

# The UK's Job Retention Scheme

31 March 2020

On 20 March 2020 the UK government announced its Job Retention Scheme (JRS), which will run for an initial period of three months from 1 March 2020. It is expected to be operational by the end of April 2020. The JRS will allow businesses to place employees on furlough (temporary leave of absence) and reclaim 80% of their usual monthly wage costs from HMRC, subject to a cap of £2,500 per month.

Further details of the JRS were released on 26 March 2020. This note outlines what we know so far and will be updated as further information becomes available. Much of the detail of how the JRS will operate still remains unclear.

## **Employer eligibility**

All private sector UK employers are eligible for the JRS provided that they had a PAYE payroll scheme on 28 February 2020 and have a UK bank account. The government is not expecting that many public sector bodies will access the JRS, although they may be able to do so in some circumstances.

Administrators of a business in administration can access the JRS.

## **Employees that can be placed on furlough**

Employees being placed on furlough must have been on the payroll on 28 February 2020. It does not matter what type of contract they were working on – full time, part time, employed agency workers and zero hours employees are all eligible.

Decisions about who to place on furlough are subject to the normal anti-discrimination requirements.

## **Employees who have been made redundant**

An employer can claim for employees made redundant since 28 February 2020 if they have been rehired subsequently.

### **Employees on sick leave**

Employees who are on sick leave or self-isolating are eligible to be furloughed after the period of sick leave/self-isolation ends. The guidance does not specify whether this applies only to coronavirus related sick leave, or sick leave for any reason.

### **Employees on maternity, adoption or shared parental leave**

The normal rules apply to employees who are on or planning to take maternity leave and who are eligible for statutory maternity pay (SMP). They are required to take compulsory maternity leave and will continue to be paid SMP in the normal way for up to 39 weeks.

However, the government guidance also says that enhanced company maternity pay (ie pay that the employer offers over and above the statutory entitlement) is a wage cost that can be claimed through the JRS. This implies that a woman could be placed on furlough after the compulsory maternity leave period but remain eligible to receive statutory and company maternity pay. The employer could reclaim the additional cost of enhanced maternity pay through the JRS. Recovery of SMP would be unaffected by the JRS.

A woman would normally have to bring maternity leave to an end in order to take some other form of leave (such as sick leave or holiday). However, it appears that this may not be the case in relation to furlough, given the apparent on-going entitlement to maternity pay and the fact that the guidance indicates that employees on furlough remain entitled to their existing rights, including maternity rights. This implies that a woman could be on maternity leave and furlough at the same time but clarification on this point is needed.

Enhanced paternity, adoption and shared parental pay are also wage costs that an employer can reclaim. The same issues arise as to whether an employee can be on furlough and paternity/adoption/ shared parental leave at the same time.

### **Employees that cannot be placed on furlough**

Employees who were recruited after 28 February 2020 are not eligible for the JRS.

Employees cannot be placed on furlough if they are already working reduced hours or for reduced pay (ie employers have already put measures in place to minimise the financial consequences of coronavirus). The guidance does not address whether it would be possible to reinstate the employees' original terms and conditions and then place them on furlough. Given that it will be possible to re-hire workers made redundant since 28 February and place them on furlough, it would seem strange if it was not possible to reinstate the original terms and conditions of those already working reduced hours or for reduced pay and then place them on furlough.

Employees who were on unpaid leave before 1 March cannot be placed on furlough. Employees who started a period of unpaid leave on or after 1 March are eligible to be placed on furlough.

## Mechanics of placing employees on furlough

The government guidance indicates that "employers should discuss with their staff and make any changes to the employment contract by agreement". This means that employees will need to consent to being placed on furlough except possibly in circumstances where there is no obligation on the employer to offer work, such as a zero hours contract, or in circumstances where an employer will "top-up" wages to their normal level.

The government guidance also says that collective consultation may be required if sufficient numbers of staff are involved. However, the obligation to consult collectively arises only where employers have "proposals to dismiss". It is arguable that an employer will not have "proposals to dismiss" until the numbers who are not going to consent to being placed on furlough are clear. In practice, employers may want to try to conduct some consultation if at all possible, particularly where employee representatives are already in place and/ or where furlough discussions are happening alongside proposed redundancies or other changes to terms and conditions.

Employers should document the decision to place an employee on furlough in writing and keep a record of this in order to be eligible for a subsidy.

Employees can be placed on furlough for a minimum of three weeks. They cannot undertake work during any period while they are on furlough. They could be asked to undertake training activities, provided that they do not provide services to or generate revenue for the organisation. Undertaking training may affect what an employee is entitled to be paid (see "Employees on furlough" below).

## What employers can and cannot claim

Employers will receive a grant from HMRC covering the lower of 80% of a furloughed employee's regular wage, or £2,500 per month.

Employers will also be able to claim Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that amount. There will be further guidance on how to calculate NICs and automatic enrolment mandatory employer pension contributions before the JRS is launched.

Employers cannot reclaim for voluntary auto-enrolment employer contributions that are above the minimum mandatory employer contribution. The minimum employer contribution is 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5 April 2020 and £520 per month from 6 April 2020 onwards).

## Calculating regular wages

Regular wages do not include fees, commission and bonuses. For full time and part time employees, the employee's salary before tax as at 28 February should be used to calculate the 80% figure. For employees whose pay varies, employers can use the higher of the same month's earnings in the previous year, or average monthly earnings in the 2019/20 tax year. For employees on variable pay who have less than a year's service, the employer should use average monthly earnings since they started work (pro-rated if necessary if an employee only started work in February).

## Employees on furlough

Employers must pass on the lower of £2,500 and 80% of their regular wage to furloughed employees. The relevant amount will be subject to deductions for income tax, NICs and auto-enrolment contributions. Employers can choose to top-up salary but are not obliged to do so. Employers cannot reclaim employer NICs or mandatory auto-enrolment employer contributions on the topped-up amount.

Although the guidance does not say this in terms, it seems likely that employees will continue to be entitled to benefits other than salary during furlough unless different arrangements are agreed.

### National Minimum Wage

As employees are not working during a period of furlough, they are not entitled to receive the national minimum wage. They can therefore be paid 80% of their regular wage, even if this would take them below the relevant national minimum wage level.

However, if an employee is required to complete training courses while they are on furlough, they must be paid at the relevant national minimum wage rate for the period of time spent on training activities.

### Other employment rights

The guidance indicates that employees on furlough remain entitled to "the same rights as they did previously", including the right to SSP, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments.

## Making a claim

HMRC is in the process of developing the system for claiming under the JRS. The government guidance indicates that employers will need to provide details of:

- Their ePAYE reference number;
- The number of employees being furloughed;
- The claim period (start and end date);
- The amount claimed (per the minimum length of furloughing of three weeks);
- Bank account details; and
- Contact details.

HMRC reserves the right retrospectively to audit all aspects of a claim.

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