

## CORONAVIRUS: UK JOB RETENTION SCHEME, REMUNERATION AND EMPLOYEES

### Background

As well as the real and devastating impact of Covid-19 on people's health and lives, it is also clearly creating disorder for businesses, impacting on operations and causing disruption across markets.

The UK government has introduced a number of unprecedented measures to help employers, including the **Covid-19 Job Retention Scheme** designed to alleviate pressure on payroll costs. Further guidance was published by the UK government on 26 March 2020 bringing some much needed clarity on the detail of the scheme.

This note focuses on the UK government's scheme for employees but there is of course a similar scheme for self-employed individuals. There are also other schemes being put in place by governments globally and it is worth any global employer considering locally available schemes.

Under the UK scheme, **all UK employers** will be able to access support to continue paying part of wage costs for individuals who would otherwise have been laid off during the current crisis. HMRC is still working hard on setting up an online system for reimbursement expected to be in place during April.

### How does the scheme work?

- Starts in April 2020 but backdated to 1 March 2020
- Runs for 3 months initially, but may be extended
- To qualify, businesses will need to designate employees as 'furloughed' (see below)
- Information needs to be sent to HMRC about furloughed employees and their earnings (when systems are ready)
- HMRC will reimburse 80% of wages up to a cap of £2,500 per individual per month
- All UK businesses are eligible, there is no limit on the size of the organisation

### Key issues for employers

#### • What is 'furlough'?

Someone who is 'furloughed' is put on paid leave of absence by their employer. Under the scheme, a 'furloughed' individual cannot do any work for the business at all, so reducing the working hours will not be enough to qualify. Individuals who are furloughed can take on volunteering work or training, as long as they do not provide services or generate revenue for the employer in doing this.

Periods of furlough for affected employees must be a minimum length of 3 weeks. It is possible for employers to 'stop and start' furlough for employees, provided each furlough period respects the minimum 3 week period for an individual.

- **How does this impact employment rights?**

An employee's employment rights should be unaffected by the period of furlough, and holiday will continue to accrue.

A key question for employers is whether placing employees on furlough requires their consent and what impact this has on the rights of the employee under the employment contract.

Placing employees on furlough on **full pay**, whilst maintaining benefits and terms and conditions in accordance with the contract, will be possible in most circumstances without consent.

By contrast, placing an employee on furlough on **reduced pay** (to reflect the cap imposed by the UK government) without consent is more difficult. The consequences of getting this wrong could be significant - employees could claim constructive dismissal or remain in employment and claim the balance as an "unlawful deduction from wages", making the employer liable to "top up" the wages in full at a later date and potentially liable for any financial loss attributable to the deduction (e.g. overdraft fees and bank charges).

- **How are employees selected?**

Where a business remains operational, the employer may need to furlough some but not all of its employees, which may lead to some difficult decision making. Equality, discrimination and other employment laws continue to apply in the usual way to decision making processes. As a result, objective selection criteria must be applied to determine which employees will be furloughed. Where more than 20 employees are involved, consideration must be given to whether collective redundancy consultation will be triggered by the furlough process; or if not, whether it will nevertheless have to be started during the furlough period.

- **How should employers document furlough arrangements?**

Depending on whether the employer will top up salary during furlough, it may need to reach agreement with impacted employees, including consequential changes to the relevant employment contracts. As part of this, and to be eligible for the scheme, employers will also need to write to their staff confirming that they have been furloughed and keep a record of employee comms.

- **What counts as wages?**

Employers will be able to recoup the lower of 80% of an employee's 'regular wage' or £2,500 per month, **plus** the associated employer NICs and minimum automatic enrolment employer pension contributions on that wage.

For full time and part-time employees, the employee's actual base salary before tax, as of 28 February 2020, should be used for the wage calculation. Fees, commission, pension allowance and bonuses are excluded. For employees whose pay varies:

- Individuals employed for a full 12 months → the higher of: (i) the same month's earnings from 2019; or (ii) the average monthly earnings from the 2019-20 tax year.
- Individuals employed for less than a year → the average monthly earnings since starting work.
- Individuals who started in February 2020 → a pro-rata for their earnings to date.

- **How will the reimbursement work in practice?**

The scheme is a 'reimbursement' meaning that an employer must pay an individual first through PAYE (deducting income tax and NICs in the usual way) and then reclaim costs from HMRC, with the reimbursement paid directly to the employer. The government has indicated that businesses should look to the Covid-19 Business Interruption Loan Scheme to support cash flow in the interim.

- **Which employees are covered?**

Furloughed employees must have been on payroll (i.e. paid via PAYE) on 28 February 2020 to qualify. This includes full-time and part-time employees, employees on agency contracts and those on flexible arrangements and zero-hour contracts. The scheme also covers any employees who have been made redundant since 28 February 2020 if they have since been rehired. Any employees who were hired after 28 February 2020 cannot be included.

- **What if an employee earns more than £2,500 per month?**

Employers can choose to fund the difference between the scheme payment and an individual's salary, but do not have to. If an employer chooses not to, it will need to amend the individual's contract to reflect their revised salary whilst furloughed to avoid being exposed to a claim for constructive dismissal or unlawful deduction of wages. Any employer NICs or pension contribution on these additional amounts will of course not be refunded through the scheme.

- **What about other contractual pay and benefits?**

The employer will continue to be liable for contractual benefits such as health and life insurance policies and any other cash allowances such as cash in lieu of pension contributions, unless an employee agrees otherwise.

- **What's the tax treatment of payments made to employers made under the scheme?**

Payments received by employers under the scheme should be included as income in the business's calculation of its taxable profits for income tax and corporation tax purposes. On the basis that the payments of wages out to employees should be tax deductible, this should result in a tax neutral position for the employer.

## Broader pay issues

In these uncertain and worrying times, companies are considering a broad range of other responses to adapt to the new environment.

### Calling for PAYE/NICs holiday:

There is no proposal from the government as yet but many businesses are calling for a 3 month PAYE and NICs holiday to be introduced. If implemented, this would be similar in nature to the extended business rates holiday that has already been introduced for certain businesses. For businesses in real financial distress, the government has also indicated that HMRC's Time to Pay service may offer support with outstanding tax liabilities.

### Conserving cash and setting pay:

Businesses are working through difficult issues around executive and wider employee pay, including considering pay cuts or freezes, zero or reduced bonuses and how best to deal with performance-related pay.

Trends we are seeing and discussing with companies include many of those seen during the global financial crisis of 2008 onwards.

- For performance-related pay, including performance against any Covid-19 related business plans as one of the performance measures for 2020.
- Ensuring businesses have enough flexibility in bonus and long term incentive plans to increase or decrease pay outs in the future. Being clear on the powers and discretions here, particularly when communicating with employees, is key.
- Amending or revisiting existing performance targets where it is clear that targets previously agreed no longer offer any incentive.
- Suspension of performance-related pay at senior levels, particularly in light of shareholder advisers Pirc writing to 4,000 listed companies globally urging them to suspend payments (other than salary) to their executives from April until the end of the financial year.
- Director and senior executive pay cuts.
- Conserving cash by paying employees and directors in shares and other instruments.
- New incentive arrangements, especially for businesses actively involved in tackling Covid-19 where specialist skills, expertise or simply manpower are at a premium.

## Broader employment issues

Issues that employers are grappling with go well beyond the Job Retention Scheme including:

- Dismissing employees engaged since 1st March 2020 (who are not covered by the Furlough scheme).
- The practicalities surrounding remote redundancy consultation (collective and individual).
- Whether there may be “lay-off” provisions which enable them to send workers home without pay for a designated period or “short-time” working providing for reduced hours and pay.
- Savings by the reduction of contractors, workers and dialling down time on zero hours contracts,
- Variations to the contract to reduce pay or other benefits with consent or without (having regard to contractual and statutory requirements when doing so or the need to engage in collective consultation).
- Employee holiday, can they be required to take it during designated periods, when do employees have a right to roll over to future years under the new legislation in this area?
- Home working and the employers duties, equipment needs, safe system of work and reasonable adjustments for those with long term disabling conditions.
- Guidance from applicable regulators and/or the Health & Safety Executive on home working.

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