

CORONAVIRUS JOB RETENTION SCHEME: GUIDANCE FOR EMPLOYERS

1. INTRODUCTION

On Friday 20 March 2020, the Chancellor announced a new "Coronavirus Job Retention Scheme" (the Scheme) to help pay people's wages. Employers will be able to contact HMRC for a grant to cover most of the wages of their workforce who remain on payroll but are temporarily not working during the coronavirus outbreak. Any employer in the country is eligible for the scheme.

The headline note on the GOV.UK website says that "*UK workers of any employer who is placed on the Coronavirus Job Retention Scheme can keep their job, with the government paying up to 80% of a worker's wages, up to a total of £2,500 per worker each month. These will be backdated to 1st March and will be initially open for 3 months, to be extended if necessary.*"

The website says that employers will need to:

- designate affected employees as 'furloughed workers,' and notify employees of this change. It notes that changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation;
- 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).

HMRC are to reimburse 80% of furloughed workers wage costs, up to a cap of £2,500 per month, and is working urgently to set up a system for reimbursement.

2. DURATION

The Government has made clear that the Scheme will run for at least 3 months from 1 March 2020, but it will be extended if necessary.

3. QUESTIONS AND ANSWERS

The details of the Scheme are not particularised at this stage. However, we have attempted below to predict some potential questions and to provide our thoughts at this early stage before further guidance becomes available to employers. Readers should be aware that we are in many cases basing these views on existing legal principles and applying common sense. The Q and A below should therefore be considered with this in mind. As and when more information and guidance becomes available we will update this.

1. What does the term "Furlough" mean?

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 would not, on the face of it, cover any workers who are working under self-employed tax status, where the worker makes a self-assessment to HMRC each year. Hence, agency workers are unlikely 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.

5. 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, but our initial view is that employers will not have to pay the 20%. To require this might defeat the effectiveness of the Scheme, because, for example, if a factory engages 500 staff, all on national minimum wage, the cost per month would exceed £100,000. 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. And, of course, employers can top up salaries further if they choose to*", which suggests that this is an option and not a requirement.

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

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. Accordingly, our calculations suggest that any wages earned by a member of staff in excess of £37,500 are not covered by the Scheme. We have assumed that sums paid under the Scheme will not be subject to tax and national insurance deductions, but this has not been made clear.

7. Which wages are covered by the Scheme?

The detail around this is not yet clear. However, the Government could have used the term "basic pay" if it intended to restrict payments under the Scheme to basic pay only. Many staff see a significant difference between basic pay and average take home pay. 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.

8. 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 on the face of it there would not be any obvious reason to do so, because the Scheme is of indefinite duration, and so employers will likely not get "credit" later on for sums which could have been claimed under the Scheme but which were not.

One wonders whether this could be a missed opportunity for the Government. It seems that grants will only be made under the Scheme where no work is performed by affected staff at all. It might have been more practical (and efficient for the Government) to have allowed partial working under the Scheme arrangements.

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

Our view is that it can, but this is not certain. Given what the Government is trying to achieve, it would be illogical to prevent employers accessing the Scheme for those staff already laid off. We think that once the employer has designated the staff as furloughed, the Scheme will apply, backdated to 1 March 2020.

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

Again, 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 use-up holiday simply in order to earn the additional 20%, but may do if they earn substantially more than £37,500.

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

Our view is that they can, provided it is clear that if they were well, they would have no work to do. We believe that the Scheme is only intended to be applicable where employers have no work to give to staff.

12. Can employees on maternity etc leave be brought into scheme by being "furloughed"?

We think that they cannot 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. If the leave period terminates once the Scheme has been withdrawn, then we expect normal rules to apply.

13. 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. Logically, the Scheme would not penalise employers (and indirectly staff) who are able to find work for the staff to do, because overall where staff can work and be paid they are less of a burden on the taxpayer.

14. 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. 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.*”

15. 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)*”.

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

Staff need to be notified of the change in their designation, from employees or workers to “furloughed workers”. In order to add clarity to a difficult and emerging situation, our view is that this should be in writing.

However, note that the Government website is clear that changing the status of staff remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation.

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.

Where there is not a contractual right to lay off, designating staff as “furloughed” will in theory amount to a breach of contract. Given that the Government is paying 80% of wages up to £2,500 per month, it is unlikely that most staff will complain. However, we can foresee potential problems arising:

- 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 the 20% reduction in wages; or

- 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. On the information we have so far, the Scheme would not preclude claims for redundancy payments being made, although in many cases the risk of staff triggering these payments will be low.

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.

17. 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 before the end of April 2020. Coronavirus Business Interruption Loans are available interest free to cover the intervening period.

From now, and consistent with the Government's intention of saving jobs in order to allow the economy to quickly recover at the end of the crisis, we anticipate the following process is likely to apply:

- (i) Where no work is available for one or more members of staff, and where there is no contractual right to lay staff off, our view is that employers should immediately consult (either individually or collectively following usual rules on consultation) with a view to affected staff agreeing to become "furloughed". Where there is a contractual right to lay staff off, go to (iii) below.
- (ii) If agreement is not reached, employers should take immediate legal advice. If agreement is reached, go to (iii) below.
- (iii) We believe the next applicable step will be that employers should write to each worker confirming that they are considered to be "furloughed", following the Chancellor's announcement of Friday 20 March 2020.
- (iv) 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. 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.

- (v) Employers should submit information to HMRC about the staff that have been furloughed and their earnings through the new online portal when it is available.
- (vi) Employers should then start to pay staff in accordance with the arrangements.

We hope this summary is helpful. It is our preliminary assessment following the recent announcement and we will keep you updated as more information becomes available.

We have a team of experts available to advise on this further. In the first instance, please contact your usual Eversheds Sutherland adviser or Audrey Elliott, Mark Hammerton, Chris Mordue, Marc Meryon or Simon Rice-Birchall of Eversheds Sutherland International LLP.