



## Furlough leave – advice note for employers

As an employer, you will now be contemplating or implementing various contingencies to cope with the challenges of the Coronavirus (Covid-19) crisis.

One obvious question will be whether to offer your employees **furlough leave** in order to benefit from the **Coronavirus Job Retention Scheme**.

There are benefits for both employers and their employees in participating and co-operating in its operation, although it will not necessarily be painless.

At present the scheme is a non-statutory one, being based on [guidance issued by the UK Government](#). It does not change existing contractual or statutory employment law nor the employment provisions of the discrimination laws which, therefore, continue to apply as usual.

Although most of the legal consequences of participating in the scheme will lie in the realm of contractual or statutory employment law, there may also be some discrimination law implications for employers. These largely lie in relation to the question of who should be offered furlough leave, a point that is covered in the Government's guidance.

These issues are more likely to arise where you are going to keep some of your business operations running, perhaps with a "skeleton crew", and where you might be considering whether to offer furlough leave only to some employees and not to others, whom you might instead expect to continue working.

When considering this, it would be prudent to give some thought to how to make these decisions in a fair manner to reduce the possibility of facing a discrimination complaint later.

### **A fair process**

As a starting point, selecting employees should be approached in a similar way to how you might approach any other employee selection decision, such as a redundancy selection decision.

As a general rule, you must not base decisions on certain factors, such as making an offer or refusing to make an offer to an employee on the grounds of religious or similar philosophical belief, political opinion, sex, that they are married or in a civil partnership, gender reassignment, sexual orientation, racial group – which are some of the statutory anti-discrimination grounds.

To prove that you have not done that, you should draw up a set of fair and neutral criteria that will be applied to everyone regardless of their personal characteristics.

What criteria might you choose? That is ultimately up to you, but you might consider a mix of things like:

- what are your business needs at this time?
- what mix of skills, qualifications and experience do you need to meet those needs and which of your current employees have those, or best have them?
- can you ensure a fair spread of the remaining work amongst your employees (e.g. where practicable, we recommend that you rotate staff on-and-off furlough leave within the conditions of the scheme), so that everyone, or everyone who wants it, gets an opportunity to maintain their skills and to earn normal wages, for a time at least, and that no one is unfairly over-burdened or placed at undue risk of illness or injury;
- how best to maintain social distancing and to reduce or eliminate health and safety risks.

As with a redundancy selection procedure, you might first ask for volunteers who are willing to (a) take and remain on furlough leave for the entirety of the duration of the furlough scheme, or (b) to be rotated on-and-off furlough leave?

## **Giving priority to members of vulnerable groups**

Certain employees may be within the groups [identified by the Government as being particularly vulnerable](#) to increased risk of contracting severe illness at this time and who should be particularly stringent in following social distancing measures.

The list includes people aged 70 or over, many people with health conditions, some of whom would be deemed to be disabled, and pregnant women. If you have any employees who meet those criteria, then offering them priority over others in taking furlough leave may seem to be a sensible course to take, but it may also raise questions of age, disability and pregnancy discrimination. So, what are the risks?

Firstly, any employee who is not a member of those vulnerable groups and who is aggrieved at not being offered the same priority is very unlikely to succeed if they complain of disability or pregnancy (or sex) discrimination.

Secondly, younger employees aged below 70 who are not otherwise within the list of vulnerable people would potentially be able to complain of age discrimination. However, it is likely that any such complaint would not succeed because any prioritisation given to the over 70s is likely to be justified by the nature of the heightened risk that they are under and by its being a measure that is wholly in line with the Government's public health policies at this time.

Finally, if you have a procedure for rotating employees on-and-off furlough leave **and** if the work can be done from an employee's home, it would be prudent to offer the opportunity to rotate to all employees, including to those who are members of the vulnerable groups.

## **Giving priority to employees who are caring for dependants**

What about employees who are not members of the listed vulnerable groups but who are caring for dependants - children, ill or disabled family members? They might want, and you might consider it sensible, to give them priority over some others in taking furlough leave, i.e. over those employees who are not members of the vulnerable groups and who are not caring for dependants.

Firstly, it would not be prudent to refuse to offer furlough leave to one of these employees **on the ground that they are caring for others**, particularly because basing a refusal **on that specific ground** is likely to be unlawful.

Secondly, do these employees have a legal right obliging you to give them that priority? Possibly. From a discrimination law perspective the question would be similar to those that arise in relation to requests for flexible working arrangements, that is, a refusal might give rise to a claim of indirect sex discrimination, particularly from women employees. As such, any refusal would have to be justified by the business needs that are compelling you to keep the employee working. So, you will need to consider whether it is reasonably necessary for you to keep the particular employee(s) at work (either on your premises, or from their homes) and whether your business needs can be adequately met by adopting alternative arrangements.

Thirdly, what if you do give members of this group priority over others and it causes an employee who has no dependants to be aggrieved at not being given the opportunity to take furlough leave? It is hard to see on what discrimination ground an aggrieved employee could base a claim. One possibility is an indirect sex discrimination claim from a male employee, but that seems unlikely and the policy is quite likely to be justified by the caring needs and social policy aims underlying it.

Finally, if you have a procedure for rotating employees on-and-off furlough leave **and** if the work can be done from an employee's home, it would be prudent to offer the opportunity to rotate to all employees, including to those who are caring for others.

## **Employees who are currently on statutory maternity leave**

Some women employees who are on statutory maternity leave and who have completed the period of compulsory maternity leave might contemplate returning to work earlier than initially planned.

The terms of the furlough scheme do not appear to prevent employees from doing this. However, the existing [rules about ending maternity leave earlier than was initially anticipated](#) have not changed - an employee must still give 8 weeks' notice to her employer of her wish to return early.

For employers, if an employee does end her maternity leave early and is still in time to benefit from the furlough scheme, then it would be prudent to offer the opportunity to her.

For further information or advice on this and any other equality issue, employers may contact the Equality Commission's Advice and Compliance team by emailing [edenquiries@equalityni.org](mailto:edenquiries@equalityni.org) or by phoning 028 90 500 600.

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