

The UK's Job Retention Scheme

1 June 2020

On 20 March 2020 the UK government announced its Job Retention Scheme (JRS). The JRS allows 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. It has been possible to submit claims since 20 April 2020.

The Chancellor of the Exchequer announced on 12 May 2020 that the JRS will remain in place until the end of October 2020 and further details of the extension were published on 29 May 2020. The JRS will continue largely in its current form until the end of July and then in a modified form for a further three months. However, the JRS will close to new entrants on 30 June, with staff who have not previously been furloughed having to be placed on furlough by 10 June 2020 in order to qualify.

Further details of the modified JRS are set out below, but the key points are that employers will have to make a contribution to workers' wage costs from September and will not be able to reclaim employer NICs or mandatory employer auto-enrolment pension contributions after July. Furloughed staff will be able to carry out work on a part-time basis from 1 July 2020, but employers will be responsible for paying staff for hours worked. More detailed guidance is expected in due course and we will update this note when that guidance is available.

The existing JRS

Employer eligibility

All private sector UK employers are eligible for the JRS provided that they had a PAYE payroll scheme on 19 March 2020 (originally 28 February 2020), have enrolled for PAYE online 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, although the government expects this would happen only where there is an expectation that the employee would be able to return to work, for example because the business will be sold.

Individual employers (for example those who employ a nanny) can also access the JRS if the other conditions are met.

Employees that can be placed on furlough

Employees being placed on furlough must have been on the payroll and notified to HMRC in a real time information submission on "or before" 19 March 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, as are workers and others who are not employees in the employment law sense, but who are paid through PAYE. This includes company directors. Apprentices can also be placed on furlough, although they must receive the National Minimum Wage for any period that they spend training.

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

Employees who have been made redundant/ left employment/ TUPE transferred

In some circumstances employers can rehire employees who were made redundant, or who otherwise stopped working for the employer on or after 28 February 2020 and then place them on furlough.

Employers can also place employees who have TUPE transferred to them since 28 February 2020 on 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, subject to the requirement that any period of furlough must last at least three weeks. Once they are placed on furlough they are entitled to furlough pay and not to sick pay. The same rules apply to employees on long term sick leave.

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.

Fixed term contracts

Those on fixed term contracts can be placed on furlough in the normal way. Contracts can be renewed or extended before their natural conclusion without breaking the terms of the JRS.

Employees on maternity, adoption or shared parental leave

The normal rules for maternity and other forms of parental leave and pay apply.

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 during her 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 19 March 2020 are not eligible for the JRS.

Employees cannot be placed on furlough if they are 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 who had been made redundant 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 until the point at which the unpaid leave ends in accordance with the original agreement. 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.

According to the version of the guidance issued on 17 April, employers must document the decision to place an employee on furlough in writing and keep a record of this for five years in order to be eligible for a subsidy. Provided that this is done in a way that is consistent with employment law, the employee does not have to provide a written response. The Treasury Direction that underpins the JRS was amended on 20 May to indicate that the employer and employee must have agreed that the employee will cease work and on what terms, and that the agreement must be confirmed by the employer in writing. These amendments align the requirements of the Direction with the contents of the guidance.

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.

Employees can be placed on furlough for a minimum of three consecutive weeks and can be furloughed multiple times, provided that each separate period lasts the minimum duration. An existing period of furlough can also be extended, in which case the extension does not have to be for any particular minimum period.

They 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, even where an employer is topping up an employee's wages above the level of the furlough grant. As noted above, this "no work" rule is changing to allow a furloughed worker to work for their employer on a part-time basis from 1 July 2020 onwards. The employer will be responsible for paying the worker for any work carried out.

Furloughed employees can be asked to undertake training activities, provided that they do not provide services to or generate revenue for the organisation. The purpose of the training must be to improve the employee's effectiveness in the employer's business or the effectiveness of the business itself. Undertaking training may affect what an employee is entitled to be paid (see "Employees on furlough" below). Furloughed employees can take part in volunteer work, again provided that this does not involve services to or generating revenue on behalf of the organisation. Employees who are on furlough cannot volunteer for their employer, even in a different role. The guidance accepts that someone who is acting as a trade union or employee representative while on furlough will not be viewed as working.

Directors who have been furloughed can perform their statutory obligations to the company provided that they do no more than would reasonably be judged necessary for those purposes. They must not do work of a kind that they would do in normal circumstances to generate revenue for or provide services to the company.

What employers can and cannot claim

The detail about what employers can reclaim is now contained in separate guidance, not in the JRS guidance. The separate "what you can claim" guidance includes detailed explanations about

how to work out 80% of wages and a calculator that is available to calculate what employers can claim in respect of most employees who are paid the same amount each pay period.

Employers will receive a grant from HMRC covering the lower of 80% of a furloughed employee's wages, or £2,500 per month. Wages include non-discretionary overtime, fees, commission payments and piece rate payments, but exclude tips, discretionary bonus or commission payments, non-cash payments and non-monetary benefits in kind and salary sacrifice schemes that reduce an employee's taxable pay.

Employers will also be able to claim Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that amount until July 2020.

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 £520 per month from 6 April 2020 onwards). Employers cannot reclaim for the Apprenticeship Levy, which should continue to be paid as usual.

Employees on furlough

Employers must pass on the lower of £2,500 and 80% of their regular wage to furloughed employees. No part of the furlough subsidy can be "netted off" to reflect the cost of benefits provided during furlough, whether as part of a salary sacrifice arrangement or otherwise. 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 or apprentice is required to complete training courses while they are on furlough, they must be paid at the relevant national minimum wage rate (taking account of the April 2020 rate increases) 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.

Holiday

Initially there was no government guidance on the interaction between furlough and holiday. The guidance on how to calculate wages now includes some further information. It confirms that employees both accrue and are able to take holiday while they are furloughed and that holiday does not break a period of furlough. Employers continue to be entitled to claim the furlough grant in respect of employees who are on holiday.

If an employee takes holiday they are entitled to receive their usual holiday pay in accordance with the Working Time Regulations and employers must pay the difference over the amount of the furlough grant. It is not spelt out, but this appears to mean that an employer will have to top up furlough pay to (up to) 100% of an employee's normal (pre-furlough) pay if an employee takes holiday during a furlough period.

The guidance indicates that in principle an employer can require employees to take holiday during a period of furlough but says that before doing so employers should consider "whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday".

Working for another employer

The guidance makes it clear that an employee is allowed to work for another employer while on furlough, if this is permitted under the existing contract of employment. This includes a situation where the employee has taken a second job while on furlough, not just where the employee had an existing second job.

Making a claim

The HMRC site for making a claim under the JRS went live on 20 April. The government guidance indicates that employers will need to provide details of:

- The employer's PAYE reference number and Self Assessment Unique Taxpayer Reference, Corporation Tax Unique Taxpayer Reference or Company Registration Number;
- The number of employees being furloughed;
- The names and NI numbers of furloughed employees;
- 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.

Employers who are furloughing 100 or more staff will need to upload a file containing the information. Other employers will have to enter details directly into the system.

HMRC will process all claims made before the JRS ends but reserves the right retrospectively to audit all aspects of a claim.

Changes to the JRS from August 2020

As noted above, the JRS closes to new entrants on 30 June 2020, meaning that employees must have been placed on furlough by 10 June in order to complete the minimum three week furlough period by the closure date. It appears that workers who have previously been furloughed will remain eligible for the JRS, even if they have subsequently returned to work for a period, perhaps because an employer is using a "roll on, roll off" system in which workers alternate periods of furlough with periods of work.

From 1 July 2020, employees will be able to carry out work for their employer on a part time basis, while remaining furloughed. The employer will be responsible for wages for hours worked, but the government will continue to pay for time spent on furlough (ie the hours the employee is not working) at the relevant rate.

Government support will start reducing on a tapered basis from 1 August 2020.

- During August, the government will continue to pay 80% of wages for furloughed workers up to the £2,500 cap, but employers will be required to pay employer NICs and mandatory employer auto-enrolment pension contributions and will no longer be able to reclaim these from the government.
- During September, the government will pay 70% of wages up to a cap of £2,187.50, with employers being liable for employer NICs, mandatory employer auto-enrolment pension contributions and for 10% of wages up to £312.50.
- During October, the government will pay 60% of wages up to a cap of £1,875, with employers being liable for employer NICs, mandatory employer auto-enrolment pension contributions and 20% of wages up to £625.

Employers will be required to submit data on the usual hours an employee would be expected to work and the hours they have actually worked in every claim period. Claims will have to be reported and made for minimum periods of a week but can be claimed for longer periods.

The JRS will close on 31 October 2020.

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