

HR Brief- What does the Coronavirus Job Retention Scheme mean in practice?

On Friday 20th March 2020 the government announced the introduction of Coronavirus Job Retention Scheme. This will see the government take on the obligation to pay part of employees' salary where those employees that would otherwise have been laid off during this crisis. This morning the government produced its detailed guidance on how the scheme will operate.

The scheme is temporary and is open to all UK employers for at least three months, starting from 1 March 2020. The government expect the scheme to be up and running by the end of April (in his statement given on Thursday 26th March, the chancellor indicated it would be live to meet most employers' April payroll dates). It is designed to support employers whose operations have been severely affected by coronavirus (COVID-19).

The full guidance can be viewed here:

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

BEIS guidance for employees: <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-guidance-for-employees#furloughed-workers>

Some headline points the new information provides are:

1. Only employees and workers engaged as at 28th February 2020 will be eligible for the scheme;
2. If an employee was made redundant on or after 28th February 2020, they will be eligible for the scheme if re-engaged by the employer;
3. The payment that can be claimed by the employer is based on the lower of 80% gross pay or £2,500. Details of how to calculate 80% salary have now been provided (see below);
4. There is a minimum furlough period of 3 weeks for each employee. This suggests that employers can review their needs every 3 weeks and move employees between furlough and working at the end of each 3 week period.

Which businesses are eligible to participate in the scheme?

There is very limited restriction on which employers may apply to the scheme. All that is necessary is:

- the business is based in the UK.
- it must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.

The one notable exception to the type of employer who can claim are public sector organisations or organisations who receive funding from the public sector. The government expects that the scheme will not be used by many public sector organisations, as the majority of public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.

Where employers receive public funding for staff costs and that funding is continuing, the government expect employers to use that money to continue to pay staff in the usual fashion

– and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.

Organisations who are receiving public funding specifically to provide services necessary to respond to COVID-19 are not expected to furlough staff.

Which employees are eligible for the scheme?

Furloughed employees must have been on employers PAYE payroll on 28 February 2020, and can be on any type of contract, including:

- full-time employees
- part-time employees
- employees on agency contracts
- employees on flexible or zero-hour contracts

The scheme also covers employees who were made redundant since 28 February 2020, if they are subsequently rehired by their employer. However, those made redundant prior to that date will not be able to access the scheme if re-engaged.

This means any employees or workers recruited from 1st March 2020 or later will not be eligible for the scheme and a claim cannot be made for them.

What eligibility requirement does an employee need to meet?

The scheme is set up to avoid employers terminating the employment relationship by dismissing employees by reason of redundancy as a result of the downturn in business which the coronavirus will cause. To achieve this aim, there are basic criteria which must be met for an employer to be able to make a claim in respect of an employee:

1. The employee must be (and remain) in employment when the application is made.

Should any employee be dismissed at any stage after an application has been made to the scheme (whether by reason of redundancy or anything else) they will no longer be eligible for the scheme and the employer (it is expected) would lose any right to continue to receive the relevant funding for wages.

2. The employee must be carrying out **NO** work for the employer. This is made clear. An employer cannot obtain funding for employees who have been retained at work to work on a part time basis or on short time working. Equally (and much more obviously) funding cannot be obtained for employees who are still working on a full time basis. This includes providing services or generating revenue. While on furlough, the employee's wage will be subject to usual income tax and other deductions.
3. Finally, the employer will only be able to make use of the scheme if placing the employee on lay off/ furlough is something which can be done lawfully. There is no underlying common law or statutory right to send an employee home and provide no work and, consequentially, no pay. This can only be done lawfully if:
 - a. there is a term in the employee's contract which allows for this. Very few contracts of employment would provide for this as lay off clauses are generally only found in particular specific sectors where the level of work regularly fluctuates.

- b. The employer and employee expressly agree that the employee can be furloughed. It would not seem to be the most difficult of negotiations to have with an employee to state that their options are to be made redundant and lose their job; or to go home, do no work but receive 80% of their earnings.

It is for the employer to determine which employees (if any) are to be placed on furlough.

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. As such, it would be important to keep a clear record of why certain individuals have been selected over others and this should be for clear business reasons only.

To be eligible for the subsidy employers should write to their employee confirming that they have been furloughed and keep a record of this communication.

Specific categories of worker

- Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February.
- Employees on sick leave or self-isolating should get Statutory Sick Pay, but can be furloughed after this.
- Employees who are shielding in line with public health guidance can be placed on furlough.
- If your employee has more than one employer they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.
- A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of your organisation. It is likely that this means arranging a weekly catch up meeting with staff to keep them advised of developments relating to the business would not be a breach of the terms rules. However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.
- If an employee is on Maternity Leave, contractual adoption pay, paternity pay or shared parental pay
 - Individuals who are on or plan to take Maternity Leave must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth.
 - If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.
 - Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.
 - If you offer enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs that you can claim through the scheme. The same principles apply where your employee qualifies for contractual adoption, paternity or shared parental pay.

How much can an employer claim?

Employers will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage. Fees, commission and bonuses should not be included.

At a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. An employer can also choose to top up an employee's salary beyond this but is not obliged to under this scheme.

Further guidance on how to calculate what an individual employee is to be issued before the scheme becomes live. However, some general guidance has already been provided:

1. For full time and part time salaried employees, the employee's actual salary before tax, as of 28 February should be used to calculate the 80%. Fees, commission and bonuses should not be included.
2. If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, you can claim for the higher of either:
 - the same month's earning from the previous year
 - average monthly earnings from the 2019-20 tax year

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

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

Once an employer has worked out how much of an employee's salary can be claimed for, you must then work out the amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions you are entitled to claim.

Employer National Insurance and Pension Contributions

All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

You can choose to provide top-up salary in addition to the grant. Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

National Living Wage/National Minimum Wage

Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for the hours they are working.

Therefore, furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW.

It will be at the employers' discretion whether they choose to fund any "top up" of the government monies to allow employees to remain on 100% pay during any period of lay off. However, as above, this discretion would not seem to be open to those who operate in the public sector or who are funded by the public sector: employees in those types of organisation must continue to receive 100% of their salary.

How do employers claim?

To claim, you employers need:

- ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- bank account number and sort code
- contact name
- phone number

The employer will need to calculate the amount it is claiming. HMRC will retain the right to retrospectively audit all aspects claims.

Claim

Employers can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1 March if applicable.

Once HMRC have received a claim and if the employer is eligible for the grant, they will pay it via BACS payment to a UK bank account.

Employers should make the claim in accordance with actual payroll amounts at the point at which payroll is run or in advance of an imminent payroll.

Employers must pay the employee all the grant received for their gross pay, no fees can be charged from the money that is granted.

When the government ends the scheme

When the government ends the scheme, employers will need to deal with employees in a normal manner, in accordance with the contract of employment and general employment law.

Employees that have been furloughed have the same rights as they did previously as the contract of employment will have continued and remained in force throughout the period of furlough. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, holiday pay entitlement, rights against unfair dismissal and to redundancy payments.

Once the scheme has been closed by the government, HMRC will continue to process remaining claims before terminating the scheme.

Income tax and Employee National Insurance

Wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

Employers will be liable to pay Employer National Insurance contributions on wages paid, as well as automatic enrolment contributions on qualifying earnings unless an employee has opted out or has ceased saving into a workplace pension scheme.

Tax Treatment of the Coronavirus Job Retention Grant

Payments received by a business under the scheme are made to offset these deductible revenue costs. They must therefore be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.

Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

When will payments be made?

The government has indicated that payments will be made by the end of April.

Does the employer need to repay the monies?

No. Never!

How long will the scheme last?

Initially, the scheme will run for 3 months, commencing from 1st March 2020. However, the Chancellor indicated it would be extended if necessary in the event the coronavirus pandemic is still disrupting the country at the end of the 3 month period.

Holiday entitlement

As the scheme does not operate so as to terminate employee's contract of employment (or any other type of worker's contract) annual leave will still accrue and workers will not use any period of entitlement to annual leave.

The further guidance is entirely silent on how any annual leave taken by employees should be accounted for in terms of:

- What rate of pay they should receive; and
- Who is responsible for paying holiday pay.

It would appear that employees on furlough have that distinct status, which suggests they cannot be on furlough and take annual leave at the same time. As such, if workers seek to take annual leave, this should be prevented during any period of furlough and any such requests should be refused or delayed until the end of a particular 3 week furlough period.

If a worker takes a period of leave at the end of a 3 week furlough period, the guidance suggests that they can then be placed back on furlough for a further (minimum 3 week period) once the annual leave period ends.

In terms of the amount of holiday pay due, this should be calculated in the usual way. If employees have agreed to be placed on furlough:

- Where there is a lay off clause in the contract of employment, this should be calculated on the basis of their normal (100%) salary they would receive while at work; or

- Where there is no lay off clause in the contract and staff are being admitted to the furlough scheme subsequent to an express agreement to vary terms and conditions, it is likely that this means any holiday pay would be calculated on the basis of the amended salary which has been agreed.

This is one area which remains unclear.

As all employment law remains unchanged by the guidance so the usual terms of the Working Time Regulations will still apply regarding notice of annual leave requests, entitlement to reject and an employers' ability to require an employee to take leave.