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# Coronavirus (COVID-19): Post-furlough guide

This guide outlines the options employers can consider once the furlough scheme ends

The Coronavirus Job Retention Scheme, (the furlough scheme) has been extended to September 2021. Under the furlough extension, the government will pay up to 80% of furloughed employee's normal pay, capped at £2,500 and employers will be responsible for NICs and pension contributions. The [Job Support Scheme \(JSS\)](#) has now been delayed indefinitely, although it may be revived once the furlough scheme finishes. Full guidance relating to the extension is ongoing and we will update this guide as soon as the information is available.

Many employers have indicated that their businesses are yet to return to pre-pandemic levels of profitability. If trading conditions have not improved, then redundancies may be necessary. To try and minimise redundancies of furloughed employees or to ensure that any post-furlough redundancies are fair, employers should consider all other options.

HR must be able to advise on all available options and build in the capability to move quickly from one scenario to another. The main options include:

1. Full return to work in the workplace
2. Continued working from home
3. Job support scheme
4. Private furlough
5. Redeployment
6. Changes to terms of employment (including reduced hours)
7. Sabbaticals
8. Secondments
9. Redundancy.

## 1. Return to the workplace

Both during and after the furlough scheme, and once national or local lockdowns or restrictions end, the first option to consider is whether a return to the workplace is feasible, both from an economic and safety perspective.

Under the national lockdown from January 2021 people have been instructed to work from home. It is only in cases where homeworking is not possible that people may attend their workplaces, as long as they follow [COVID-19 secure guidelines](#).

When considering employers' options, the CIPD is recommending [three key tests](#) before bringing people back to the workplace: is it essential; is it sufficiently safe; and is it mutually agreed? Factors relating to staff who are returning to the workplace include the following:

## Planning

If work cannot be done from home decisions need to be made about the numbers of employees that can safely return, depending on the local and national situation at the time (ie after the end of the lockdown announced in January 2021). Staff can return in cohorts, on a compulsory or voluntary basis, at least initially. There should be a procedure for managing employees who show coronavirus symptoms or are contacted by the test and trace system.

## Risk assessments

An up to date detailed COVID-19 specific risk assessment, which help employers demonstrate steps taken to manage the risk of transmission and safeguard employees' health, is needed. Factors assessed should include the feasibility of implementing social distancing, employees' views, the number of vulnerable staff, and the size and nature of the workplace. Any national lockdown restrictions and the relevant alert level under local lockdown measures and proximity to any local outbreaks should trigger an updated risk assessment. The risks to staff who live with vulnerable people, have caring responsibilities, or public transport dependency also need to be factored in. Employers with smaller premises, who may feel social distancing is impossible in the workplace may decide to continue home-working or adopt additional measures outlined in [HSE guidance](#) where the 2m distance rule is not possible.

## COVID-19 secure guidance

Employers should follow the up-to-date government and public health guidance applicable to their sector to ensure that everyone is fully compliant with social distancing and COVID-19 secure working practices, including physical barriers like perspex screens, hand hygiene, and cleanliness of surfaces and shared equipment. Good ventilation can help reduce the risk of spreading coronavirus. Advice on the use of air conditioning systems can be found on the [HSE website](#). The Health and Safety Executive (HSE) will conduct spot checks and has also published advice and guidance relating to COVID-19 health and safety measures on its [website](#). A [toolkit](#) from the Society of Occupational Medicine (in collaboration with the CIPD, Mind, Acas and BITC) helps employers plan a

safe return to the workplace, and the Institution of Occupational Safety and Health offers [resources and free e-learning modules](#). The World Health Organisation (WHO) released [workplace guidance](#) and a risk assessment tool, which can be accessed via the HSE website.

## Consultation

Consult with employees to determine who can attend the workplace safely, with consideration for:

- individual employee's journeys
- childcare responsibilities
- mental health
- physical vulnerabilities of staff and their family members
- protected characteristics
- level of risk.

Employees should be given reasonable notice about any requirement to return to work so that they can address childcare commitments, health concerns or general including wellbeing issues.

## Re-induction

It is advised to keep a written record of the communication about furlough ending and the requirement to return to work, which may include an outline of the re-induction arrangements.

A re-induction process for returning staff will help avert anxiety and discontent. If possible, line managers should discuss adjustments and support for an effective return with every employee. There will be new company policies and procedures, as well as potential changes to work duties, client procedures or supply arrangements, and staff may need training during the first few days back. There may also be a need for mindfulness training and establishing new goals and targets.

The government has emphasised that employers should only ask people to return to the workplace where it is not possible to work from home. Being transparent and open with employees about the measures that have been implemented will help reduce reluctance to return.

Furloughed employees may feel disconnected from the company and their colleagues, and so rebuilding connections and a strong culture should be a priority. Open and frank discussions about an effective return to work and answering questions about new procedures will encourage faster adaptation to returning to the workplace. The situation

may present some opportunities to streamline traditional approaches for example by initiating a phased return, eliminating unnecessary processes or allowing a blended form of home and workplace flexible working. For further detail on the choices and decision-making process see our [return to the workplace guide](#).

## Supporting vulnerable workers

There is [government guidance](#) for clinically extremely vulnerable (CEV) people to protect them from coronavirus. With rising infection rates and restrictions in place, shielding has been reintroduced for CEV people - see our [shielding guidance](#) for more information.

Once restrictions are lifted, CEV people should be offered home working or the safest available workplace roles maintaining social distancing. This may involve new alternative roles or working patterns, provided they consent to this.

Employers should have undertaken individual risk assessments well in advance to support all vulnerable staff to return.

### Other vulnerable workers

Employers may need to take special care with other staff not just those who count as CEV, for example, older workers, and those who are pregnant, obese or from ethnic minorities. These groups may be more vulnerable to serious consequences of the virus. Men are also at a higher risk than women.

Some staff may be protected under the Equality Act and could find employers' decisions about returning to the workplace or staying away to be indirectly discriminatory. People professionals and line managers need to agree specific arrangements which factor in workers' conditions if there is evidence to suggest they are more vulnerable to COVID-19.

Once the restrictions lift, some vulnerable furloughed staff will be ready to return to work, others may be very anxious, or uncooperative about returning. Discussions with staff surrounding individual risk assessments will be of critical importance including adjusted duties or redeployment, provided staff agree. Specialist advice may be needed for example from an occupational health service, doctor's advice on any underlying conditions, employment assistance programmes or counselling and advice on returning to work or reasonable adjustments. Staff may need time to adjust to reassurances that the workplace is as COVID secure as possible.

Health and safety protections at work are harder to meet for those who are clinically extremely vulnerable. If an employer insists on ending homeworking with no good reason, this may be a constructive unfair dismissal, which could be automatically unfair with no

minimum qualifying period of employment required to bring the claim.

Clinically extremely vulnerable individuals may be advised to stay home if transmission levels increase again, so employers need to retain flexibility in their arrangements. SSP (Statutory Sick Pay) remains available for those with symptoms or who live with someone with actual coronavirus symptoms, or who have been notified that they should self-isolate under the NHS test and trace system.

## **Supporting employees with childcare responsibilities**

For employees with children, returning to their previous work routine once restrictions lift may require staged implementation, especially if childcare routines have been disrupted during the pandemic.

Employers should discuss childcare issues and the options, including agreed altered hours, to help employees work effectively. Other options include:

- Continued home working: After furlough employees may informally request altered days or hours to help them work effectively at home whilst also caring for their children.
- Flexible working requests: After furlough employees may formally request to alter their hours or pattern of work.
- Unpaid time off for dependants: This leave only covers things such as care arrangements suddenly breaking down. This is only a limited amount of unpaid time off to deal with the current situation.
- Unpaid parental leave: Parents are entitled to 18 weeks' leave for each child and adopted child, up to their 18th birthday. This leave is limited to four weeks per child although the employer can agree to increase this.
- Annual leave: employees may ask to use annual leave which has accrued during furlough for their childcare needs.

## **Employees who are reluctant to return**

Once the Coronavirus Job Retention Scheme ends, and any national lockdown ends, furloughed employees being asked to return to the workplace may be reluctant or may even refuse to return. As outlined above, employees may have concerns due to their health or increased risk factors, but some employees may simply need more time than others to adjust to new arrangements. As the virus is still in circulation, many people are anxious about the risk of infection, for example from proximity to colleagues, or using public transport. Staff may have experienced challenging domestic situations, such as caring for a vulnerable relative or bereavement as well as financial worries which will have impacted their mental health.

People professionals should seek to understand individual employee's reasons as to why they are reluctant to attend and identify specific safety concerns. There is also a duty to consult with their employee representatives on health and safety matters. Concerns may range from health risks to worries about other employee's lack of caution or issues about their commute. The simplest solution may be to allow continued working from home for employees who object, if the nature of their role means that they can do so.

Open dialogue and reassurance about stringent safety measures and any further adjustments may encourage employees to feel safe returning. Employers can provide copies of Coronavirus Risk Assessments and discuss the findings to demonstrate they have complied with, or gone further than, the government guidance.

Employees may also benefit from Employee Assistance Programmes or access to Occupational Health advisers. You can also use the CIPD's content on [mental health](#), or resources from organisations like Mind as further support. CIPD members can also access a new [well-being helpline](#) for advice and support. There is also advice from [Carers UK](#) and [Carers Trust](#) for employees with caring responsibilities.

## **Legal provisions**

Employers can normally require employees to follow their reasonable instructions and attend work. If employees fail to do so, employers can in theory take disciplinary action over the unauthorised absence. However, these are not normal times, and employees have many legal points they can raise. These include the right to request working from home and refusal to attend the workplace on health and safety grounds, if the employee feels the employer has taken inadequate steps and it is not reasonable to require them to attend an unsafe workplace.

All employers have implied duties to take reasonable care of the health and safety of their employees and to provide a suitable working environment. Any failure to implement COVID-19 workplace guidance may constitute a breach of these duties, leading to a variety of claims.

## **Potential claims**

HR should be able to advise management about all employee rights surrounding returns to work, including the following:

### **Serious and imminent danger**

The detriment provisions of the Employment Rights Act 1996 (Section 44) says that employees must not be subjected to a detriment by their employer if they leave or refuse to attend work where they reasonably believed there was a serious and imminent danger.

These provisions could be raised by employees who are being disciplined about workplace attendance.

Thorough risk assessments and communication of COVID-19 secure workplace plans should help show the employer took appropriate steps. If the number of cases of COVID-19 is low, then it will be harder for employees to show the employer's failure to take steps has put them in danger. If there is a local outbreak or second wave, the employer's preventative steps are even more important. Employees with pre-existing health conditions are also more likely to show grounds for a reasonable belief of serious and imminent danger to their health.

## **Automatically unfair dismissal**

The law also gives employees further protection against being dismissed or treated detrimentally if they have refused to attend work because they have a genuine health concern. Employees who leave or avoid a dangerous workplace, or take steps to protect themselves where they reasonably believe there was a serious and imminent danger can bring automatic unfair dismissal claims without a qualifying period of service.

## **Whistleblowing**

An employee who raises concerns about the employer failing to implement sufficient safety measures in the pandemic could be making a qualifying protected disclosure and be protected against dismissal or detriment as a whistle-blower. This also gives automatic unfair dismissal protection if the worker suffers a detriment for having made a protected disclosure. The compensation for this is theoretically unlimited.

## **Discrimination**

Many vulnerable employees with underlying conditions may meet the definition of disability under the Equality Act. This means employers must discuss, and then make, reasonable adjustments. These could include allowing homeworking or transferring to another lower risk role. If work can be done from home, this is likely to be a reasonable adjustment which must be considered for those who qualify under the disability provisions. Employees who live with clinically vulnerable people may also be protected from discrimination as a result of their association with a disabled person. Employers who give a blanket refusal to consider continued home working would disproportionately impact people who are associated with disabled people. It is also likely that they have protection from detriment or dismissal as there are genuine health and safety reasons for needing to stay away from the workplace.

## **2. Continued working from home**

Once furlough ends, employers who have experienced some productive and successful homeworking may opt for furloughed employees continue working from home. This could be on a full time basis, or on reduced hours by agreement. This is in line with the latest government advice and so all options to allow this should be explored in full.

### Legal implications of home working

Remote working policies and guidance for line managers may assist with managing working from home. Points to note include:

- Working time: There may be more flexibility over working hours when working from home but the Working Time Regulations 1998 still apply, including the working week and daily rest breaks. Are there strict office hours or a specified set number of hours per day?
- Health and safety: Employers' responsibility for employee's mental and physical health, safety and welfare extends to home working. Employers should usually conduct risk assessments of all work activities including employees working from home.
- Salary and expenses: Salary and benefits should usually remain the same. Changes to expenses may be appropriate if normal travel expenses and allowances are no longer needed but utility bills may increase as a result of working from home.
- Data protection: Compliance with data protection principles should continue during remote working. Employers may need to include express terms reserving a right to monitor work communications on home-based devices as well as reminders about home security and confidential information. Data transfer between home and the workplace also needs careful consideration. The ICO has produced guidance on [data protection and working from home](#).

### Practical implications of home working

There are many positives as well as challenges inherent in remote working. Employers need to ensure employee engagement and productivity. They also need to consider equipment needs, communication, motivation, monitoring of performance and output. Employers also need to address the following issues around home working:

- Combat isolation and stress, for example, encouraging dialogue by asking employees how remote working is suiting them and maintaining a collective sense of belonging.
- Monitor security measures and computer virus protection used by employees.
- Ensure that someone is available to help with IT issues remotely.

Take out insurance for employees and equipment. For further guidance following a transition to working from home see the CIPD's [series on getting the most from remote working](#), including our recommendations for [developing effective virtual teams](#), our series



of tips for making the most of remote working and the recording of our [webinar session on looking after your remote teams](#). You can also refer to the FAQs on managing remote working.

### 3. Job support scheme (JSS)

The new job support scheme has been postponed in light of the extension of the furlough scheme. We are awaiting further guidance as to whether the new JSS scheme will be modified or, as seems likely, cancelled following the extension of the furlough scheme. This guide will be updated once the information is available.

Under the JSS, employees do not need to have been previously furloughed as the scheme would apply to those who used the furlough scheme before, as well as those who did not. If the scheme is reinstated it is likely to apply throughout England, Scotland, Wales and Northern Ireland and there are two main aspects:

#### Job support scheme: Open

If introduced this scheme will cover employers with reduced business due to COVID-19 who wish to retain employees who are working at least 20% of their usual hours. Employers would have to pay employees their normal contractual wage for the time worked, but for time not worked the cost will be split between the employer, the government and the employee, subject to a cap.

#### Job support scheme: Closed

This would apply if a business is closed due to a national or local lockdown situation causing the employer to:

- 'legally' shut down as the result of the lockdown; and
- have employees who have to cease work for a minimum of 7 consecutive (calendar) days.

This temporary 'closed' grant would only apply whilst the lockdown restrictions are in place. A percentage of the employees' normal salary (previously suggested at 67%) will be funded by the government subject to a cap. The employer will only have to pay the NI and pension contributions on that amount.

The guidance states that the employers' business must be legally forced to close as a direct result of Coronavirus restrictions, for example a pub in a region where pubs are told to shut.

Further details will be contained in government guidance if the scheme is revived.

Separate to the suspended JSS there are other support measures still available, such as

local restriction support grants for businesses in England that are shut due to local lockdowns. These grants range from £1,300 to £3,000 per month paid in fortnightly instalments. More information is available on the [government website](#).

#### 4. Private furlough

Once the Coronavirus job retention scheme ends in September 2021, if no further schemes are forthcoming and business has recovered insufficiently then employers could introduce private furlough – a form of non-statutory lay-off that is not covered by existing legal provisions, paid or unpaid. However, the general rule of an employment contract – unless specifically noted – is that an employer cannot deny work to employees and reduce their pay. It is rare for employment contracts to contain a contractual right to lay off, so employers will have to negotiate a new private furlough contract.

Employers will have to fund private furlough, and if the alternative is redundancy, employees may agree not to work for an extended period. Employers should address the extent to which staff can work elsewhere during any private furlough period. Employees may need other work, especially if pay is lower than under the previous furlough scheme.

Employers should consult with employees, as simply imposing private furlough may breach existing contracts, particularly the implied term of trust and confidence. There will be difficult situations to handle if some staff are chosen to work and some are asked to agree to private furlough.

Agreements should cover:

- the hours employees will be working (if any) and the hours they will be furloughed
- the length of term of the arrangement
- the notice required to bring the arrangement to an end
- if the employee is allowed to take on other paid work
- any restrictions on working, for example working for a competitor
- the temporary nature of the arrangement and, if agreed, that the employee will go back to previous contractual terms, pay and hours when the variation ends
- what happens if government guidance changes and the agreement needs to be varied
- terms involving payment, as a percentage of normal pay - this could be at 80% of salary, as with the government scheme or below 80%. Private furlough can be unpaid if employees agree
- deductions for tax, national insurance and any pension contributions
- if other aspects of the contract of employment will continue on the same terms as before
- entitlement to annual leave.

The employee's agreement to the variation can be given by signing a copy of the letter or agreement.

The law provides that employees who have been laid off for certain lengths of time can claim a statutory redundancy payment. Where employees agree to private furlough without pay they may be entitled to a statutory guarantee payment, as they would for lay off or short time working.

Employers should ensure that employees chosen for private furlough are selected fairly and that there is no discrimination in terms of protected characteristics. Collective representatives or a union may have to be involved as well as obtaining individual agreement to the private furlough arrangement.

## 5. Redeployment

Redeployment essentially means moving an employee from one role to another. The new role does not have to be similar to the original one and can involve different duties, locations, or seniority levels.

There are potential legal risks surrounding changing employment duties unless employees agree. Employees need sufficient information about the alternative role and time to allow them to make an informed decision; they should not be rushed by use of unnecessarily short deadlines. Employees may only agree easily if they are paid at their previous rate and may need to be trained or upskilled.

If numerous staff are being redeployed a redeployment policy may help to achieve consistency, and some redeployments may trigger an organisation's redundancy policy. Matters to consider include:

- When and why the employer may redeploy.
- Employees' redeployment rights if they accept or reject the alternative role.
- What happens if the employee refuses.

If employers decide that employees previously on furlough need to be redeployed it is best to keep written evidence of the decision-making process. Particular care is needed if redeployment arises in connection with redundancies, as employers must meet certain 'suitable alternative' employment criteria.

Key points to note:

- Agreement: Employers cannot usually redeploy staff without reaching an express agreement. There should be written confirmation of all changes to duties and any terms of employment that are unaffected should be stated.

- Length: The length of redeployment should be agreed, if it is only for a specific limited period this should be made clear specifying the review or end date.
- Time: Employees should have reasonable time to consider redeployment.
- Training: Employees should not be asked to operate beyond their experience or competence, without any required training prior to the redeployment.
- Support: The manager providing support and advice in the new role should be specified before the redeployment is agreed.
- Induction: A full induction programme for the redeployment should be offered covering everything from timings of shift patterns and breaks, supervision, training and how to report concerns or feedback.

Some employees on certain types of visa should check the impact of redeployment for example any need to change sponsors and a new certificate of sponsorship.

## 6. Changes to terms of employment (including reduced hours)

By agreement, employers can implement a variety of innovative new arrangements including reduced hours for the same pay, or the same hours with reduced pay. The general contractual principle is that change can only be effective when agreed by both parties, and that applies to employment contracts too. It is always best to try and consult and agree changes first.

Potential alternative arrangements include:

- reduced working weeks
- minimum-hours or zero-hours contracts
- temporary or permanent reductions in working days for all employees
- alternate week working patterns
- reduced bonuses
- recruitment freezes or salary reductions.

When furlough ends the main changes HR professionals may be asked to implement are alterations to:

- rates of pay
- working hours or working part-time (which may link with the JSS if it is revived)
- location
- employee benefits or bonuses

If salary reductions are needed, consideration should be given to starting at the top as employees will be more likely to accept salary reductions if these start at board level.

Some terms and conditions have flexibility clauses which purport to allow the employer to unilaterally make contractual variations where necessary. These clauses may be helpful in persuading employees that changes are permissible but, in reality, employers cannot use flexibility clauses to enforce changes to the employees' disadvantage. The clauses may be effective for minor changes only.

Consultation ensures employers and employees discuss planned changes, and work together to implement them. A reduction in pay or hours resulting in less pay is a significant change with a higher duty to consult. If there is inadequate consultation the implied term of trust and confidence between employer and employee may be broken.

If employees do not agree, then employers need to consult individually and attempt to explain the reasons and necessity for the proposed change. If the employee still refuses, employers need to decide whether to impose the change anyway and see if the employees agree or use dismissal and re-engagement on the new terms. Dismissal and re-engagement can be risky and will trigger collective consultation requirements where 20 or more dismissals are proposed.

## 7. Sabbaticals

Once the 'furlough' scheme ends, employers who are not yet ready to return to partial or normal working levels can try offering sabbaticals or unpaid leave to minimise redundancies. The JSS or a similar scheme may also be reintroduced although this is not certain.

The term 'sabbatical' is not a defined legal concept but refers to a prolonged period of leave, which can be unpaid, like normal unpaid leave, or can be partially paid.

Employers will need to obtain agreement, and some employees may be reluctant after months of reduced pay on furlough. Decisions will also need to be made about:

- the length of the sabbatical or unpaid leave and
- any incentives or benefits on offer
- whether all staff or certain teams will be offered the option
- the extent to which they can work for a competitor

Please see our [sabbaticals guide](#) for further details.

## 8. Secondments

Employee secondments are where employees are hired on a temporary basis to work for another company, for example a client. Alternatively, there may be a secondment to a different part of the employer's business that is experiencing an uptick in demand. The

employee returns to their original employer at the end of the secondment.

In normal times, secondments may be used as career development for an employee, or to help cover temporary increases in workload or the absence of another employee. In current times, secondments may help avoid redundancies. Employers should consider the following aspects of secondments:

- **Agreement**

Employees should agree to the secondment and must be selected fairly. If the secondment is for a client or other organisation, a further contract specifying terms and conditions will be required. Employment rights and benefits normally remain unchanged. If the secondment is internal, agreed changes to written particulars may be required to reflect the contractual changes in the employee's duties or hours. Restrictive covenants, intellectual property or confidentiality clauses may need to be revised.

- **Length**

A secondment is usually for a set period or fixed term. This should be agreed from the start, alternatively the agreement may be terminable on a fixed notice period. The agreement should specify when and how the original employer, host or employee can terminate the secondment.

- **Secondment terms**

A secondment agreement can be contained in a letter between the original employer and the employee setting out the duties required by the host and any necessary changes to the employment contract. In addition to hours and payment, matters such as staff meetings and training should be addressed. The employee should consent to changes before the secondment. Alternatively, a three-way agreement may be signed by the original employer, the host and the employee.

- **Payment**

The secondee will often be paid by the original employer throughout the secondment but the host company will then reimburse the original employer. The host may pay a secondment fee including a profit element for the original employer. If the original employer is VAT registered, the secondment fee may be liable for VAT. The host may pay any additional costs including training fees, bonuses, overtime, relocation or travel expenses.

- **Continuous employment**

The employee will maintain their statutory period of continuous employment with

the original employer despite the secondment. If the employee is seconded for more than two years, depending on how watertight the arrangement is, they may have an argument that they became an employee of the host and can bring unfair dismissal claims at the end of the arrangement.

- **Employer responsibilities**

During secondments the original employer usually remains the employer of the secondee, for example appraisals, disciplinary or grievance measures and day to day control remain with the original employer. If there is any possibility of the secondee becoming the employee of the host then this should be addressed. Normally the employee owes duties to their original employer - the host company will owe limited duties to the employee subject to its contractual agreement with the original employer.

## 9. Redundancies post-furlough

When the Coronavirus Job Retention Scheme was implemented a primary purpose was to avoid redundancies, but for some employers this scheme may only delay the inevitable. The fact that employees have been furloughed does not prevent employers implementing redundancies after the scheme ends. The normal redundancy rules apply despite the pandemic – if there is a reduction in work or genuine expectation of such a downturn then employers can consider reducing headcount.

Redundancy dismissals require redundancy payments which can be considerable, and employers should always consider alternative ways of reducing salary payments and headcount when the furlough scheme ends. Employers should address the following points relating to redundancy.

### Timing

Employers can start the redundancy process when employees are still on furlough. If the process is very rapid there is some risk that:

- HMRC may query if the employer intended to make redundancies all along and used the furlough scheme while carrying out consultation.
- Employees may argue that the proposed dismissals are unfair because full furlough for the duration of the scheme is an alternative to redundancy that employers should have considered.

### Fairness

Redundancy fairness always depends on the precise facts, correct consultation and procedures being followed. Pitfalls for employers include:

- Failure to fully consider potentially viable alternatives to redundancy
- Failure consult meaningfully
- Failure to choose a proper pool for selection
- Unfair or discriminatory selection criteria.

The redundancy process is likely to be unfair if the employer did not at least consider re-furloughing employees as potential alternatives at the planning stage. Tribunal cases are starting to emerge where employees bring unfair dismissal claims because furlough was not considered as an alternative to redundancy.

## **Alternatives**

The duty to explore all alternatives to redundancy includes considering options such as those outlined above and there is also a duty to explore alternative roles. Employees should be encouraged to contribute to these discussions with any ideas they have to avoid redundancy.

## **Agreement**

Due to the evolving nature of the guidance employers should keep copies of furlough agreements (which should have been in place by the end of 13 November 2020) as well as written evidence to show that their operations have been negatively affected by coronavirus and that redundancies are unavoidable.

## **Consultation**

It is essential that employers do not transition abruptly from an employee being on furlough to being told that they are redundant. Employers need to plan fully and individually consult. If 20 or more redundancies are proposed in one establishment within a 90-day period, then they will need to collectively consult as well. Consultation must be for a minimum of 30 or 45 days depending on the number of redundancies proposed.

Employers must also notify the Secretary of State by completing an HR1 form. Collective consultation may involve appointing elected employee representatives.

Consultation is intended to reach agreement on avoiding dismissals; reducing the number of employees to be dismissed; and mitigating the consequences of dismissal. If consultation is not carried out, or not carried out fully, then a protective award of up to 90 days' pay per employee may be awarded. Individual consultation will entail discussing the reasons for the redundancy, selection criteria and any proposed alternatives.

## **Remote consultations**

Carrying out collective and individual consultation obligations remotely is permissible. If



employee representatives and employees are working from home, the employer can undertake consultation using virtual meetings through a secure online portal. Several online “town halls” may be needed to inform employees about proposed measures to ensure the whole workforce is notified properly. The consultation may take longer, and employers will need to adjust projected timescales.

Alternatively, consultation could be undertaken by phone or in person with appropriate risk assessments and protective measures subject to current government guidance.

It is common practice to allow the employee to be accompanied at redundancy consultation meetings (and any appeal meeting) by a colleague or trade union representative, although this is not a statutory right. There is no legal obligation to allow the employee to be accompanied by a friend or a family member but in practice it will be difficult to ensure nobody else is present in the room during remote meetings so it might be sensible to allow a friend or family member to accompany the employee. Employees may need disability related adjustments for collective and individual consultation.

## **Employee representatives**

If employee representatives have not already been elected, employers will need to ensure any election is fair. This may include arranging online voting although the voting process can present a challenge if it is not in a physical workplace. Some possible options include using a third-party online voting platform, which ensures anonymity or designing an internal system.

## **Special circumstances**

There is a special circumstances defence for employers who could not reasonably practicably comply with the requirement to collectively consult. This defence applies in very limited circumstances and it is unlikely to apply only because of the pandemic.

## **Redundancy and notice pay**

No part of the furlough grant can go towards paying redundancy pay itself. Redundant employees must be paid statutory or contractual notice, holiday and redundancy pay. The redundancy notice period can run during furlough so employees can be made redundant before furlough ends. Previous government guidance confirms that employers can therefore reclaim notice pay under the scheme for furloughed employees who are serving their notice period. Statutory notice pay during the notice period is payable at the rate of the employee’s full contractual normal salary not their wages under the furlough scheme.

The [November guidance](#) confirms that if employers can continue to claim for a furloughed employee who is serving a statutory notice period, but only before the 1

December 2020. The updated guidance on the extended furlough scheme means that after this date employers cannot claim the furlough grant during a furloughed employee's period of contractual or statutory notice.

The government contribution towards employees serving contractual or statutory notice periods therefore ends for claim periods after 1 December 2020. Employers who are thinking about dismissing for redundancy may need to give employees notice before 1 December, or accept that both redundancy payments and full usual notice pay will be payable by the employer in full rather than allocating a portion of the furlough grant towards the notice part of the payment.

Employers cannot reclaim payments in lieu of notice under the furlough scheme, these should be calculated based on pre-furlough pay.

Furloughed employees' redundancy pay is also calculated based on their normal pre-pandemic wage, rather than their reduced furlough pay. Other items such as compensation for unfair dismissal, failure to provide a written statement of reasons for dismissal and failure to comply with an order for re-instatement or re-engagement are also based on full pay.

Following termination of employment on grounds of redundancy, employees will be entitled to redundancy and notice payments calculated in accordance with the employee's contract, length of service and weekly salary. There must also be full pay for accrued but untaken holidays - furlough pay may need to be topped up to 100% of normal pay. For further detail on redundancies see our [coronavirus redundancy guide](#).

### **Employees already redundant**

The late decision to extend furlough to September 2021 means some redundancies implemented may have been unnecessary or could have been postponed. Employees on the payroll on 23 September 2020 who were then redundant or stopped working for the employer can be re-employed and furloughed. This includes employees on fixed-term contracts who can also be re-employed and claimed for. Employers do not have to re-hire employees but there is at least a moral obligation to consider this. The cost for employers is the employer NICs and pension contributions. An agreement would be needed regarding any redundancy payments already made.

### **Redundancy due to insolvencies**

Staff who were furloughed during the Coronavirus Job Retention Scheme, then made redundant due to the employer's insolvency, may be eligible to apply for payments including redundancy pay, accrued holiday pay and paid notice periods from the Insolvency Service.

In addition, unpaid wages, accrued holiday, overtime and commission can be claimed. Employees eligible for redundancy pay need the normal two-year qualification period but this can include time on furlough.

The Insolvency Service can only make payments to employees made redundant by the employer, but not to those dismissed then re-employed under the furlough scheme. There is an online application and case reference number available from the insolvency practitioner and government [special guidance](#) for employees whose employers became insolvent post furlough.

### **Apprenticeships, kickstart placements, traineeships and industry placements**

In addition to the bonus scheme the government have announced several short-term schemes to encourage employment of young people in the aftermath of the lockdown measures. Government policy papers set out details of apprenticeship funding in England for new apprentices starting on or after 1 August 2020. The idea is to enable employers to develop a skilled workforce in the post COVID-19 economic recovery. An incentive payment is payable to employers hiring apprentices between 1 August 2020 and 31 January 2021.

### **Managing employees' morale and well being**

Following redundancies, anxiety can increase about the potential for further redundancies, leading to a decline in staff motivation, morale and productivity. How HR professionals handle the redundancy process is key. The HR teams and managers involved in the process may need support themselves and staff who have not handled redundancies before may need training.

Employers can provide external counselling, professional medical help, employee support helplines and redundancy outplacement services. In addition, employers can offer a recruitment list to advertise vacancies to former staff when they arise. This may involve repayment of any enhanced element of redundancy packages if the employee is re-employed within a specified time period. The statutory element of a redundancy payment is not usually repayable.

Whilst employees who have kept their jobs may be relieved, the stress of seeing colleagues lose their jobs can have a ripple effect. An employer's future success depends upon the retained staff, so HR and line managers need to motivate them following the redundancies.

Communication is critical. Employers should acknowledge the departures and, where possible, provide reassurance that no further redundancies are planned. They should focus on establishing a new collective focus on teamwork and boosting morale, so that

the business can move forward. There may be new teams, managers and workloads, but also new opportunities for advancement.

In summary, employers have many options post-furlough. Where the business requires it, they can implement a full or partial return to the workplace (in line with COVID-secure guidelines). There is also the option, where possible, to allow employees to continue working from home. If a downturn in demand is expected, but likely to be short-term, then the job support scheme or private furlough may be a good choice for this period. Employers should also look at the skills of their staff and assess if redeployment, or changes to terms of employment, are viable alternatives to redundancies. Sabbaticals and secondments can be beneficial, both for businesses experiencing a downturn in demand, and employees wanting to gain experience. Finally, there is the option of redundancy, which employers must ensure they carry out fairly, after all viable alternatives have been considered. The post-furlough environment may well be tough for some businesses to adjust to, but planning and proactive decision making will ensure it is easier to navigate.

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