

CORONAVIRUS JOB RETENTION SCHEME

Introduction

The coronavirus pandemic has affected the entire world, including many workplaces in Britain where employers have made staff redundant or laid workers off without pay just at a time when staff need their salary to survive during a time of lock down.

In the UK, trade unions and employers met with the government to try to sort this matter out and that has resulted in the introduction of the Coronavirus Job Retention Scheme (JRS).

In this Bulletin we will be looking at the details of the JRS which were published online on 26th March 2020.¹

The Scheme is referred to as a “Furlough” Scheme which involves employees agreeing to be put on a temporary unpaid leave of absence from work, thereby maintaining the employment relationship, albeit with no work being done by the employee and no salary being paid.

What are the terms of the JRS?

In outline, the JRS is a temporary scheme that is operated by the Government and which:

- Is open initially to all UK employers for the period 1st March to 31st May 2020. The Government may extend it beyond that period;
- Is designed to be available to UK employers whose business has been severely affected by the COVID-19 (coronavirus)
- Will enable employers to be able to claim for 80% of furloughed employees’ usual monthly wage costs, up to £2,500 a month ;
- Will also enable employers of furloughed employees to be able to claim for the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage;
- The furlough pay of employees is subject to normal tax and National Insurance Contributions, and employees should also pay their minimum automatic enrolment pension contributions as usual;

¹ At: <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

- Employers can use this scheme anytime during the period of its availability.

Which employers can claim?

To be able to make a claim, an employer must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account

Provided that condition is met, any UK organisation with employees, such as private sector businesses, charities or public authorities, can apply.

For companies in administration, the administrator will be able to access the JRS.

Which employees are eligible to be covered by the Scheme?

The Scheme² applies to all employees of UK employers on the PAYE payroll on 28 February 2020 including:

- Full and part time employees;
- Employees on agency contracts who are paid through PAYE;
- Employees on flexible or zero hours contracts who are paid through PAYE;
- Employees made redundant due to the coronavirus since 28 February 2020, if rehired by their employer;
- Employees from extremely vulnerable groups who are advised to self-isolate for 12 weeks under the government's shielding guidance (provided they are not home working);
- Employees in receipt of family leave related enhanced

(earnings related) pay such as maternity and adoption pay, shared parental pay and paternity pay.

What this means is that all the entitlements around, for instance, Maternity Leave, Statutory Maternity Pay (SMP), Maternity Allowance continue to apply, including the SMP arrangements for pay and time off. Where an employer has agreed to enhance any of the allowances, perhaps by continuing to pay basic pay rather than a lower statutory figure, the company can submit a claim for the extra, enhanced, amount

NOTE: Employees who have more than one employer can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

Which employees are not covered by the Scheme?

Government advice indicates that the following employees are not covered by the Scheme:

- any employee undertaking work for or on behalf of the organisation (and even if on reduced hours or working from home).

NOTE: if workers are required to complete an online training courses whilst they are furloughed, then they must be paid at least the National Living Wage or National Minimum

² Information taken from "The Clyde Guide to UK Employment Issues and COVID-19

(Coronavirus)" (updated 30.03.20.pdf)

Wage for the time spent training, even if this is more than the 80% of their wage that will be subsidised;

NOTE: whilst furloughed workers cannot carry out work for their employer, they can take part in volunteer work (eg, for the NHS or Samaritans)

- Any employees on unpaid leave unless they were placed on unpaid leave after 28 February 2020;
- Employees hired after 28 February 2020;
- Employees on sick leave or self-isolating should get Statutory Sick Pay but can be furloughed after this. This may obviously affect how much the employer can recover for that employee.

Do employees have to consent to being furloughed?

A condition of reimbursement from the Government scheme is that employers should write to their employees confirming that they have been furloughed and keep a record of this communication.

However, employers are obliged to obtain the agreement in writing of employees whose contracts have been changed as this amounts to a variation in terms and conditions of employment.

Law firm Clyde and Co suggest examples relevant to furloughing which would need an agreement include:

- the employee not working;
- when they will return to work;

- reduced remuneration;
- any changes to benefits;
- a change of rate of pay (the effect of the JRS only allowing 80% of pay to a maximum of £2,500 a month (the equivalent of £30,000 a year based on 12 x £2500 a month)

NOTE: When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.

Should employers follow a process in deciding which staff to put on furlough?

The simple answer is yes, they should.

The Government guidance picks up the need to adopt a fair process that ensures the avoidance of issues related to equality and discrimination.

The guidance also suggests that if sufficient numbers of staff are involved, collective consultation should take place.

Clyde & Co's advice notes that this type of consultation is similar to redundancy consultation, the alternative if the furlough arrangement isn't implemented and, therefore, goes onto suggest adopting those standards as a guide to consultation.

Statutory redundancy consultation³ affecting 20 or more employees at an establishment requires a 30 day collective consultation with the recognised trade union's reps or elected employee reps (the latter where a union is not recognised).

³ See: <https://www.gov.uk/redundancy-your-rights/consultation>

Where a trade union is recognised, there may be an agreement about the standard of consultation that is superior to the statutory minimums.

How long can an employee be furloughed for?

An employee has to be furloughed for a minimum period of three weeks to qualify for payments from the Scheme.

The Scheme is currently set to end on 31st May but may be extended.

Does my employer have to pay me the money that has been claimed for my wages?

Yes, at a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month.

That payment will be subject to Tax and employee National Insurance.

What about my pension?

The terms of the JRS also require an employer to deduct employee contributions to pay automatic enrolment contributions (set at 5%) on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

Many TSSA members belong to occupational pension schemes like the Railways Pension Scheme (RPS) or the TfL Pension Fund. We are seeking confirmation of issues such as how furloughing would affect:

- employee contributions which are higher than 5%;
- pensionable pay;
- benefits.

One matter that has cropped up in relation to the RPS is the status of people who experience being furloughed and whether they are

regarded as "pausing" their membership or as continuing in service.

This is important because there is no rule in the RPS to cover members pausing their membership as members are either "in service" or "a leaver".

Leavers are either because the person has left service with the employer or the member has decided to drop out of the Scheme (the latter of which activates a cooling off period for the member to reflect on their decision).

In the event that members are regarded as leaving the RPS as a result of furloughing, it depends on the rules of their Section of the RPS whether new entrants are allowed to join which would determine whether furloughed staff could re-join, thus continuing their membership, once back in work.

In the event that an employer decided to close the pension scheme to further accrual (thus effectively making all the members deferred status), not only would they have to engage in a 60 day consultation with the members and trade unions, they would also have to obtain the agreement of the RPS Trustee. There may also be a range of other issues that the company would face, including incurring significant debts.

During consultations over furloughing, reps and organisers are recommended to make sure that members are regarded as continuing in service – or, if the RPS Section has a rule allowing career breaks, whether that could be used to ensure that employees remain RPS members.

Can an employer top up my wages?

An employer can also choose to top up an employee's salary beyond the amount they claim for that person from the Job Retention Scheme. Reps should push this arrangement with their employer.

How does being furloughed affect my Universal Credit?

If you're earning less because you're on furlough, your Universal Credit payment might change. In general, Universal Credit reduces the more money you earn (for every £1 you earn, your Universal Credit amount reduces by 63p). More information can be found at:

<https://www.gov.uk/universal-credit/how-your-earnings-affect-your-payments>

When will the Scheme be available for my employer to make a claim?

Government advice at the end of March indicated that the JRS would become available at the end of April. This could obviously cause financial difficulties for employees in the meantime although the Government has announced arrangements in relation to a rent and mortgage payments as well as property evictions for the former of these.⁴

How does my employer work out how much to claim?

There are two possible calculations based on whether an employee's salary is the same each month or varies from month to month:

- For full time and part time salaried employees whose salary doesn't change, the employee's actual salary before

tax, as of 28 February 2020 should be used by your employer to calculate the 80%. NOTE: Fees, commission and bonuses will not be included;

- For staff whose pay varies from month to month, and where the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, the company can claim from the higher of either:
 - the same month's earning from the previous year, or
 - average monthly earnings from the 2019-20 tax year

If the employee has been employed for less than a year, the employer can claim for an average of their monthly earnings since they started work.

If the employee only started in February 2020, use a pro-rata for their earnings so far to claim.

What if the employer has already dismissed employees?

The Scheme will be backdated to 1 March 2020. Employees can be re-engaged if they agree and then placed on furlough leave.

Where trade unions and employees are already in negotiations about reduction in wages, employers may wish to continue with those talks although employees will no doubt wish to wait to understand if furloughing is applicable.

⁴ See unnumbered page 3 of: <https://assets.publishing.service.gov.uk/governme>

nt/uploads/system/uploads/attachment_data/file/873676/Covid-19_fact_sheet_18_March.pdf

Reps action

Reps are advised:

- To make the contents of this Bulletin available to their colleagues and ask those who are not TSSA members to join the union asap. They can do this online at:
<https://www.tssa.org.uk/en/join-us/join-online/index.cfm>
- to ensure that their TSSA organiser is kept up to date with any developments that may mean staff are going to be furloughed.
- That where their employer intends to furlough staff, they should push their employer to agree to top up affected employees' salaries to make their wages up to their current pay levels.

Acknowledgements and further information

In putting this circular together, TSSA would like to acknowledge the following sources:

UK Government Website article published 26th March 2020: *"Claim for your employee's wages through the Coronavirus Job Retention Scheme"* available at:
<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

UK Government Website article published 26th March 2020: *"Check if your employer can use the Coronavirus Job Retention Scheme"* available at:
<https://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme>

Clyde & Co: *"The Clyde Guide to UK Employment Issues and COVID-19 (Coronavirus)"* (updated 30th March 2020) obtainable from:
<https://www.clydeco.com/blog/the-hive/article/q-a-covid-19-coronavirus>

Personnel Today (27th March 2020): *"What you need to know about furlough"* at:
<https://www.personneltoday.com/hr/what-you-need-to-know-about-the-coronavirus-job-retention-scheme/>