

# Coronavirus Job Retention Scheme (the Scheme)

The country has today woken up to an unprecedented closure of businesses and restrictions on movement, and many businesses are asking 'what do we do now'?

Since the Chancellor announced his unprecedented job retention scheme (the Scheme) on Friday 20th March 2020 we've been inundated with queries – unfortunately the Government has not yet passed legislation (anticipated in April) which will set out the precise legal effect and conditions of the Scheme, although content of the proposed legislation was revealed yesterday. However, we feel it important to share with you our understanding so far but ask you to recognise that it will be subject to the legislation when passed and the possibility of change and further emergency action.

Here's what we see so far:

1. To benefit from the Scheme the Employer needs to designate “furloughed workers” who are put on leave with no requirement that they work. The intention appears to be that there is no work for the “furloughed workers” who would otherwise be made redundant. (The expression “furloughed workers” is completely new to UK law and appears to be borrowed from US labour law.)
2. All businesses are eligible for support from the Scheme.
3. The scheme covers all employees and workers who have tax and national insurance deducted at source through the PAYE scheme.
4. You will have to notify employees of this change in status to “furloughed workers”. The change in status remains subject to existing employment law and as such, it would be best to avoid the prospect of claims by getting an employee's agreement/consent to the change in status and reduction in pay (if that's what the employer decides, see 6 below) – if agreement is not possible then we will need to consider each set of circumstances on its own facts to decide the best way to proceed.
5. The clearest way to secure agreement/consent from an employee is to use a furlough agreement, which will set out the understanding between the parties. This document can deal with issues such as the sums to be paid and the anticipated duration.
6. The Scheme will pay a furloughed employee 80% of their average pay up to a maximum of £2,500 net per month. Unofficially we understand that the average will be worked out using the last 4 weeks' pay rather than the usual 12 weeks' which we often see being used for employment purposes. This broadly means that employees earning up to £40,000 a year will be able to receive 80% of their net pay under the Scheme. The employer will wish to consider whether the employee receives 100% of their pay – note that absent agreement, not paying the employee their full salary would be a breach of contract giving rise to potential claims – realistically in the current climate employees may likely agree to receive a lower sum.
7. The scheme will be managed through a new online portal and a new system of reimbursement both of which are currently being set up. Ultimately, it sounds as though it will be a reverse of the PAYE payments to HMRC.
8. Our guess is that the first payment isn't likely to be paid out to employers until towards the end of April which will especially cause a problem for those employers who have to run a weekly payroll.

9. But the impact of delay in payment under the Scheme can be lessened for those businesses with a turnover of under £45 million per annum who can apply for a business interruption loan which is interest free for 12 months. You should consider borrowing enough to cover your payroll until the first payment is made at the end of April. For those with a turnover in excess of £45million the corporate finance support package is due to be launched in two weeks so a review of the available cash at the deferment of VAT and tax payments would need to be considered before discussing with your bank, who we're told should be supportive.
10. We understand that no holiday pay or leave will accrue while an employee is furloughed and no tax or NI is payable both of which are logical as it would be a period of leave and the government will be paying the salary costs.
11. The scheme has retrospective effect as of 1 March 2020 and will initially apply for 3 months until the end of May 2020.
12. It is likely to be possible to reinstate employees who were made redundant or laid off in March 2020, and instead place them on furlough. Where notice and redundancy payments have been made, it will be necessary to discuss how these will be repaid.
13. The current draft Coronavirus Bill suggests that making an employee redundant for a coronavirus related reason even though SSP or furlough support was available from the Government will amount to an automatically unfair dismissal.

There are some important things we don't know yet including:

- How flexible will the scheme be?
- Will a furloughed employee be able to do any work at all? It's likely that they won't be able to do any otherwise it would undermine the scheme.
- Will average pay be based on basic pay or actual take home pay? We assume actual take home but we will have to wait and see.
- Whether employment costs (Income Tax, Employee/Employer National Insurance contributions, pensions etc.) will be covered by the 80%/£2,500.
- How will you evidence whether someone who is not working – has no work to do? We expect given the emergency that this will be relatively straightforward via a declaration.
- What happens if the business is unable to continue and redundancies are required whilst an employee is furloughed?

In the immediate term we recommend that businesses take the following steps: -

1. Keep hold of as much cash as possible for as long as you can (but speak to creditors particularly HMRC for agreement before withholding PAYE and NI).
2. Make an application for a business interruption loan even if this is not necessarily required at the moment.
3. Review your staffing levels and consider who might be placed on furlough leave – this would be the same approach as considering a redundancy situation asking yourself the question which jobs and roles do I need less of/do I not need at all in the current circumstances (the Scheme allows you to hang on to your employees pending the end of the crisis and being in the best position to pick up again).
4. Keep in regular contact with your employees, providing update where possible.

There's a lot for us to learn about furloughing in the coming days and we are here to help you avoid unnecessary claims or disputes and to make sure that you are able to claim the grant.

Please call the Covid-19 helpline on 03330 433230 or contact your usual Brabners Employment team contact.

The contents of this document provides information that is of general nature and is subject to the eventual legislative and other possible changes. We do not accept liability for action taken on the basis of the above information alone and you should seek advice on your own individual circumstances.