FAQs for Employers on Ending Furlough and Requiring Employees to Return to Work

What is the process for unfurloughing staff?

In order to claim their wages under the Coronavirus Job Retention Scheme (CJRS), employees will need to remain on furlough for a minimum period of 3 weeks (21 days). Employees should be available to return to work at any time whilst on furlough. However, employers should give employees on furlough reasonable notice that they are required to return to work, depending on the needs of the business. Preferably this should be done by telephone in the first instance so that employers can be confident employees are aware of the requirement to return to work and so that any issues or difficulties that employees may anticipate in returning to work can be addressed. Notification of the requirement to return to work and that furlough is coming to an end can be confirmed by letter (including by email where employees have email access) (please refer to our template letter on the Law Hub "Notification of End of Furlough"). In the written notification, employees should be advised that they may be placed back on furlough after their return to work should business circumstances require.

A failure to return to work may be classed as unauthorised absence and subject to the employer's disciplinary procedure, depending on the circumstances.

How should employers determine which staff to unfurlough?

The process of selecting which staff to take off furlough is essentially the same as identifying which staff to place on furlough, except in reverse. Provided that the criteria applied for selecting which staff to ask to return to work is not discriminatory, this can be determined in accordance with the employer's business needs.

Should employers draw up a set of criteria for determining which staff to unfurlough?

Unlike in a redundancy scenario where there are a number of employees at risk of redundancy and the employer needs to determine fairly which employees to provisionally select for redundancy by applying fair and objective selection criteria, there is no legal obligation to do so in relation to furlough. This is provided that any decision in terms of how to select for furlough or to take off furlough is made in accordance with trust and confidence, to reduce the risk of constructive dismissal claims and is non-discriminatory. It may be for example, that as more work becomes available, employers require employees with certain skill sets or in certain work roles to return to work from furlough. You may find it useful to consider our template Furlough Policy which sets out some suggested criteria.

What if an employee refuses to return to work from furlough?

Some employees may be reluctant to return to work, particularly where the CJRS remains in place and they would otherwise be entitled to furloughed wages. For those employees, it should be made clear that, depending on the facts, should they fail to return to work their absence would be unauthorised and could amount to a disciplinary matter in accordance with the employer's disciplinary procedure.

Please note, however, that if the employee refuses to return to work because they reasonably believe that the threat to their health and safety in contracting coronavirus in the workplace is serious and imminent and that it cannot reasonably be controlled i.e. by the workplace measures that the employer has put in place, then any dismissal would be automatically unfair and there would be a risk of an unfair dismissal award. Where the employee is refusing to return to work for this reason, their concerns should be investigated in the first instance (whether or not the employee has raised

the complaint as a formal grievance under the employer's grievance procedure) and they should be reminded of the health and safety measures the employer has put in place to protect their and others' health and safety. Where employers have carried out a risk assessment of the workplace to include an assessment of the risks in the workplace due to the coronavirus epidemic and has followed government guidance in doing all they reasonably can to keep their employees safe, this will be the best defence to a complaint of this nature and employees should be required to return to work where business circumstances require.

In some situations an employee should not be forced to return to work from furlough and the employer should consider extending their period of furlough where the CJRS remains in place. This would be the case for those categories of employees who are unable to work due to the coronavirus, such as employees who have received a letter from their GP or the NHS requiring them to shield, or employees with caring responsibilities who are unable to return to work for this reason e.g. where schools remain closed and who are not essential workers. Where employers do not continue to furlough those unable to work due to caring responsibilities, whilst they would be entitled to a "reasonable" amount of time off, that time off would be unpaid. More obviously, employees who have symptoms of coronavirus or who are sharing a household with employees with symptoms of coronavirus should not return to work until the period of self-isolation has ended, unless their work can be done from home and they are otherwise well enough to work. Where they are not fit for work (including where they are self-isolating in accordance with public health advice), they would be entitled to Statutory Sick Pay, subject to meeting the other eligibility requirements for SSP, where they are not already receiving furloughed wages. Employers can ask for reasonable evidence that the employee fits within one of those categories.

What about employees who are vulnerable in being at greater risk of serious illness should they contract coronavirus but who are not "extremely clinically vulnerable" and therefore not required to shield? Can employers require them to return to work?

They can be asked to return to work on the basis that they are not required to shield in accordance with public health advice. However, where they have a disability under the Equality Act 2010, the employer will have certain legal duties towards them, including the duty to put in place any reasonable adjustments required. Employers may also be required to conduct risk assessments to assess any particular risks to their health in returning to the workplace due to their vulnerability. Employers may require occupational health or GP advice in relation to the employee to assist in assessing the risks and identifying the measures required.

Pregnant women can, subject to the findings of their risk assessment, continue to travel to workplaces and continue to work. Where the risk assessment concludes that it would not be safe for her to do so and there is no suitable alternative work available for her, the employee will need to be suspended on full pay, possibly for the duration of her pregnancy.