



Burgis & Bullock
Chartered Accountants

Coronavirus Job Retention Scheme

Employers Beware!

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Many employers faced with the prospect of having to close their businesses for a period of time welcomed the Government's announcement of their Job Retention Scheme [JRS] which will provide the opportunity for most employees to receive 80% of their pay whilst they cannot work and would otherwise have to be made redundant.

However, the JRS guidelines make it clear that in applying the scheme, employers are expected to follow employment legislation requirements.

If employers do not follow these requirements, then they could find themselves facing expensive employment claims in the future. If you are in any doubt, then you should consult with an employment law specialist.

What should employers watch out for?

Initiating the scheme

Whilst the JRS introduced the term "furloughing" it is very similar to the concept of laying off employees. Although the ability to temporarily "lay off" employees has been around for many years, very few employment contracts actually contain the right for employers to do so. **Without the consent of the employee, employers cannot lay employees off or put them on short time working because to do so would be a breach of contract.**

Consequently, the first action the employer must do is check if the right to lay off is in the contract of employment and, if it is not, then they **must** get the employees consent, in writing.

Check if there are lay off clauses already in the employment contract that there is not a required period of notice that the employer has to give the employee.

When considering which of your employees should be furloughed, **the equality and discrimination rules still apply.**

You should therefore record the reasons for your selection. Remember you could face discrimination claims from those who believed they should not be furloughed as well as those you didn't furlough but who thought you should have.

Once consent has been established then the employer must write to the employee to confirm the period of furlough they are being asked to undertake. Remember the minimum number of weeks that the furlough period must be for is 3 weeks to qualify for the JRS. **The employer is required to keep copies of these furlough letters for 5 years in case they are required as part of HMRC's audit into the JRS.** Please see our earlier guidance on what should be included in the furlough letters.

If you are considering furloughing 20 or more employees, then it is likely that you will have to carry out a period of consultation. Having to carry out consultation will obviously mean a delay in being able to place employees on furlough and you are strongly recommended to take the advice of an employment law legal specialist on this point.

Any entity, including charities, can apply for the scheme but if you are receiving public sector money to fund a position then there is an expectation that the role would be continuing during this period and therefore that employee would not qualify to be furloughed. Public sector money would include funds from Local Authorities or Central Government.

Operating the scheme

Remember the scheme can only be applied to those individuals who were on your payroll on or before 28 February 2020. If someone joined after that date, then they cannot be furloughed.

If someone stopped working for you after 28 February 2020 you can re-employ them and then immediately place them on furlough.

As long as they were on your payroll at 28 February 2020 then zero hours staff can be furloughed, as can nannies; directors (subject to the comments below); agency workers or foreign nationals.

Employees are not able to do any work during the furlough period, although they may partake in training or volunteer work. If you put employees on reduced working hours they cannot be furloughed. If you top up the 80% of pay, then they still cannot carry out any work for you.

Directors/office holders may carry out their statutory duties as a director during the furlough period, but they must not carry out any work to generate business or provide services for their company. Please see our separate guide on “Directors Furloughing and their Responsibilities” for more details on this.

Apprentices can be furloughed but if they continue their training during the period you must make sure you pay them at least the Apprenticeship Minimum Wage/National Living Wage. So, if the 80% is not sufficient you will be required to pay the extra to meet these criteria.

All payments made to employees are subject to PAYE, NIC and, where applicable, Auto Enrolment Pension contributions. However, employers will be able to claim back the relevant employers NIC and AE employer pension contributions as part of their JRS grant.

Employees who are self-isolating will be able to get Statutory Sick Pay and they can be furloughed once they can no longer receive SSP. Those employees who are shielding or required to stay home with someone who is shielding or for other caring responsibilities can be furloughed.

How much can I claim for?

You can claim for 80% of your employee’s salary up to a maximum of £2,500 per month, plus employers NIC and Auto Enrolment employer contributions. This grant will be prorated if employees are only furloughed for part of a pay period.

For those with variable pay arrangements you pay the higher of:

- The same month’s earnings from the previous year: or
- The average monthly earnings for the 2019-20 tax year.

As when you calculate holiday pay the calculation of average pay must include regular overtime, bonuses, commission payments etc. Discretionary bonuses/tips should be excluded.

Benefits in kind or salary sacrifice schemes should be excluded from the salary calculation. HMRC have announced that employees can opt out of salary sacrifice schemes as they consider Covid-19 a life event permitting such a change.

Students loans need to be paid as usual and are not covered by the grant.

You will still need to pay the PAYE as usual on the payments made to employees under the scheme, although you can apply to HMRC for a time to pay arrangement.

Employee rights

Employees rights still accrue during the furlough period.

So, they have the right to accrue holiday; maternity and other parental rights; rights to unfair dismissal and redundancy payments.

Whilst not yet explicitly confirmed it would appear that employees may not be able to take holiday (including Bank Holidays) during a furlough period. However, the employee will accrue the right to take the holiday entitlement that accrued during the period once they return to work. To avoid the situation where employers could have been faced with lots of requests for holiday just as they return to work the Government also announced that temporarily employees would be allowed to carry over up to 4 weeks holiday to the next 2 years. It would be up to the employer's discretion to agree with an employee as to whether any additional amount of holiday could also be carried over. If holidays are permitted, then the employer would be required to pay the employee 100% of pay for that time and it would not attract the 80% grant.

Employers do have the right to tell employees when they can or can't take holiday. However, if they must give employees a specific period of notice which is:

In the case of requiring them to take holiday, the equivalent to twice the numbers of days holiday that is involved. So, if you want them to take 5 days holiday you must give them 10 days' notice.

In the case of cancelling a holiday then the notice period is the same number of days as the holiday that is to be cancelled. So, if you are cancelling a 5-day holiday you must give them 5 days' notice.

So, if you are thinking of asking employees to use some of their holiday entitlement during this period please be aware of these notice period requirements.

By law, employers are responsible for the health and safety of all employees, including those working from home.

Employer responsibilities

During the coronavirus pandemic, it's very unlikely that employers can carry out usual health and safety risk assessments at an employee's home.

However, an employer should still check that:

- each employee feels the work they're being asked to do at home can be done safely
- employees have the right equipment to work safely
- managers keep in regular contact with their employees, including making sure they do not feel isolated
- reasonable adjustments are made for an employee who has a disability.

If changes are needed, employers are responsible for making sure they happen.

Remember your responsibilities include supporting your employees' mental health and wellbeing, including furloughed employees. Also, your working employees continue to be covered by the working hours directive, whether they be at home or in the office.

Final word of caution

The latest JRS guidance states It is designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy. However, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus.

Initial commentary from the Government referred to the scheme applying to those employees who might otherwise have been made redundant. We have yet to see how HMRC might assess whether the grant was applicable to a business, for instance by challenging the interpretation of “severely impacted”. The latest guidance states that HMRC will be conducting audits after the scheme has closed. It would therefore be sensible to record some notes now as to how your business was impacted by the virus and why you needed to furlough all or some of your staff as a result.

Conclusion

As ever the role of employer is a difficult and onerous one. Despite the Government offering a “lifeline” to help with cashflows, they are not lifting any of your responsibilities towards your employees. If you have any concerns with regards to the position with your employees, then we recommend taking professional advice so that in the event of a future claim your position would have some protection.

Burgis & Bullock, Chartered Accountants
Phone: 0345 177 5500

Web: www.burgisbullock.com
Email: info@burgisbullock.com