

Job Retention Scheme

What should employers do before submitting their claims?

20 April 2020

Employers must strike a difficult balance between ensuring their claims are complete and accessing JRS grants as quickly as possible.

In preparing for the launch of the Job Retention Scheme (JRS) claims portal, employers have modelled the implications for their workforces and businesses based on HMRC's previous guidance. This has changed as the JRS policy has developed. However, the Treasury has now published the detailed and legally binding JRS rules. HMRC also published further guidance on 17 April and on the morning of 20 April. This article summarises how the JRS operates and – in light of the new Treasury rules and HMRC's latest guidance – highlights the key factors employers should consider when submitting their JRS claims. This article is based on the position as at 20 April 2020. Developments in this area are fast moving, and employers should be aware that HMRC could issue further updates.

How the JRS works

Under the JRS, HMRC will pay participating employers 80 percent of a 'furloughed worker's' pay (subject to a maximum payment of £2,500 per month) **plus** the associated employers' NIC and minimum employer pension contributions. The scheme will operate from **1 March to 30 June 2020** and may be extended. Claims may be made from **20 April**, and should be paid **within six working days**.

HMRC's latest guidance states that claims will be reviewed, and payments withheld or recovered where a claim is based on inaccurate information. Claims may be retrospectively audited, and employers must retain relevant records (including the amount claimed for each worker, the supporting calculations, and the period covered by each claim) for five years.

Who can participate?

Any employer that operated a PAYE scheme on 19 March 2020, is enrolled for PAYE Online, and has a UK bank account can access the JRS.

The basic rule is that employees and other individuals paid subject to PAYE, such as officeholders and agency workers, can be furloughed provided they were on the payroll and included in an RTI submission made **on or before 19 March 2020** (the qualifying date was previously 28 February 2020).

However, individuals who were made redundant after 28 February can be rehired and then furloughed to preserve their job, even if they were not re-employed until after 19 March. Claims can be made in relation to these workers from the date on which they were furloughed.

Employees who were on unpaid leave on 28 February can only be furloughed from the date on which it was agreed they would return to work, but employees placed on unpaid leave

after that date can, with their agreement, be recalled and furloughed at any time.

HMRC's guidance specifically confirms that individuals can be furloughed if they cannot work because they are 'shielding' in line with public health guidelines, or have COVID-19 related caring responsibilities (e.g. childcare due to school closures).

Furloughed employees cannot undertake any work for the employer or any connected organisation, and so the JRS **cannot** be used to meet part of the employment costs of individuals who continue to work reduced hours. However, furloughed workers can undertake a new or existing employment with an unconnected employer.

Workers must be furloughed for a minimum of three consecutive weeks, but can be furloughed more than once while the JRS runs

How are employees 'furloughed'?

An employer can furlough some or all of its eligible workers with their agreement. HMRC's latest guidance indicates this must be done in line with employment law principles, and that whilst there needs to be a written record of the agreement, the employee need not have provided a written response indicating their assent. HMRC's latest guidance does not appear to be in strict agreement with the Treasury rules on this point, which seem to require a written response from the employee. This remains a complex area, and employee consent **must** have been obtained in order for a furlough to be valid.

The employer must provide certain details of furloughed workers to HMRC through the online portal.

Normal employment law principles apply, including contractual requirements, anti-discrimination and consultation legislation. Mandatory collective consultation of 30 or 45 days in GB, and up to 90 days in NI, may be triggered depending on the number of affected employees. Furloughed workers retain their existing employment rights and continuity of employment.

Under the JRS, the employer **must** pay the furloughed worker at least the lower of 80 percent of their reference pay and £2,500 per month, subject to the usual payroll deductions. The employer can agree to pay furloughed workers more than their minimum JRS entitlement if it so wishes.

If an employer pays **less** than the minimum JRS entitlement to furloughed workers, the relevant payments will **not** be reimbursed by HMRC.

The Treasury Direction indicates where furloughed employees were paid less than their minimum JRS entitlements between 29 February and 19 April (exclusive of both dates), the employer can still claim reimbursement for the amounts previously paid provided they pay the relevant shortfall to those employees before claiming the relevant amounts under the JRS.

This suggests that there is a risk that employers who defer employee payment until they receive funds under the JRS scheme may not be entitled to reimbursement for that initial period. However, the wording of the shortfall paragraph in the direction makes it difficult to interpret its proposed meaning and it would seem unlikely that it would be Treasury's intent to restrict access to the grant in the circumstances. Clarification is being sought to confirm businesses' obligations in this regard.

What are the practical points?

Categorising employees and calculating reference pay

For full and part time 'fixed rate employees' (as defined by the Treasury rules), the grant will be based on their actual salary, before tax, for the latest pay period that ended on or before 19 March. However, employers who furloughed workers on the basis of HMRC's earlier guidance can use actual pay for the latest period ended on or before 28 February as the reference salary for their first claim.

For other employees (i.e. those with variable pay), their reference pay is the higher of the:

- Average monthly pay for the 2019/20 tax year; and
- Pay from the same month in the prior year.

Broadly, the reference pay includes non-discretionary cash payments such as wages, overtime, fees and compulsory commission. Discretionary payments – such as bonuses and tips – and the cost of benefits in kind are excluded.

For these purposes, the Treasury rules definition of 'fixed rate employee' is similar to the definition of 'salaried worker' for National Minimum Wage (NMW) purposes.

This was not covered in HMRC's earlier guidance. In practice, many furloughed workers considered by their employer to be on 'fixed pay' based on HMRC's earlier JRS guidance will not be treated as 'fixed rate employees' under the final Treasury rules. HMRC's latest guidance suggests that, provided the employer's approach is reasonable, they will not refuse or recover claims based on how employees have been categorised. However, this is a difficult area. Employers should ensure the approach they take could be sustained if challenged, and is consistent with how the relevant workers are treated for NMW purposes.

HMRC released an online calculator on 20 April to assist employers in compiling their JRS claims. The calculator is currently unable to support calculations for a number of categories of employee, the most notable being those employees with variable pay. It is expected subsequent versions of the calculator will address this issue, however, until that time, employers will have to calculate their own claims, without aid of HMRC's calculator, for all but fixed rate employees.

Holiday pay

HMRC's latest guidance also confirms that workers continue to accrue, and may take, holiday leave whilst furloughed.

Holiday whilst furloughed must be paid at the employee's full rate, but the employer's claim remains subject to the usual JRS limit. HMRC will keep this policy under review.

Frequency of claims

HMRC's latest guidance states that employers cannot make more than one claim during a claim period and cannot make any changes to submitted claims.

KPMG comments

In light of the recently published Treasury rules and HMRC guidance, in our view there are five areas that employers should review when submitting their JRS claims:

- Have you identified all eligible workers? As the JRS has been extended to qualifying workers who were on the payroll on (and who were notified to HMRC on an RTI submission on or before) 19 March 2020, rather than 28 February 2020, employers should ensure these individuals are considered in their furlough plans.
- Do you have written agreement to the furlough? Employers should ensure they hold a valid written record of the furlough agreement before the first claim is made.
- Have you identified all your 'fixed rate employees'? In practice, many furloughed workers who appeared to be on 'fixed pay' based on HMRC's earlier guidance will not be treated as 'fixed rate employees' under the Treasury rules. Employers should confirm that the basis on which they have categorised furloughed workers and calculated their reference pay is appropriate before submitting their claims. Furthermore, as HMRC's current online calculator only supports fixed rate employees, additional care may be required to ensure the calculations for other employees are accurate as HMRC have not provided the means to allow employers to verify these calculations.
- Have reference pay components been correctly identified? Very broadly, the Treasury rules and latest HMRC guidance confirm that reference pay includes regular cash payments made under legally enforceable arrangements. However, the application of the rules to individual remuneration packages can be complex. Employers should review the components that they took into account when calculating furloughed workers' reference pay based on HMRC's earlier guidance to ensure these are in line with the latest position.
- Do you need to make any 'top up' payments prior to your first claim? Furloughed workers who received less than the minimum JRS payment between 29 February 2020 and 19 April 2020 (exclusive) must arguably be paid the shortfall before their employer makes a claim for those payments. Employers should confirm whether they are required to make such a 'top up' payment in order to be able to reclaim these amounts through the scheme. Further clarification is being sought to confirm the intent behind the Treasury Direction in this regard.

Claims must be accurate and cannot be revised. Given that HMRC's latest guidance (including the first worked examples) was made available only from the evening of 17 April and that the online calculator released on 20 April only currently covers fixed rate employees, employers should review their claims carefully before they are submitted to the HMRC portal.

For further information please contact:



Johnny Hanna
*Partner in Charge,
KPMG Belfast*

e: johnny.hanna@kpmg.ie
t: +44 289 089 3812



Eunan Ferguson
*Director, Employment Taxes,
KPMG Belfast*

e: eunan.ferguson@kpmg.ie
t: +44 289 089 3706



Aidan Smith
*Director, Employment Taxes,
KPMG Belfast*

e: aidan.smith@kpmg.ie
t: +44 289 089 3772



Sinead McCavera
*Manager, Employment Taxes,
KPMG Belfast*

e: sinead.mccavera@kpmg.ie
t: +44 289 026 8815