



Can I 'furlough' an employee on maternity leave and top up the rest of their maternity pay? In other words, could 80% or up to £2,500 per month of maternity leave pay now be paid by the government?

**SIDLEY**

*In light of the rapidly developing situation and government response, this memorandum is current as at 16 April 2020.*

Current government guidance is unclear on this point, but it appears that this depends on whether the employee is receiving statutory maternity pay (“**SMP**”) or enhanced (earnings-related) contractual maternity pay. Subject to further clarification from the government, the likely position is as follows:

If an employee is receiving enhanced (earnings-related) contractual maternity pay and they are furloughed, the guidance states that the employer can claim for 80% of the enhanced element of the pay under the Coronavirus Job Retention Scheme (“**CJRS**”), subject to the £2,500 per month cap. The employer may top-up the remainder of the enhanced element voluntarily, but it cannot claim for this under the CJRS.

Employees receiving SMP will continue to receive SMP in the usual way, regardless of whether or not they are furloughed.

If an employee is receiving SMP, and they are not entitled to any enhanced maternity pay above the statutory level, they will receive SMP only, over the usual periods. They will not be entitled to any additional payment under the CJRS as they would not be receiving any additional money if they were not furloughed.

If an employee is furloughed while on maternity leave, this does not bring their maternity leave (or their associated rights) to an end. Furlough leave is simply a status that enables the employer to claim for any enhanced contractual element of maternity pay under the CJRS.

The above also applies in relation to adoption, paternity or shared parental pay.

### **What is the effect on SMP if an employee starts maternity leave while they are furloughed?**

Government guidance for employees states that, if an employee’s earnings have been reduced due to being furloughed prior to starting maternity leave, this may affect their SMP.

This is likely to be because, during the first six weeks of maternity leave, SMP is payable at a higher rate of 90% of the employee’s normal weekly earnings. This is calculated using the employee’s earnings during the eight weeks prior to the 14th week before the expected week of childbirth. Therefore, if an employee is furloughed on reduced pay during this period, their SMP will also be reduced.