

Coronavirus Job Retention Scheme (the “Scheme”) FAQs

Overview of the Scheme

Who is covered by the Scheme?

We understand that any employer within the UK will be eligible for the Scheme.

What does the Scheme offer?

The Scheme is essentially a safety net for those employees who would have otherwise been laid off, made redundant or otherwise dismissed in response to the current pandemic. The government, via the Chancellor, has announced that it will offer a grant to cover up to 80% of wages (capped at £2500 and not clear yet if this is gross or net) of the wages of people who are not working but are furloughed and kept on payroll, instead of being laid off.

Who qualifies for the Scheme?

The Chancellor has announced that the Scheme will apply to all employees who are on the payroll (including those on zero hour or flexible contracts) who have been furloughed, where they would otherwise have been laid off or made redundant due to the current pandemic.

Flexible/zero hour contracts and temporary employees

It is probable that the employer will have to submit the last 12 weeks payroll information regarding an employee/worker to HMRC to implement the payment. A week's pay is usually based on an average of the last 12 weeks, due to change to 52 weeks from April.

Reduced hours

We think it is unlikely that the Scheme will apply to those employees who have had their hours reduced as it is likely that employees will need to be laid off with no work to be labelled furloughed.

If hours have already been reduced and then the employee is furloughed, it is likely that the employee would be entitled to 80% of his/her reduced hours only.

Employees who have recently been made redundant before 20th March

There is the potential for employers to rescind redundancy and agree to place on these individuals on furlough, however we are awaiting clarification from the Government on this point.

What is the definition of a furloughed worker?

This is not a term that we would usually use in UK employment law and therefore there is no legal definition. From our research, it is a term that appears to derive from US labour law and means mandatory suspension from work without pay.

In the UK will be akin to a lay off and will be a temporary suspension for a specific period of time whereby the furloughed worker will not be able to carry out any work but will remain an employee.

Is this different to laying off staff?

Yes, employers have a limited ability to lay off staff and this is subject to an existing contractual provision. A lay off clause can enable employers to reduce hours and cut wages, as necessary for business needs. Furloughed employees will not be able to carry out any work during the furloughed period but still receive 80% pay.

What are the proposed timescales for the JRS?

At present, we are aware that the JRS will last 3 months from 1st March 2020 i.e. until 31st May 2020. This may however be extended. We are aware that the payments can be backdated to 1st March 2020 however, as the HMRC portal is not yet running we are currently awaiting details as to how this will work.

Practical steps for employers to undertake

What is the process under the JRS?

Employers will need to fairly select those to be furloughed i.e. those who would have been laid off or made redundant. They would then need to agree the change to the status to furloughed with those employees and notify the employees once the change has been enacted. Once the HMRC portal has been set up, the employer will need to provide all necessary information regarding the selected employees.

How are employees selected?

There is no law covering this however we suggest carrying out a mini redundancy selection. Employees do not need to be notified of this as businesses will have to act quickly. Fair selection criterion may include skills, qualifications and aptitude, standard of work and/or performance, attendance and disciplinary record. You can select employees based on their length of service however this must be justified and must not be relied upon as the only selection criteria. It is good practice to keep your selection criteria as evidence in case the employee disputes the selection or HMRC ask for evidence. Employers must be careful not to discriminate through selection and must not select due to protected characteristics.

Can employers choose employees based on their ability to work during the pandemic? (i.e. those with children or dependants? Or who are unable to work from home?)

Workers who cannot work from home or who currently have no work to do may be obvious candidates for furloughing however, employers should take care not to discriminate (i.e. base decisions on the protected characteristics). In particular, we urge employers to exercise caution around age, pregnancy and disability.

Can employees volunteer to be furloughed?

Yes, employers may need to consider a process of calling for volunteers. However employers must be careful to ensure that they can demonstrate a genuine need to furlough employees due to COVID-19.

What happens after the initial period? Will the furloughed workers be made redundant?

The idea is that the furloughed period is temporary and fixed term and that employees will return to the same job after the expiration of this period. However, employers may still need to terminate employees after the expiry of this period depending on business needs. If this is the case, the normal redundancy process should be followed. Alternatively, employers may need to agree carried terms with the employee on return.

Is there a risk of furloughing too many employees?

Yes if the business is unable to continue without the furloughed employees. However, the employer is entitled to call them back if necessary. It is therefore important that this is set out in correspondence sent to the selected employees before the furloughed period starts.

Payments

How much will employees receive from the Scheme and how is this paid?

The Scheme means that furloughed employees would receive 80% of their normal pay. It is likely that the employer will have to continue paying the employee through its payroll and that the employer can then claim this back through HMRC.

Do employers have to pay the additional 20% to make up to full pay?

No. It is ultimately up to the employer to decide whether they offer full pay to a furloughed employee. Employers will need to agree reduction to 80% with the furloughed employees.

Will the employer be required to repay any monies received?

The Scheme is called a 'grant' and therefore we think that this is unlikely however, we are still awaiting further information from the government.

What does it mean to be a furloughed worker?

What are furloughed employees rights?

Furloughed employees remain employees during this period and are therefore still entitled to pay, benefits and their pension. Employees are entitled to refuse to be furloughed however, the only cause of action that is available to them should they be dismissed due to their refusal is an action for breach of contract/ constructive dismissal. Constructive dismissal is only usually open to those with over 2 years service. However, due to the significant backlog at the Tribunal and the current climate this is likely not to be an attractive option.

Can employees undertake voluntary work for their employer once they are labelled a furlough worker?

It is clear from current guidance that employees will not be able to carry out any work for the employer that furloughs them. It may be possible to carry out training/development or unpaid or temporary work for a different employer.

Employers must be careful not to insist on work as this is likely to fall foul of the Scheme.

What happens to an employee's pension and the auto enrolment pension contribution?

This will remain unchanged. However, the employer may change their pension contribution if their wages fall below a certain amount with the employee's agreement.

Are employees entitled to look elsewhere for work?

If an employee found suitable alternative work then they would be entitled to resign. It is unlikely that they would be able to carry out any paid work for an alternative employer whilst furloughed but may be able to carry out unpaid voluntary work.

Further details

When will full details be published by HMRC?

The government have not yet set a date to provide further details. We hope that they will be provided shortly and in any event, by 1st April to enable employers to make the necessary arrangements in preparation for the April payroll. We think it is highly likely that grant money will not arrive in time for April payroll.

Contact Us

If you need any assistance with how to deal with workers or employees in these unprecedented times, please do not hesitate to contact Kate Brooks on 01202 057754 or kate.brooks@ellisjones.co.uk