

On Friday 20 March, the Chancellor Rishi Sunak announced the setting up of a new Coronavirus Job Retention Scheme. The aim of the scheme is to enable UK employers to access a grant to continue paying part of the salary of employees who would otherwise have been laid off or made redundant as a result of the coronavirus crisis.

The Chancellor's initial statement was radical but distinctly lacking in detail, and over the past week employers and employees alike (not to mention employment lawyers!) have been feeling their way in the dark, trying to work out how the scheme might apply to them. On Thursday 26 March, the government finally published detailed guidance for employers on how the scheme will operate.

We have divided the guidance into the frequently asked questions we have been most asked over the last week:

1. What is the basic premise of the Coronavirus Job Retention Scheme (JRS)?

- Under the JRS, employers will be able to ask employee(s) to stop working, while keeping them on their pay roll. These individuals are described by the scheme as "furloughed workers".
- The government will pay employers cash grants of 80% of the wages of furloughed workers, up to a cap of £2,500, for as long as they keep the employee employed during the furlough period. In addition, employers will also be able to claim back the employers nic and any auto enrolment pension contribution that they incur on the 80% payment to employees.
- The minimum furlough period is 3 weeks. That is, employers must furlough employees for a minimum of three consecutive weeks in order to qualify for the JRS grant.
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- It is anticipated that the scheme will be up and running by the end of April.

2. Which employers are eligible to access the scheme?

- All UK employers which operate PAYE can access the scheme. Employers will need to have created and started a PAYE payroll scheme on 28 February 2020.
- The scheme will apply irrespective of the size or sector of the organisation, and so will include businesses, charities, recruitment agencies (which pay agency workers through PAYE) and public authorities. There is an expectation that most public sector organisations will not use the scheme, since most public sector employees are continuing to provide essential services during the coronavirus outbreak.
- There is no requirement for the business to be considered "essential" in order to access the scheme. Nor it is necessary for employers to show that they are suffering any sort of financial hardship.

3. Who can be furloughed?

- The issue of employment status was confusing in the government's original guidance, with references to employees and workers being used interchangeably.
- The government has now confirmed that the JRS will support any individuals who are engaged through the PAYE system, regardless of their employment contract. This means workers who are paid through PAYE will be covered, including those on zero-hour contracts or other flexible contracts. For ease, this note uses the term employee to refer to all those who are paid via PAYE.
- Only employees employed on or before 28 February 2020 will be covered by the scheme. Those taken on after 28 February are excluded (ie cannot be furloughed or have a claim made in respect of their wages).
- The JRS will also cover employees who were made redundant since 28 February 2020, if they are rehired by their employer. It is therefore possible for employers to re-employ staff made redundant after 28 February and place them on furlough in order to benefit from the JRS.

4. What wages are covered by JRS?

- The government will pay employers accessing the JRS cash grants of 80% of furloughed employees usual monthly wage costs, up to a cap of £2,500. In other words, the payment will be the lower of 80% of salary or £2,500 per month. The use of the word "grant" rather than "loan", means that the money will not need to be repaid.
- In addition, the grant will cover the associated Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions payable on the subsidised wages paid to furloughed employees. Further guidance will be issued on how to calculate this. Please see our illustration at the end of this notice as to how we believe the calculation will work.
- Fees, commission and bonuses should not be included in the calculation of wages.
- An employer can choose to top up an employee's salary, above the 80% / £2,500 cap, but it is not obliged to do so under the JRS.

5. How should 80% of wages be calculated?

- For employees who receive a regular salary, the 80% should be calculated based on an employee's actual salary before tax (ie their gross salary), as of 28 February.
- For employees whose pay varies, eg. zero-hour or flexible contracts, the 80% limit will be applied to the higher of:
 - the same month's earnings from the previous year; or
 - the average monthly earnings from the 2019-20 tax year; or
 - if they have been employed less than a year, an average of their monthly earnings since they started work (or pro-rata earnings if they only started work in February).

6. How long will the scheme operate for?

- The JRS is a temporary scheme which will run for at least three months from 1 March 2020 until the end of May. Although not mentioned in this guidance, in his announcement on 20 March, the Chancellor said he will extend the scheme for longer if necessary.
- Employers can access the scheme any time during this period.

7. Will the payment made to employees be taxable?

- Yes, individuals will pay income tax and National Insurance Contributions as usual on any payments received as part of the JRS (via PAYE deductions made by their employer). Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have opted out.
- Employers will also need to pay Employer National Insurance Contributions, but as mentioned above, will be able to apply for a grant to cover this.

8. What about employees on reduced hours?

- To be eligible, employees on furlough will not be able to undertake any work for or on behalf of the employer organisation.
- Employees who are still working, but on reduced hours or for reduced pay, will not be eligible to be covered by this scheme. This is because the JRS is aimed at supporting people who would otherwise be dismissed or otherwise left without pay.

9. Process for furloughing employees

- There has been some debate about whether employers can impose the decision to furlough on their staff or whether it must be done with consent. The government has now confirmed that any decision must be discussed with staff and any changes made “by agreement”.
- The guidance also states that “if sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment”. Consultation is likely to be needed if dealing with more than 20 employees. Please check with an employment law specialist if considering this number of employees.
- In deciding who to furlough, the government stresses that “equality and discrimination laws will apply in the usual way”. In other words, not surprisingly, decisions about who or who not to furlough should not be based on a protected characteristic. Otherwise, nothing is said about how employers should go about selecting who to furlough (assuming only part of the workforce needs to be furloughed), suggesting the discretion remains with the employer. Nevertheless, it is still likely to be sensible to try to establish a fair selection process and criteria, which in these times, may include consideration of those who fall within vulnerable groups or have additional caring responsibilities as a result of the coronavirus outbreak.

- In order to be eligible for the subsidy, the guidance states that employers should write to their employee(s) confirming that they have been furloughed and should keep a record of this letter. The potential implication is that without written evidence of such communication, there is a risk that employers may not be able to claim under the JRS. We can assist with the drafting of appropriate furlough letters where needed.

10. Is there a minimum period an employee can be furloughed for?

- The government has stated that the minimum length an employee can be furloughed for is three weeks. To ensure employers comply with that, they will only be able to submit one claim every three weeks.
- This means employers will not be able to rotate employees on furlough with those working over short periods, e.g. over a week or a few days. This potentially creates logistical issues for employers who need to keep a small number of staff working, for example, about how they might cover those staff should any of them become sick or need to self-isolate. You can reinstate an employee after the minimum three-week furlough period and then subsequently furlough them again later (for another minimum period of 3 weeks)

11. Does the JRS place restrictions on subsequent dismissals?

- Although we had wondered if the government might make it a requirement of the scheme that employees are retained for a period after the furlough scheme ends, the government has not imposed any such conditions.
- Instead, the guidance states that, at the end of the scheme, employers will need to decide whether employees will be able to return to their duties, or whether it will be necessary to consider redundancies. These will be subject to the usual rules on carrying out a fair dismissal.

12. How does the JRS apply to people on sick leave?

- A question we have been asked a lot is whether an employee who is absent due to sickness can be furloughed. We now know that the answer to this question is no.
- So anyone who is off sick, or who is self-isolating in accordance with government guidance, should be paid statutory sick pay, or enhanced sick pay if provided for by their contractual terms. (As a reminder, government guidance is that anyone who lives in the same household as someone with symptoms of coronavirus must remain at home for 14 days.) This means that it is not possible to use the JRS to “top up” statutory sick pay, or to claim support when paying enhanced sick pay.
- Significantly, however, once someone is no longer off sick or no longer required to self-isolate, they can be furloughed at that stage.

- The government has also confirmed that people who are “shielding” can be placed on furlough. This refers to people who have been identified as clinically extremely vulnerable and so at very high risk of severe illness from coronavirus. All people in this category have been contacted by the NHS and advised to stay at home at all times and avoid face-to-face contact for at least 12 weeks. It is helpful to receive clarity that these individuals may be furloughed, since it could be a breach of an employer’s duty to take care of its employees to insist that they continue to attend work (in the event that working from home is not possible).
- What is still not clear is what would happen to someone who is sick while on furlough. However, our view is that since they would be within the JRS by that stage, they would continue to be furloughed and so continue to be entitled to 80% of their wages (capped), rather than drop to SSP.

13. How does the JRS apply to people on unpaid leave?

- Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February.
- The implication therefore is that those placed on unpaid leave after 28 February, could be treated in a similar way to those made redundant after that date, ie brought back onto full pay and subsequently placed on furlough.

14. Can people on maternity leave (or similar) be furloughed?

- The JRS does not affect employees’ entitlement to statutory maternity pay. However, employers who offer enhanced contractual maternity pay can furlough employees on maternity leave to receive support with the cost of that enhanced payment. The same applies for people on other types of similar leave (e.g. shared parental leave).
- Care will need to be taken when deciding whether to furlough an employee who is on maternity leave, to ensure that they are not furloughed because they are on maternity leave. As the guidance explains, equality and discrimination laws will apply to the JRS, and to furlough someone because of a protected characteristic, such as maternity, could potentially amount to direct discrimination, for which there is no defence. Instead, as mentioned, employers are advised to adopt fair selection criteria if they are only furloughing some employees. We are happy to provide advice on your particular circumstances if needed.

15. What happens if employees have more than one job?

- We have received a lot of enquiries about whether employees with two or more jobs can be eligible for the JRS.
- The government has confirmed that this is possible and that each job should be treated separately. So, if an employee has more than one employer, they can be furloughed for each job, and the cap will apply to each individually. Although not specified in the guidance, this also implies that employees can be furloughed in one job, while continuing to work in another job.
- Furloughed employees can also take part in volunteer work or training, as long as they don’t provide services to or generate revenue for their employer.

16. What about the National Minimum Wage (NMW)?

- There has been a lot of debate this week about what might happen if furloughing employees brings their pay under the NMW. The government has simplified matters by stating that furloughed employees can be paid the lower of 80% of salary or £2,500, even if it brings them below the NMW.

17. Can Directors be furloughed?

- We have not seen anything that clarifies this particular point, other than confirmation that only earnings that have been paid through the PAYE system will qualify – in other words if you have received dividends rather than salary then these will not count.
- Being a Director or Manager of a company does not disqualify you from the JRS.
- In addition, Directors or Managers will be able to continue undertaking their statutory duties while furloughed, such as filling out company accounts etc. (as announced by HM Treasury, but written confirmation still awaited at 30/3/2020)

18. Can I take holiday in a furlough period?

- Any paid activity such as holiday would void a furlough period. However, employees right to holiday pay (including for untaken Bank Holidays) continue to accrue during the period of furlough.
- The Government have also announced that employees may carry forward any untaken holiday for a period of 2 years. This is to ease the burden of businesses being faced with multiple requests for holiday at the point work can resume.

Although the government's latest guidance on the Job Retention Scheme has undoubtedly provided helpful clarity on a number of questions that have been circulating since the initial announcement, it certainly doesn't answer everything or help with the practicalities of getting the scheme agreed with employees. If you would like assistance with how this might work in your particular organisation, please contact your usual contact at the Firm.

This publication is a general summary of the law. It should not replace legal advice tailored to your specific circumstances.

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