
Coronavirus Job Retention Scheme

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Coronavirus Job Retention Scheme

In an unprecedented move on Friday, the government announced plans to help pay the wages of employees not working, under the Coronavirus Job Retention Scheme.

The government is being forced to devise and implement momentous measures with exceptional rapidity. Some issues are unclear, others are not addressed. Further details will be published in the next few days. In common with the government, employers must act quickly. However, they should also exercise caution.

What We Know So Far:

- All UK businesses, including charities and not for profit organisations, will be eligible to apply for grants.
- The scheme offers temporary contributions to the wages of workers whom employers cannot afford to pay due to the COVID-19 pandemic, to avoid redundancies. It will operate for at least 3 months, but may be extended.
- To apply, employers must first designate *employees* they are unable to pay as 'furloughed *workers*'. These workers must be notified of their change in status. To be considered furloughed, the workers must not be working at all, but will remain 'on the books'.
- Information about the furloughed workers and their earnings can then be submitted to HMRC through a new online portal. HMRC will reimburse 80% of a furloughed worker's wages for all employment costs to employers directly, up to a cap of £2,500 per month – just above the national median salary. This amount can be topped up by employers, if they choose to do so.
- The government has pledged to pay grants for as many jobs as is necessary in order to prevent increases in unemployment. There is currently no limit on the funding to be made available for the scheme, which will be financed through the sale of gilts and bonds. The Institute of Fiscal Studies predicts that if 10% of employees are affected, the scheme will cost £10bn in the first 3 months.
- HMRC are working urgently to set up a system for reimbursement, as there is no existing method to facilitate payments to employers in this way.
- The Chancellor aims for the first grants to be paid within weeks and no later than the end of April. Grants can be backdated to 1 March.
- The scheme is intended to be as broad as possible. However, the government guidance creates confusion by referring interchangeably to "employees" and "workers" – which term covers those who contract to provide services personally, but who are not in business on their own account and that do not provide their work in an arrangement where the "employer" is actually a customer or client.

- More information on the Coronavirus Job Retention Scheme and other announcements are expected in the coming days, particularly in relation to small and medium-sized businesses.

Risks and Issues:

'Furloughed' status:

- Changing the status of an employee remains subject to existing employment law and the ability to do so will therefore be dependent upon the terms of the employment contract:
 - Few contracts contain an express right to change status or lay off employees for whom the employer has no work;
 - Unless such a right exists, employers will need to agree the change, or introduce it on notice;
 - Merely imposing the change will expose the employer to the risk of employees resigning to claim wrongful dismissal and (for those with 2 years' qualifying service) unfair dismissal. Alternatively, employees could refuse to accept the change, continue in employment under protest and later claim damages or an unlawful deduction of wages for the balance of their contractual salaries;
 - In practice, many employees may consider it more attractive to accept the change to become furloughed than face redundancy;
 - One key issue to be resolved is whether a designated employee will cease to qualify for the grant if the employer serves notice of dismissal. It is highly likely to be the case – otherwise employers will have been handed an incentive to dismiss. They can designate an employee with furlough status, claim the grant, serve notice and use the grant to subsidise dismissal.

'Wage costs':

- The precise definition of wage costs remains unclear. Government guidance to employees states the grants will cover 80% of wages for *all employment costs*, implying the grant would cover pension and National Insurance contributions.

20% top-up:

- Government guidance states that employers can “choose” to fund the difference between normal salary and value of the grant, but do not have to do so:
 - As the guidance states that the change to furloughed status remains subject to existing employment law and the contract of employment, it is unlikely that employers will be given a statutory exemption from paying sums contractually due under the contract;
 - If that is correct, employers must reach and record agreement with furloughed employees to waive all or part of the excess over the value of the grant.

Non-furloughed workers:

- It is clear from the process outlined so far that only employers can apply for grants to pay the wages of furloughed workers:
 - Employees cannot demand to be furloughed without their employer's agreement;
 - Selection of furloughed, retained and redundant employees could cause resentment within the workplace eg from employees who are retained, while their colleagues are sent home and paid 80% of their wages for no work at all;
 - The guidance does not refer to any requirement to adopt fair criteria to make those decisions, to which normal discrimination laws would apply;
 - No grant is available for employees continuing to work normal or reduced hours, for example, due to agreed short time working. As workers designated as 'furloughed' under the scheme cannot undertake *any* work for their employer, the grants cannot be used to top-up the wages of such workers. The unintended consequence of this is that employers may feel incentivised to furlough their workers rather than keeping them working, which will lead to weaker productivity in the economy and a greater cost the Exchequer. This cannot be the policy aim of the government.
 - Employers may dislike rewarding, for example, half their workforce for no work at all when they would prefer to have all their staff on half-time working. One possible solution would be to rotate workers on furlough, in order to treat all workers equally. However, it may be that such complexity proves administratively prohibitive for some employers.

Abuse:

- Concerns have already been raised over businesses exploiting the scheme by claiming workers are furloughed when, in reality, they remain in work, particularly for owner-managed companies paying wages to the owner. The government is yet to release details of how the scheme will be regulated and what evidence employers will need to provide.

The government have been clear that the scheme will apply broadly, in an attempt to protect as many jobs as possible. However, more information is awaited in relation to how the scheme will engage with workers on zero-hours contracts or those already on short-time working. The Chancellor is also promising initiatives for the self-employed – which could also extend to “workers.”

Aside from the rapidly evolving legal position, effective communication and transparency are key for all employers when implementing a period of furlough. Open discussion, pragmatic solutions and, preferably agreement will be critical in using the scheme to save businesses and reduce the risk of claims.

Contact

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