

COVID-19 Update: Job Retention Scheme – what we know so far – updated

The Chancellor announced on Friday 20 March 2020 the Government cover up to 80% of employee costs under the Job Retention Scheme if a business has no work for its employees. However, the mechanics of how the scheme will work has not yet been announced by the HMRC, neither has the online application portal been built. We have provided this information document for guidance purposes only based upon '*what we know to date*', and details may change once announced. Members are advised to be cautious not to furlough employees prematurely. We will update our members as quickly as we are able when the HMRC release confirmed details of the scheme.

What is the Coronavirus Job Retention Scheme?

Under the Coronavirus Job Retention Scheme, all UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis. At present the scheme is open to all UK businesses

This is an entirely new scheme, which will be administered and operated by HMRC who are working urgently to set up a portal system to reimburse these monies, as the current systems are not set up to facilitate payments to employers. At the press conference the Chancellor indicated that he hoped the first grants would be paid before the end of April 2020. He also stated that claims could be made for wages lost since 1 March 2020.

Once the portal is open, the earlier you are able to apply to the scheme, the earlier your application will be assessed. We are therefore urging all our members to regularly check HMRC & government guidance. The BPIF will also publicise the portal and provide additional details on it as soon as we can. However, like any new system, there will be teething problems and it's likely that there will be a very high number of applications.

Questions and Answers

1. What does the term "Furlough" mean?

This is a completely new concept to employment law in England and Wales. In the United States, a furlough (from Dutch: verlof, "leave of absence") is a temporary leave of employees due to special needs of a company or employer, which may be due to economic conditions at the specific employer or in the economy as a whole. This term has been adopted by the Chancellor in his recent announcement in relation to the Scheme.

2. Does the Scheme cover wages for 'workers' as well as 'employees'?

Government guidance is not clear, but it appears that what is necessary is that the staff are already paid through the employer's payroll. This would appear to include directly-engaged workers in relation to whom the employer currently deducts income tax and national insurance. It is unlikely to cover any workers who are working under self-employed tax status, where the worker makes a self-assessment to HMRC each year. Agency workers are unlikely to be covered but fixed term & casual workers are likely to be covered.

3. What about staff who have already been dismissed prior to the Scheme becoming active?

Whilst the Scheme is expressed to be backdated to 1 March 2020, it is our view that it only applies to those staff who were employed/engaged at the time of the Chancellor's announcement on 20 March 2020, and who have not been dismissed since. Further guidance may/will be forthcoming on this issue.

4. Does the process have to be initiated by the employer?

Yes, and claims will only be accepted where the employer can prove there is no work for employees designated as furloughed. For those employees who are able to work and where there is work available for them to do, then they will simply be paid as normal.

5. Is it a condition of the scheme that the employee does no work at all during the furlough period? If so, what would be the consequences if this is not observed?

Whilst it is not completely clear, the obvious intention of the Scheme is to allow employers to pay staff who are without work. To this extent, we see performing work and being furloughed as mutually exclusive, one or the other. HMRC will of course have visibility of pay records, and therefore we would anticipate that if a member of staff earns wages during a furlough period, it will result in the employer not being reimbursed for any "furloughed" wages paid. The Government guidance to employees states "*To qualify for this scheme, you should not undertake work for them while you are furloughed.*"

6. Can employers bring staff into the Scheme who are already on sick leave or receiving SSP/CSP due to self-isolation?

Only when employees present as fit for work can they be considered for the scheme. If an employee is self-isolating with Covid-19 symptoms, has a fit or self-isolation note they cannot be considered for the scheme. The scheme will then only apply if employers have no work to give employees recovered from sickness or self-isolation. To avoid abuse of the system it is likely that the HMRC will ask for payroll evidence of any sickness. It might be tempting for some employees to try persuade employers that they are fit and well to benefit from the scheme because receiving 80% pay is more lucrative than receiving SSP. This situation will need to be carefully managed, therefore we would advise that before offering the scheme to employees currently presenting as sick you wait for further updates as to the mechanics of the scheme from the HMRC and/or updated guidance from us.

7. If employees have already been temporarily laid off, can the employer access the Scheme?

Our view is that it can, but this is not certain until the scheme details are announced. However, it would seem illogical to prevent employers accessing the Scheme for those staff already temporarily laid off.

8. What if those furloughed employees become unwell?

If one of your furloughed employees becomes unwell, then we assume that the normal rules in relation to incapacity for work will apply. It is much easier now to get an isolation note from NHS 111, which confirms that you are required to self-isolate. If an employee provides you with that isolation note, then they should move onto SSP, which is payable from day 1. Having said that, if an employee is receiving 80% of their salary and does not require to attend work, then it is unlikely that they will advise you of the requirement to self-isolate.

9. Can employees on maternity or parental leave be brought into scheme by being “furloughed”?

We think not until the leave period has ended. If, once the leave period has ended, the staff member is designated as furloughed, there is no reason to believe that the Scheme will not apply.

10. How do I select which employees to furlough?

If there is work available for some of the work force and not others, only the employees to whom you cannot provide work can be furloughed. Where you have employees doing similar jobs but do not have the work capacity for everybody, it is important you are able to demonstrate a fair selection process to avoid as much as possible staff resentment and/or claims of discrimination. Reasonable selection processes could be; skill set, method of transport to work, underlying illness risks, child care requirements (*although with the latter two examples if you are presented with allegations of sex or disability discrimination you should seek legal advice before making your decision*)

11. Does the “furlough period” need to be continuous? Is there flexibility for workers to move in and out of the scheme?

There has been no detail published on this. Once an application has been to the Scheme it may be an administration burden to make amendments, but it would be nonsensical to penalise employers who are able to find work for the staff to do.

If there are occasional or temporary projects or work assignments, then it seems unlikely that HMRC will still pay any contribution to their salary payments during that period of work, but we will clarify that point once more information becomes available.

12. What of staff who are not currently laid off, but have chosen to take paid holidays, unpaid holidays or unpaid sabbaticals?

Our view is that once the employer has designated the staff as furloughed, the Scheme will apply, backdated to 1 March 2020. If the employer is not paying the 20% of salary, staff who are on paid annual leave and receiving full pay may prefer to retain their “holiday” status. This could be the subject of agreement between staff and the employer. Practically, we think it unlikely that a worker would take holiday simply in order to earn the additional 20%, but may do if they earn substantially more than £37,500.

The Scheme, however, is unlikely to apply where employees have agreed to take unpaid holiday/sabbaticals for personal reasons unrelated to the coronavirus outbreak where there remains work for them to do.

If employees have annual leave pre-booked before the outbreak of the Covid-19, you have the right to seek their agreement to reasonably cancel this holiday for business need or to cover down turn in work with sufficient notice of the cancellation.

13. Does the scheme apply to employees taking unpaid leave due to childcare?

The scheme only applies if you are unable to provide the employee with any work.

14. Does the scheme apply to zero hours?

We are not clear currently whether or not the furlough scheme will apply to zero hours workers, or how their pay would be calculated if it does. We suspect that it will apply to such workers where they are paid via PAYE. If so, it may be that their pay would be calculated over a reference period prior to the start of the furlough period (which 'retrospectively' began on 1 March 2020).

15. What happens if applying the 80% take employees below the national minimum wage?

We do not know the answer to this until the mechanics of the scheme are released by the HMRC. It is anticipated they will be aware of this issue with the Government being keen to protect the most vulnerable.

16. Are my employees allowed to volunteer or undertake other work whilst they have been furloughed?

If the existing contract allows employees to undertake other work whilst employed by you, then provided those employees follow Government guidance on social distancing and self-isolation, as well as adhering to any updated or subsequent guidance on a full lock-down, then it would be possible for them to undertake other voluntary or paid work. The HMRC will no doubt request visibility of all pay records as part of the application process to negate double recovery by any employee.

We therefore anticipate that if an employee earns wages during a furloughed period from another source, it will result in their substantive employer not being reimbursed for any furloughed wages paid. So strictly speaking if the employment contract allows your employees to undertake other work (not many do) you should be cautious in applying this contractual right. Although securing alternative paid work is likely to be difficult in the current climate in any event. At present, there will be a considerable requirement for volunteers across the entire country and it would be good for all employers to let their staff make their positive contribution for this crisis.

17. Is the employer obligated to make up the 20% of wages lost by staff who are paid under the Scheme?

This is not completely clear, our initial view is that employers will not have to pay the 20%. The statement made by the Chancellor also says, *"Government grants will cover 80% of the salary of retained workers up to a total of £2,500 a month – that's above the median income. Employers can top up salaries further if they choose to"*, which suggests that this is an option and not a requirement.

However technically if the employee is available to work, then they are entitled to be paid, so that 20% reduction in salary may be regarded as an unauthorised deduction from wages, depending upon what is in the contract of employment. We can only advise that you consult and negotiate with your employees either collectively or individually. You should record all conversations in writing.

18. What is the effective salary cap, below which the Scheme applies and above which it does not? What about tax?

Government grants will cover 80% of the salary of retained workers up to a total of £2,500 a month. If 80% of salary is £2,500 per month, the full salary would be £3,125 per month. This amounts to a salary of £37,500 per annum, *"above the median income"*.

Accordingly, we believe the position will be that member of staff who is paid in excess of £37,500 per annum, the difference will not be covered by the Scheme.

The tax position has not been made clear and urgent clarification would be helpful. Our initial view is that employers will be required to deduct income tax and employee's NICs from the wages paid to furloughed workers. More significantly, it looks as though employers will also need to pay the employer's NICs (13.8%) and (where applicable) any apprenticeship levy (0.5%) on those wages and that these employment costs will be factored in to what can be claimed from HMRC by way of reimbursement.

This suggests that employers can only claim 80% of a furloughed worker's wages each month to the extent that if the aggregate cost of paying those wages and paying the employer's NICs. If that is right, it follows that employers who want the Scheme to cover all of their employment costs would have to agree to pay the furloughed worker an amount equal to £2,500 per month less the amount they will have to pay in employer's NICs.

19. Which wages are covered by the Scheme?

The detail around this is not yet clear. Our view is that the Scheme is likely to apply to a staff member's normal take home pay, and of course HMRC will have the payroll records to substantiate this. Since this is not clear, there remains a risk for any employer which pays staff on the basis of normal pay: the employer might only be able to access the Scheme and be reimbursed to a maximum of 80% of basic wages.

20. Can the employer choose to claim less than 80%? If so, is there scope to increase the claim later?

We think that the employer must be able to do this, but there would not be any obvious reason to do so, because the Scheme is of indefinite duration. Employers are unlikely to get "credit" later on for sums which could have been claimed under the Scheme but which were not.

21. If there is a delay in payment by the HMRC, can you pass the delay onto your employees?

This seems unlikely to be encouraged and without provision by the Government may amount to a breach of contract and/or unlawful deduction of wages. HMRC has set up a dedicated helpline for individuals in financial distress on 0800 0159 559

22. Will statutory guarantee pay apply for furloughed workers?

No, the scheme is different to statutory guaranteed pay during a period of law off or short term working. Guarantee pay would not be due in addition to the 80% (plus any top up by the employer) paid by the Government.

23. What is the process for the employer accessing funds under the Scheme?

GOV.UK says employers will need to "submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal (HMRC will set out further details on the information required)".

We anticipate the process will look something like this but until the scheme mechanics are announced we do not know.

1. **Identify Affected Employees** – establish those employees who have no work to undertake as a direct consequence of coronavirus;
2. **Change the Status Of Employees** – you will need to change the designation of those affected employees to 'furloughed workers'. This can only happen with the agreement of your employees and will result in a change to existing terms and conditions of employment (see 16 below)

3. **Notify HMRC**— you will be required to submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal.

24. What steps does the employer need to take to designate staff as “furloughed workers”?

Employees need to be notified of the change in their designation, from employees or workers to “furloughed workers” and we would advise that be done in writing. We have prepared a draft letter that our members can use and in due course we would expect ACAS to prepare a template letter by way of guidance. In the absence of such template, we believe the letter should confirm that each member of staff will receive 80% of their salary up to £2,500 per month (taking into account employer’s NICs and any apprenticeship levy due).

The gross amount of pay per month should be set out. It should be made clear that the payment is being made under the Coronavirus Job Retention Scheme and is subject to change depending upon the rules of that Scheme, and in particular upon the interpretation of rules under that Scheme as clarity emerges.

Check your existing terms and conditions of employment. What you are looking for is a clause confirming that you are able to vary the existing terms and conditions simply by notifying the employees.

If there is a contractual right to lay staff off in the employment contract, this should present little difficulty: furloughed status will at least mean that the staff are paid eventually.

Where there is not a contractual right to lay off, designating staff as “furloughed” will in theory amount to a breach of contract and you will need the agreement of employees before the change can be implemented.

If you have a unionised workforce, then you will need to check the terms of those collective agreements. This is slightly more complicated, so feel free to contact our employment/HR team on how best to consult with the union.

If there is no recognised trade union, then you will need to communicate with your staff.

You need to make it clear:-

- what change you are proposing,
- why you are proposing to make that change,
- when that change will take effect,
- who is likely to be affected by that change and
- how long that change will be in place.

As part of any consultation on these changes, ideally you should give your employees an opportunity to provide you with any comments or questions, however it may be possible simply to impose the change on your employees. We would rather you did not just impose the change, but if you are in any doubt, then please contact your HR adviser.

To acknowledge the change, you will need to get your employees to sign a letter confirming that they are in agreement with the change. Our HR team can provide you with a template letter for agreement to the change of employed status. In the current climate, employees faced with losing their job, or at least getting a fair proportion of their wages are likely to take a pragmatic approach and agree to the change.

However, we can foresee potential problems arising for which we do not yet have the answers:

- for those who are paid more than £2,500 per month and where the employer does not propose to top-up the wages
- for those who will see a pay-cut where the employer does not pay or top up the 20% reduction in wages
- due to the fact the normal lay-off rules will continue to apply, such that if staff are laid off for four consecutive weeks or for six weeks in any period of 13, they would be entitled to leave and claim a redundancy payment (although in practice the continuation of a proportion of pay will mean that only higher earners will actually satisfy the relevant conditions). On the information we have so far, the Scheme would not preclude claims for redundancy payments being made. We should stress that in the current economic climate, it would be unlikely that staff would claim a redundancy payment rather than ongoing pay, but it is possible depending on circumstances, particularly for higher paid staff who might be able to find other opportunities for work.

25. When will the portal go live, and what advice are we giving employers in terms of actions now?

In the Chancellor's statement on Friday 20 March 2020, he said "I can assure you that HMRC are working night and day to get the scheme up and running and we expect the first grants to be paid within weeks – and we're aiming to get it done before the end of April."

Employers should therefore anticipate payments under the Scheme will not likely be available for the end of April 2020. Coronavirus Business Interruption Loans are available interest free which may help cover the intervening period.

26. Are there any other steps I can take?

If you are in the process of changing terms and conditions of employment, it might be prudent to consider whether or not there are any other changes that can be added to the consultation.

The contractual ability to lay off staff, or to impose short-time working is something you may want to consider.

Whilst the Job Retention Scheme will provide short term relief to businesses and individuals, looking to the future, it is worth considering whether there may be a requirement to consider laying off staff, rather than making them redundant. You can discuss the benefits of lay-offs and short-time working rather than outright redundancies with our employment team.

Please refer to the legal update on short term working and lay-off in the dedicated COVID-19 area of our website.

27. How long will this Scheme be in place?

The Chancellor has announced that it will be in place for an initial period of three months, however has indicated that he is open for this to continue, depending upon the need.

28. What protection is in place for any self-employed sub-contractor?

For any individual, income tax self-assessment, payments normally due on the 31 July 2020 will be deferred until the 31 January 2021. No penalties or interest for late payment will be charged in this deferral period. HMRC have also scaled up their time to pay offers to all individuals who are in temporary financial distress as a result of Covid-19 and have outstanding tax liabilities.

29. What about my business if I'm self-employed?

As well as the income tax-self assessment payments being deferred, there are a couple of other measures that have been put in place, such as deferring VAT and Income Tax payments.

If you pay VAT, then you will be allowed to defer any payments for a period of 3 months. You should speak to HMRC as soon as possible to confirm the deferment of any VAT and also any income tax payable for your employees.

30. Coronavirus Business Interruption Loan Scheme

In addition to the above the new temporary Coronavirus Business Interruption Loan Scheme, delivered by the British Business Bank will be launched this week.

This is primarily to support small and medium-sized businesses to access bank lending and overdrafts.

The Government will provide lenders with a guarantee of 80% on each loan (subject to a per-lender cap on claims) to give lenders further confidence in continuing to provide finance to SMEs. The government will not charge businesses or banks for this guarantee, and the Scheme will support loans of up to £5 million in value.

Businesses can access the first 12 months of that finance interest free, as government will cover the first 12 months of interest payments.

You are eligible for the scheme if your business is:

- UK based, with turnover of no more than £45 million per year
- Meets the other British Business Bank eligibility criteria

The full rules of the Scheme and the list of accredited lenders is available on the British Business Bank website. All the major banks will offer the Scheme once it has launched. There are 40 accredited providers in all. You should talk to your bank or finance provider (not the British Business Bank) as soon as possible and discuss your business plan with them. This will help your finance provider to act quickly once the Scheme has launched. If you have an existing loan with monthly repayments you may want to ask for a repayment holiday to help with cash flow.

Resource History

BPIF Legal

Thomson Reuters Practical Law

Eversheds Sutherland

Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses (applicable in England).