

# The UK's Job Retention Scheme

11 November 2020

Although the government's Job Retention Scheme (JRS) was initially expected to close on 31 October 2020, on 5 November 2020 the government announced that it would remain in place in some form until the end of March 2021 (the extended JRS). The government published further guidance on the extended JRS on 10 November 2020.

The extended JRS that applies between November and January largely reflects the JRS terms that applied in August 2020. Employers can place employees on furlough (temporary leave of absence) on a full time or flexible basis. They can claim 80% of usual monthly wage costs in respect of employees' unworked hours from HMRC, subject to a cap of £2,500 per employee per month. The cap is pro-rated for staff on flexible furlough to reflect the hours they are not working. Employers must pay employer NICs and auto-enrolment pension contributions on the sums paid.

This note outlines what we know so far about how the extended JRS will operate. The government will review the terms of the JRS in January 2021 to assess the level of support businesses continue to require. This raises the prospect of employers having to contribute to wage costs after January, as they did during September and October 2020.

The government announcement on 5 November confirmed that in light of the extension of the JRS it will not pay a Job Retention Bonus to eligible employers in February 2021 as originally planned. The Job Support Scheme that was due to replace the JRS has also been postponed.

## **Employer eligibility**

All private sector UK employers are eligible for the JRS if they have an online PAYE payroll and a UK bank account. The JRS applies to all employers in the same way, regardless of whether they are open or required to close as a result of coronavirus restrictions.

The government is not expecting public sector bodies to access the JRS, although they may be able to do so in some circumstances.

Employers do not need to have claimed under the JRS between March and October to be eligible for the extended JRS.

Administrators are eligible for the extended JRS but should only use it if there is a reasonable likelihood of staff being retained in employment, for example because the administrator is pursuing a sale of the business.

From December 2020 HMRC will publish the names of employers who have claimed under the extended JRS after November.

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

Employees can be placed on furlough if they were on the employer's payroll on 30 October 2020 and notified to HMRC in a Real Time Information submission between 20 March and 30 October 2020. It does not matter what type of contract they were working on and the scheme covers workers as well as employees.

Employees do not need to have been furloughed between March and October 2020 to be eligible to be furloughed under the extended JRS.

Normal equality and discrimination laws apply to decisions about which employees to furlough.

#### *Employees on sick leave*

Employees who are on sick leave or self-isolating because of coronavirus are eligible for Statutory Sick Pay (SSP). However, an employee who is on sick leave and in receipt of SSP can still be furloughed if there are business reasons for doing so. Once they are placed on furlough, they are entitled to furlough pay and not to sick pay.

If a furloughed employee becomes unwell, they are entitled to receive at least SSP. However, employers can decide whether to transfer the employee from furlough pay to SSP, or whether to keep them on furlough at the furlough rate of pay. Employers remain entitled to reclaim furlough pay from the government even if an employee is unwell (provided that they have not been transferred to SSP).

#### *Employees who are shielding*

Employees who are shielding in line with public health guidance, or who need to stay at home with someone who is shielding, can be placed on furlough.

#### *Employees with caring responsibilities*

Employees who cannot work because they have caring responsibilities as a result of COVID-19, such as those with children whose schools or nurseries are closed for example, can be furloughed.

#### *Employees returning from family leave*

Employees who are returning from maternity leave, adoption leave, paternity leave, shared parental leave or parental bereavement leave can be placed on furlough in the normal way.

The guidance says that in order to be placed on furlough an employee must have ended the relevant period of family leave. For example, a woman must bring her maternity leave to an end

by giving the employer the relevant amount of notice, or reached the end of her maternity leave period, before the employer can place her on furlough.

### *Re-employing employees*

Employers can re-employ employees who were on the payroll on 23 September 2020 but who have subsequently been made redundant or stopped work and place them on furlough, provided that the other eligibility criteria are met.

Employers can extend fixed term contracts that are due to expire on or after 1 November and place the employees on furlough if they were employed on or before 30 October 2020 and the employer had made the relevant Real Time Information submission.

### *Staff serving notice of redundancy*

At the moment it is possible to give an employee notice of dismissal for redundancy while they are on furlough. Employers can continue to claim the furlough grant during the employee's notice period.

It appears that the government intends to change the position in December. The guidance issued on 10 November indicates that the government is currently reviewing whether employers should be able to claim the furlough grant for employees who are serving notice periods and "will change the approach for claim periods starting on or after 1 December 2020". Further details are expected before the end of November.

### **Mechanics of placing employees on furlough**

Employees who are fully furloughed cannot undertake any work for the employer or any linked or associated organisation while they are on furlough. There is no "de minimis" exception to this rule. They can however take part in training or volunteer for another employer or organisation.

Flexibly furloughed employees can work for their employer for any number of hours and on any work pattern. The employer must pay them for their hours of work in the normal way. They can volunteer for another employer or organisation or take part in training during their furloughed hours.

As under the JRS, furloughed employees can undertake duties as employee or union representatives or act as a pension scheme trustee.

There is no minimum furlough period but claims must cover a minimum period of seven consecutive calendar days. Flexible furlough agreements can last for any period and employers and employees can enter into more than one such agreement.

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.

Employers must confirm in writing to the employee that they have been placed on furlough or flexible furlough and keep a record of this for five years in order to be eligible for a subsidy. Employees do not have to provide a written response. Employers must also keep records of how many hours of work an employee has carried out and for how many hours they have been furloughed for six years.

Retrospective furlough agreements covering the period from 1 November are possible if they are reached on or before 13 November.

### **What employers can and cannot claim**

Employers will receive a grant from HMRC covering the lower of 80% of a fully furloughed employee's wages, or £2,500 per month. The full amounts claimed must be paid to employees.

If an employee is flexibly furloughed, the employer is responsible for paying for the hours worked and can claim 80% of wages for the non-worked hours from the government. The cap on how much the employer can claim is proportional to the hours not worked.

Employers can "top up" salary while an employee is furloughed but are not obliged to do so.

The mechanics of claiming will broadly reflect the existing process under the JRS.

### **Other employment rights**

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 and to be paid at least the statutory national minimum wage for hours worked.

The guidance confirms that employees can take holiday while on furlough and that for flexibly furloughed employees, holiday should be counted as furloughed hours not working hours. Employees are entitled to their normal pay for periods of holiday and employers are obliged to pay employees who are on holiday additional amounts over the grant. The normal rules that allow an employer to require an employee not to take holiday continue to apply.

**11 November 2020**

## Contacts



**Stefan Martin**  
Partner, London  
T +44 20 7296 2751  
[stefan.martin@hoganlovells.com](mailto:stefan.martin@hoganlovells.com)



**Ed Bowyer**  
Partner, London  
T +44 20 72962682  
[ed.bowyer@hoganlovells.com](mailto:ed.bowyer@hoganlovells.com)



**Jo Broadbent**  
Counsel Knowledge Lawyer  
London  
T +44 20 7296 2026  
[jo.broadbent@hoganlovells.com](mailto:jo.broadbent@hoganlovells.com)

## [www.hoganlovells.com](http://www.hoganlovells.com)

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com). Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.  
© Hogan Lovells 2020. All rights reserved.