

**Application of Furlough and  
Treatment of other contingent workers  
for use by Local Authorities / other public sector bodies**

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## 1. Introduction

- 1.1. Any options adopted from this paper should be discussed and where possible agreed with Trades Unions as a temporary measure during exigent circumstances, and do not form a precedent for the future.
- 1.2. In an emergency such as the one currently being experienced from the Covid-19 pandemic there may be a necessity to change the way we manage staff on different types of contracts, and this guide is intended to outline the possible options, circumstances in which you might choose these options and considerations you will need to make in certain circumstances.
- 1.3. It is recognised that during such a situation, functions which are not identified as a core critical functions may have reduced service or stop service delivery altogether. Core critical functions should continue wherever possible, but it is recognised that they may be impacted by staff shortages. To ensure critical services remain operational, councils may need to treat staff in key critical functions differently from staff in non-critical functions, and this guidance sets out these situations accordingly.

## 2 Use of Furlough

The government support to allow employers to “furlough” staff currently is not applicable in the Local Government environment except in very specific circumstances. The LGA guidance states

*“Where employers receive public grant funding for staff costs, and that funding is continuing, we expect employers to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them. This also applies to non-public sector employers who receive public grant funding for staff costs.*

*Where staff are not able to carry out their usual work, all employers in the public sector should make every effort to redeploy employees to assist with the Government’s response. This could include redeployment within the current organisation, or to other areas of the public sector.*

*In exceptional cases where Local Authorities need to close venues and furlough staff, it may be appropriate for them to claim funding through the Coronavirus Job Retention Scheme.”*

The option to furlough staff (i.e. put them on a reduced wage for a period of time which allows the employee to still be paid for 80% of their salary (up to a cap of £2,500) and for this to be reclaimed by the employer) is intended as a mechanism to avoid redundancy or job loss – so specifically where businesses have closed and do not have income to pay staff, the furlough scheme is designed to keep people “employed” rather than redundant and thereby limits the impact on individuals. This will not be the case for most local government employees who have salaries backed by the government and are, one expects, able to return to work once the current situation ends and unlikely to be otherwise redundant. Furlough therefore is not a mechanism to manage employees who are at home without work.

Exceptions to this may be situations where there is a traded service, and the employees are likely to be redundant if the service is not trading. This may apply more to third party contracted services in the local government environment.

When making a decision whether or not to put staff on furlough the following considerations should be made:

- Does the organisation employing these staff receive public money for staff costs and is that money is continuing? If so, they should continue as normal and not furlough.



- Is furloughing demonstrably the best option for employer and employee i.e. is the alternative lay off or redundancy? If so, then it may be appropriate to consider the job retention scheme.
- Is there any duplication of public money? Furloughing should not be used to secure funds from HMRC that are forthcoming from other public sources e.g. grant funding which will continue)
- Are the staff potentially in scope definitely not able to be redeployed and will their services remain unrequired? Furloughed staff cannot provide any services for or on behalf of the employer and are often contractually prohibited from working for another local authority employer (although authorities may want to exercise their discretion to allow a furloughed employee to work elsewhere while furloughed, especially if that work would be in an essential service).
- The minimum period of furloughing is 3 weeks although employees can be furloughed multiple times if they return to work, but each furloughed period must be for at least 3 weeks

The mechanics of the Job Retention scheme are still to be fully publicised but the key points to consider are:

- Whether the employee eligible to be furloughed: They must have been on the payroll at 19<sup>th</sup> March 2020 (amended from 28<sup>th</sup> February 2020 by The Chancellor on 17<sup>th</sup> April 2020), but can be off sick, on maternity or paternity leave or self-isolating.
- You do however need the employees' individual consent to furlough them, as technically the alternative is to make them redundant and this could potentially build in significant up-front costs.
- The 80% of salary is capped at £2,500 per month. The employer can (and should) make up the 20% of salary not paid, but employees paid over £36,000 per year will lose financially.
- Only the mandatory 3% of pension contributions and National Insurance payments are recoverable, but additional pension contributions will need to continue to be paid by the employer.
- The scheme opens for claims from 1<sup>st</sup> March and is currently only available for 3 months from that date, although this may be extended by the government if it considers it necessary and the restrictions on trade continue.
- Furloughed staff continue to be paid on your payroll, and you will need to make a claim for 80% of their salary and included costs from HMRC once the scheme opens formally at the end of April. You will need to be mindful therefore that ultimately it will be an HMRC decision about whether the claim is accepted, and you will need to be able to demonstrate, as a public sector body, the claim meets the criteria set out above.

### 3 Types of worker

Different contract types and different types of worker may have different rights and contractual arrangements in this situation. The guidance below captures our understanding of the situation as it currently stands, but in some instances, you may need to seek additional advice from your



procurement teams where contractual provisions for supply are in place.

### 3.1 Casual and zero hours workers

Where casual or zero hours workers have an expectation of work (so have been on some kind of roster) the expectation is that those people will continue to be paid, with an average of the last 12 months payments if the hours are irregular over the roster.

You may be able to redeploy casual or zero hours staff and this should be explored first as an alternative to having them at home on pay but without work. The Government Guidance indicates that Furlough MAY apply to casual or zero hours staff – but see the section on the operation of furlough as only certain types of work where there is a trading element may be eligible and this will not automatically apply to all casual workers.

### 3.2 Agency Workers

The Cabinet Office issued a guidance note on the payment of suppliers of contingent workers which you can read [here](#). This guidance is targeted at central government, but other public sector bodies are REQUESTED to use this approach, although it is not binding on them.

Where a worker is employed through an agency and is on the payroll of the agency in the main the liability for payment (or the use of furlough) remains the responsibility of the agency. Councils often pay higher daily rates for agency workers to offset against the fact that they don't carry any liability for holiday or sick pay, and in the current situation this technically remains the case. The Government guidance requests that public sector bodies pay 80% of the salary of the contingent worker up to the cap of £2,500 per month (so the same as in furlough) whilst the worker is unable to work as a direct result of Covid 19 – so for example sickness, self-isolation closure of premises or childcare issues and where they are unable to work from home.

You will need to review this with your agency provision leads and legal / procurement teams to understand what individual position your council is going to take, and be consistent with all workers in these situations.

If you have a temporary worker (for example an administrative worker) who you no longer require (as you cannot provide work for them) you would be in a position to terminate the contract and the person would have to claim income support. This is a different situation than one where the work would be ongoing through any shut down period.

The furlough scheme is designed to compensate workers for loss of earnings as a direct result of Corona Virus, therefore if a temporary contract was due to come to an end anyway that contract should end as planned and there is no “redundancy” situation arising requiring consideration of furlough. The worker should not be better off than if the Corona virus situation had not arisen.

### 3.3 Workers on IR35 arrangements

Whilst there is a shortage of information on workers on IR35 there are some principles which need to be considered to make any decision fair;

- Where the worker is on your payroll, whether they are a sole trader or operating a personal services company and you are no longer able to provide them with work, you will need to refer back to the terms on which you offered them work at the start of the contract to determine any clauses for cessation.



- You may decide that you wish to retain the skills and expertise of the person, so continue to pay them (at the 80% capped rate if applicable) during the period to ensure they return to you when the work resumes, particularly if there is a risk they will find a contract elsewhere and then be unavailable to you once you recommence.
- As with agency workers however if the contract was due to end anyway during the period and the work is completed there is no requirement to make any other arrangements.
- Whilst IR35 workers may be eligible for furlough in principle (being paid through your payroll) again it is unlikely that most workers of this type will be undertaking work which is funded by external income, and so as a public sector organisation it is unlikely you would be able to reclaim this cost once the scheme opens. IR35 workers can be offered redeployment if that is appropriate, and you may take a view that if they unreasonably refuse work you may decide not to continue with a payment. The Government guidance requests that you continue to pay workers whilst you have funds in place, but you are not required to do so.

## 4 Treatment of resignations or hires

### 4.1 Resignation prior to self isolation measures

If you have an employee who has resigned prior to isolation and the notice period is due to expire during that time, you are not required to automatically allow the employee to withdraw their resignation. You may of course do so if you wish, however in allowing a resignation to be withdrawn this then means that at the end of the self-isolation period when normal measures are back in place, the employee will need to return to their previous role.

Furlough will not apply to public sector employees in this situation in the same way as it might do in the private sector.

An employee resigning will need to claim benefit if they leave and are unable to take up another post due to their new employers' restrictions.

### 4.2 Offer of work and start date

Where you have made a contractual (i.e. not conditional) offer of employment you will need to discuss with your new hire what the choices are for starting them at the original proposed date or what alternatives there may be. There are options to onboard virtually, but it will depend on the role and the individual circumstances. Further guidance on this is available here [Digital onboarding](#)

If you are unable to start them you will need to mutually agree a new start date and issue a new contract. If the individual is unwilling to negotiate and agree this with you, you will need to hold to the original start date but also give them contractual notice of termination and issue a new contract with a future start date – which they may or may not accept.



## West Midlands Employers

### Outline of options available for different workers and financial measures for use by Local Authorities / other public sector bodies

Below is a presentation of the workers and financial measures a Local Authority should consider. In all cases where a worker is unable to work due to business closure and cannot work at home, it is important to consider redeployment in the **first** instance.

The below table is an outline of what is a typical position of these categories of workers however decisions will need to be taken based on individual circumstances. What is typically happening in LA has been surveyed and a report on the findings will be captured in due course.

	Continue Full pay	Redundancy	Furlough: publicly funded post	Furlough: not publicly funded and funding has ceased	Average pay over e.g. 12/52 weeks	Terminate Arrangement at end of Assignment	Cabinet Office Guidance on contingent workers: 80%/£2500 cap
Permanent Employee	✓	✗	✗	✓	✗	✗	✗
Casual Worker	✗	✗	✗	✓	✓	✗	✗
Agency	✓ ****	✗	✓ *	✓	✗	✓	✓ **
One off casual assignment	✗	✗	✗	✗	✗	✓ ***	✗
IR35	✓ ****	✗	✓	✓	✗	✓	✓

\*Through the agency

\*\*Through the Local Authority

\*\*\* It may be possible to terminate before the assignment if proper notice given

\*\*\*\* If the worker cannot work, consider Cabinet Office Guidance on contingent workers

Permanent Employee	Casual Worker	Agency Worker	One-off casual assignment	IR35 Workers
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<ul style="list-style-type: none"> <li>• Continue full pay whether the employee is working, or not able to due to COVID-19</li> <li>• Consider Furlough – if in a privately funded post and funding has gone</li> </ul>	<ul style="list-style-type: none"> <li>• Contractually not guaranteed work</li> <li>• Usually there is a regular pattern of work</li> <li>• Government expectation: continue to pay based on estimated average pay while funding remains in place</li> <li>• Consider Furlough if in privately funding post where funding has gone</li> </ul>	<ul style="list-style-type: none"> <li>• Continue to pay in full for duration of the assignment where public funds remain in place and the agency worker is continuing to work</li> <li>• Where agency worker is unable to work due to COVID-19 consider following the Cabinet Office guidance which recommends paying up to 80%/£2500 of their pay. Consider top up to 100% if agency worker entitled to such pay under the Agency Worker Regulations</li> <li>• If funding no longer remains in place</li> <li>• explore agency placing them on furlough as they are employed by the agency</li> </ul>	<ul style="list-style-type: none"> <li>• If a one-off arrangement has been made in the future and there has not been a regular pattern of engagement this may be able to be terminated with the right amount of notice</li> <li>• However, if funding for the arrangement remains in place consider honouring the arrangement and paying even if the worker is unable to work due to COVID-19</li> </ul>	<ul style="list-style-type: none"> <li>• This mirrors agency workers</li> <li>• If they can work continue to pay for duration of assignment</li> <li>• If not consider following Cabinet Office advice to pay up to 80%/£2500 cap while funding remains in place</li> <li>• The LA can consider placing the worker on Furlough, if funding no longer remains on place</li> <li>• Depending on the details of the contract – cessation clause may be used to terminate the contract</li> </ul>
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