



Lockdown 2.0 and extension of the furlough scheme

Following the announcement of the new national restrictions which came into effect from 5th November 2020, we look at the implications for employers of the new lockdown and in particular the extension of the furlough scheme during this period and beyond.

The legal framework for the new lockdown has been published in the form of the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020. These regulations came into force on 5th November 2020 and are due to expire on 2nd December 2020. Read the government guidance [here](#).

Working from home

The regulations make it a criminal offence for anyone to leave their home address without a reasonable excuse, and set out a list of exemptions which will amount to a reasonable excuse. One of these exemptions (regulation 6, Exception 2) is if it is "*reasonably necessary ... to leave or be outside [the person's] home ... for the purposes of work ..., where it is not reasonably possible for [the person] to work... from home*".

The "*not reasonably possible*" test is a high threshold to meet, and it is not sufficient that the employee cannot work as efficiently from home. The wording of the regulations is stricter than the Government's guidance published on 31st October which referred to people who cannot "work effectively" from home.

Businesses which normally operate from office premises will, as a rule, be best advised to close their offices for the duration of this lockdown and to require their staff to continue working from home, particularly where they were able to do so during the previous lockdown between March and June.

The regulations set a similarly high threshold for the holding of any work meetings without breaching the restrictions on gatherings of two or more people. Here the wording of the relevant exemption is that the gathering would have to be "*reasonably necessary for work purposes*".

Extension of furlough scheme

The Government has extended the furlough scheme (Coronavirus Job Retention Scheme) for the duration of the new lockdown and on 5th November announced a further extension of the furlough scheme beyond the lockdown until the end of March 2021. Employees on furlough will continue to receive 80% of their normal

wages, subject to a maximum of £2,500 per month.

The employer's contribution to furlough costs will be limited to employer National Insurance contributions (NICs) and pension contributions, which takes the funding arrangements back to how the furlough scheme operated in August, before employers had to start paying 10% and then 20% contributions to furlough pay. For an average claim, employer's NICs and pension contributions account for 5% of total employment costs, or £70 per employee per month. The Government will review the level of employer contributions to the furlough scheme in January 2021.

All businesses which have a UK bank account and PAYE scheme will be eligible for the extended furlough scheme, whether or not they have previously accessed the furlough scheme (subject to some restrictions for publicly funded employers).

All employees will be eligible for furlough provided that they were on the employer's PAYE on or before 30th October 2020 including a RTI submission to HMRC by this date. This allows recently recruited employees to be placed on furlough as well as employees who continued to work throughout the pandemic including the March-June lockdown.

The extended furlough scheme is also open to employees who were made redundant, or otherwise stopped working after 23rd September 2020, if the employer is willing to re-employ them. The employer is not under any obligation to re-employ its former employee in these circumstances, and this option would involve additional costs for the employer and could give rise to additional issues and legal risks. For example, the offsetting of notice pay against furlough pay and the potential need for a fresh redundancy selection process.

Employers should take legal advice before deciding whether to agree to a request to re-employ. They should bear in mind that in this situation an employee may maintain their continuity of employment when entering into a new contract and therefore retain unfair dismissal rights, especially if the gap between the end of the old contract and the start of the new contract is less than one week.

The option of flexible furlough continues to be available under the extended furlough scheme, so that an employee can continue to work some of their normal hours (for which they are paid as normal) and the employer claims under the furlough scheme in respect of their unworked hours. Any pattern of reduced working can be supported in this way.

Employers should check carefully whether they can rely on existing written agreements with their employees to continue furlough arrangements for the new lockdown, or whether they will need to implement new agreements.

Detailed scheme rules and further guidance from HMRC are awaited imminently, and are expected to clarify a number of outstanding questions about how the extended furlough scheme will operate. These include the reference periods for calculating an employee's normal pay and identifying their normal working hours, and whether it will be possible for employers to make staff redundant and claim notice pay costs under the extended scheme.

In light of the extension of the furlough scheme until the end of March 2021, the Government has now cancelled the Job Retention Bonus Scheme. Under this scheme employers who retained a previously furloughed employee until the end of January 2021 were due to qualify for a £1,000 bonus. The Government has said that it will announce a new retention incentive scheme at a later date.

Job Support Scheme (JSS)

The new Job Support Scheme (JSS), which was due to start on 1st November 2020, has been delayed until the expiry of the extended furlough scheme. Now that the furlough scheme has been further extended until 31st March 2021, it appears that the JSS will not be introduced earlier than April 2021.

Under the JSS an employee will receive two-thirds of their pay for unworked hours provided they work at least 20% of their normal hours, subject to a 5% contribution by the employer. Where a business is legally required to close under tier 3 restrictions, the employee will receive two-thirds of their normal pay, without the employer being required to pay towards wage costs. For more details please see our [updated article about the JSS](#).

Vulnerable employees

The Government has published new guidance on shielding clinically extremely vulnerable people, such as those undergoing cancer treatment or with severe respiratory conditions such as cystic fibrosis, severe asthma and severe COPD. These individuals are “strongly advised” to work from home. If they cannot work from home, they are advised that they should not attend work for the period of the lockdown. Employers should place these individuals on furlough leave where they are eligible. Other people who live with clinically extremely vulnerable people can still attend work if they cannot work from home (see guidance [here](#)).

Employees who are clinically vulnerable but not extremely vulnerable, such as those with chronic heart disease or pregnant women, are not given separate guidance beyond the advice to be especially careful to follow the rules, minimise contact with others and observe good hygiene.

Please contact our Employment team for advice and support on any of these issues, or if you have any queries.

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https://www.legislation.gov.uk/uksi/2020/1200/pdfs/uksi_20201200_en.pdf

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It is also not yet clear whether the extension of the furlough scheme will result in any changes to the Job Retention Bonus Scheme. Under this scheme employers who retain a previously furloughed employee until the end of January 2021 will qualify for a £1,000 bonus.

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<https://www.crippspg.co.uk/brave-future/people/the-job-support-scheme/>

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<https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19>

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