, where the employer has notified an employee of its intention to grant a discretionary bonus to an employee (or employees) in specified terms and then fails to do so a claim could be brought.



Employers should still continue with the salary sacrifice arrangements. However, while an employee cannot ordinarily opt out of a salary sacrifice arrangement unless there is a “life event”, HMRC have confirmed that COVID-19 counts as a life event that could warrant changes to salary sacrifice arrangements, and the employment contract can be updated accordingly.

For some employees staff tips make up a significant proportion of their pay. It is not always clear that all tips are discretionary in nature. This will depend for example, on the extent of the discretion the employer has to distribute them amongst employees and whether an employer is exercising their discretion in relation to payment of tips via a tronc system. Clarification from HMRC would be helpful as any tips that are not discretionary in nature may arguably be regular payments which should be included in the calculation of pay.

### **Can employees be put on furlough leave if the employer is insolvent?**

Where a company goes into administration (whereby administrators are appointed to either keep the company going or with a view to selling the business to another buyer) the administrators can access the Job Retention Scheme. The updated guidance makes clear that the administrator would only be expected to access the Scheme if there was a “reasonable likelihood of rehiring workers”. While it is accepted seeking a new buyer in the current climate is likely to be difficult it should at least provide some incentive on administrators to keep the business as a going concern until the current lockdown is relaxed. However this is likely to provide little comfort to those employees dismissed as a result of a company becoming insolvent before 28 February 2020 since they cannot be furloughed if they were not on the payroll as at 28 February 2020.

### **What is the position of those individuals who work through a personal service company?**

The updated employer’s guidance for employers and employees confirms that individuals who work for someone else through a PSC arrangement can be furloughed provided they are not in business on their own account and are paid via PAYE. If however they are paid by submitting an invoice via their personal service company they cannot be furloughed. Instead they may be able to claim a grant through the Government’s [self-employment income support scheme](#). Under that scheme those who are self-employed and meet the qualifying criteria can claim a taxable grant worth 80% of their trading profits up to a maximum of £2,500 per month for the next 3 months. The qualifying criteria are that the individual must:

- have submitted an Income Tax Self-Assessment tax return for the tax year 2018-19
- have traded in the tax year 2019-20
- be trading when you apply, or would be except for COVID-19
- intend to continue to trade in the tax year 2020-21
- have lost trading profits due to COVID-19

Note that self-employed trading profits must also be less than £50,000 and more than half of the individual income must come from self-employment.

### **Can contingent workers within public sector organisations, be eligible for the furlough scheme?**

The general position is that the government expects public sector organisations not to use the Scheme as most public sector workers are continuing to provide essential services or contribute to the response to the Coronavirus pandemic. Similarly private sector employers who receive public funding for staff costs are expected to continue to pay staff and not to furlough them.

However there is separate [guidance from the cabinet office](#) which applies to contingent workers (e.g. agency workers and contract workers working through a PSC or through an umbrella company) and which provides that they can be furloughed provided they:

- are in the middle of ongoing contracts for central government departments, their executive agencies or non-departmental bodies,
- are unable to work due to the outbreak of COVID-19, for example due to sickness absence, self-isolation or the temporary closure of the workplace, and
- cannot work from home.

Contingent workers are entitled to be paid 80% of their pay rate up to a maximum of £2,500 per month excluding statutory costs such as national insurance, holiday, apprenticeship levy and pension and supplier margin. Full details of how the payments are calculated and administered are set out in the Cabinet Office guidance.

Where contingent workers would have been let go as a result of their assignment coming to an end, irrespective of the spread of COVID-19, an employer is not able to make a claim for them through the Coronavirus Job Retention Scheme.

### **Can employees on fixed term contracts be furloughed?**

An employee on a fixed term contract who is on the employer's PAYE payroll on or before 28 February 2020 can be furloughed. However, where the fixed term ends without being renewed the employer can only claim the grant of up to 80% of salary plus employer's NIC's and minimum automatic enrolment employer pension contributions up to a maximum of £2,500 until the date the contract terminated. The government has confirmed that a fixed term contract which was due to come to an end during the period of the furlough leave can be extended or renewed.

### **Can an agency worker be furloughed and if so who is responsible for paying them?**

The updated guidance clarifies that any agency worker who is paid by PAYE including those employed by an umbrella company can be furloughed. Where the agency worker is employed by an umbrella company it will be the umbrella company that is responsible for furloughing the agency worker. An agency worker who is employed by an agency cannot work for or on behalf of the agency although they will be able to work for another agency.

Where the agency worker is directly employed by the agency and they have not been furloughed or provided with work they should write to the agency in the terms suggested in our last Q & A. The agency worker should also check the provisions of their contract to see if they are entitled to a payment between assignments.

9 April 2019