

Step-By-Step Guide to Placing Employees on Furlough

Information correct as of 6 April
2021



Introduction

This guide is for when you are required to close or have experienced a downturn in work because of the coronavirus (COVID-19) pandemic, have less work available for employees, and wish to utilise the government's Coronavirus Job Retention Scheme (CJRS), also referred to as the furlough scheme.

Firstly, check the contracts for a clause entitling you to lay off to ensure it covers your situation as this will determine which process you adopt. Take advice if necessary. If you have questions about whether you can claim under the CJRS for a particular employee, or more generally about the scheme, please refer to our [Extended Furlough FAQ](#) or contact HMRC.

Lay-off/furlough process WITH a contractual lay-off clause

- Arrange to meet or speak with whichever employees you intend to lay off/furlough. This can be in person, by phone, Skype, Microsoft Teams or whatever other means you have available and work for you logistically.
- Confirm to them that due to the downturn in work caused by COVID-19, you were planning to invoke the lay-off clause in their contract, which permits you to send them home on nil pay.
- However, based on the support offered by the government, as an alternative, you plan to furlough them instead and then make an application to HMRC under the CJRS to pay 80% of their wages up to a maximum of £2,500 per month in line with the scheme.
- Given that the furlough scheme is much more generous to the nil pay lay-off in their contract, you assume that everyone is agreeable to this course of action. However, ask if anyone objects and, if they do, you will be happy to discuss that with them further. Note that you still need their agreement to be furloughed but hopefully, given the alternative, this will not be a problem.
- If you're considering a flexible furlough arrangement, then discuss that with the employee and get agreement to the proposal.
- Keep a note of the meeting/call so you have evidence as to what was said, who was present and the fact that the employees have agreed to the furlough.
- Give them a copy of our [Extended Furlough Letter](#), either in person, by post or by email, confirming the details of the furlough. You will have to select the version that best reflects the employee's working hours/pattern. It is very important that you provide this or some other form of written confirmation to your employee and retain it for at least five years as you might be asked for it by HMRC in any subsequent audit of the scheme.

Lay-off/furlough process WITHOUT a contractual lay-off clause

- Arrange to meet or speak with whichever employees you intend to lay off/furlough. This can be in person, by phone, Skype, Microsoft Teams or whatever other means you have available and work for you logistically.
- Confirm to them that due to the downturn in work caused by the COVID-19 crisis, it may well be necessary to either close the business or make redundancies because the company is in financial difficulty.
- However, as an alternative to that, the company is prepared to place employees on furlough and then make an application to HMRC to pay 80% of their wages up to a maximum of £2,500 per month in line with the CJRS.
- If you're considering a flexible furlough arrangement, then discuss that with the employee and get agreement to the proposal.
- The purpose of this meeting/discussion is to seek agreement from the employees to be furloughed. Explain again that if employees are not willing to be furloughed, then there is a real danger that the company will be forced to close or, at the very least, make redundancies.

In those circumstances, explain that you hope employees will be willing to be furloughed instead.

- Ask the employees if they agree to be furloughed in the first instance and, in the highly unlikely circumstances that an application to HMRC is rejected, they instead agree to lay off with nil pay. If employees strongly object to being laid off, you could limit this to just furlough.
- You will want some evidence that the employees have agreed to this change. This can be minutes of a meeting or conversation confirming verbal acceptance of the furlough/lay-off. You could ask employees to send a short email confirming they are agreeable to being furloughed in line with the HMRC CJRS. However, note that the only requirement under the scheme is to provide written confirmation to the employee that they have agreed to and will be furloughed and keep a copy on file. See details [here](#).
- Give or send each employee a copy of our [Extended Furlough Letter](#) to confirm the furlough/lay-off arrangements. Again, select the letter which best reflects the employee's working pattern. It is very important that you provide this or some other form of written notice to your employee and retain it for at least five years as you might be asked for it by HMRC in any subsequent audit of the scheme.
- Whilst speaking to employees to explain the situation is preferable, we appreciate that may not be possible in the current environment. As an alternative, it is permissible to only write to / email your employees. In that case, the initial letter is a proposal rather than confirmation of agreement and our furlough letter should be adapted accordingly. Confirming acceptance of the proposal is still vitally important and, again, it will be for individual employers to decide how to do that. For example, you may want your employees to confirm acceptance by return email or verbally by telephone. That will be for you to decide and keep track of.
- If any of your employees will not agree to the furloughed as above, you will need to continue to pay them as normal until you are able to either lawfully make them redundant or you have dismissed and re-engaged them under a new contract as below.

Employees without a lay-off clause who don't agree to be furloughed

- You will need to decide whether the employees need to be made redundant or whether you want to dismiss them under their current contract and re-hire them on new terms that permit furlough/lay-off. This might depend on your view about how your business might weather this current economic storm.
- The guidance makes it clear that any redundancy or dismissal and re-engagement process will need to follow the usual fair process, including collective consultation where necessary.
- If you find that you have 20 or more staff refusing to agree to be furloughed, you will need to engage in collective consultation. In the absence of a trade union recognised for collective consultation, this involves the election or appointment of an Employee Representative and a minimum period of consultation (30 days or 45 days according to the numbers involved). Dismissal and re-engagement requires full notice of dismissal to be served. This might mean that for some longer-serving staff or others on long notice terms, you can't actually lawfully enforce this until the initial 12-week furlough period has concluded.

Whichever route you take, you can obtain guidance about the process from the Ellis Whittam Employment Law Team. Please consult your dedicated adviser or, if you're not an Ellis Whittam client and would like support, call 0345 226 8393 or email enquiries@elliswhittam.com.