



Employment Law Newsletter - September 2020

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Job support scheme

Chancellor Rishi Sunak repeatedly warned us that there would be no extension to the Coronavirus Job Retention Scheme (CJRS) beyond 31st October 2020. Many of you have changed the structure of your businesses because of that warning.

Under the CJRS the Government pays a proportion of an employee's wages. But on 24th September 2020, the Chancellor revealed the Job Support Scheme (JSS), under which the Government will pay a proportion of the employee's wages. Detailed guidance is to come but what do we know now?

What's its purpose?

It aims to help keep your employees attached to the workforce by protecting viable jobs in businesses that face lower demand over the winter months owing to COVID-19. The Treasury Factsheet uses the term 'employees'. The guidance may include workers.

When will it run?

The scheme will open on 1st November 2020 and run for 6 months until April 2021.

How will it work?

You must continue to pay your employee for the time they work, but the cost of the hours they don't work will be split between the employer, (through wages), the Government (through wage support) and the employee (through a wage reduction).

Which employers will be eligible?

Employers must have a UK bank account and UK PAYE schemes to claim the JSS grant.

All small and medium employers will be eligible without any financial assessment test.

Large employers will only be eligible where their turnover is lower now than before experiencing difficulties from COVID-19.

Further guidance is promised on what the financial assessment test will entail for large employers. However, the JSS Factsheet states that the Government expects that large employers will not be making capital distributions, such as dividends or share buybacks if they are using the JSS.

We also await detail of how small, medium and large employers will be defined for the JSS.

Which employees will be eligible?

Employees must be on your PAYE payroll on or before 23rd September 2020. This means that you must have submitted Real Time Information notifying payment to that employee to HMRC on or before 23rd September.

How much will the Government pay?

The Government will pay a third of hours not worked up to a cap, with you contributing a third. This will ensure employees earn a minimum of 77% of their normal wages, where the Government contribution has not been capped.

What about the Job Retention Bonus?

If you use the JSS, you will also be able to claim the Job Retention Bonus (JRB), if you meet the eligibility criteria. The JRB is a one-off payment to employers of £1,000 for every employee for whom you previously claimed under the CJRS, and who remains continuously employed through to 31st January 2021. Eligible employees must earn at least £520 a month on average between 1st November 2020 and 31st January 2021.

How many hours must employees work?

To get a rebate on an employee's pay under the JSS, employees must work a minimum of 33% of their usual hours and must not be on notice of redundancy.

Will the scheme be flexible?

This minimum threshold requirement of 33% of usual working hours will apply for the first three months of the scheme after which the Government will consider whether to increase it. You will be able to cycle employees on and off the scheme and they do not have to be working the same pattern each month, but each short-time working arrangement must cover a minimum period of seven days.

How will the contributions work?

The employee works 33% of normal hours and receives 77% of pay. 55% funded directly by the employer (33% + 22%) and 22% funded by the Government (via the employer). The Government has rounded down the numbers.

For every hour the employee does not work, you and the Government will each pay one-third of the employee's usual pay. The Government contribution will be capped at £697.92 per month. This means that, where the Government contribution has not been capped, employees will receive at least 77% of their pay. The grant will not cover Class 1 employers' NI or pension contributions, which you will have to pay.

HM Treasury #WINTERECONOMYPLAN

JOB SUPPORT SCHEME

6 month scheme, starting 1 Nov

To be eligible employees work a minimum of 33% of their hours

For remaining hours not worked, the government and employer pay 1/3 wages each

So employees working 33% of their hours will receive at least 77% of their pay

■ PAID BY EMPLOYER
■ PAID BY GOVERNMENT

AN EMPLOYEE WORKING 33% OF THEIR NORMAL HOURS WOULD RECEIVE 77% OF THEIR PAY

22% 55%

How do you claim the grant?

You will be able to make a claim online through GOV.UK from December 2020 and the government will pay the grant monthly in arrears. So, you will only be able to claim for a given pay period, after you have paid the employee and sent your RTI return to HMRC.

Must you have used the CJRS (furlough)?

No. Neither you nor the employee needs to have previously used the CJRS to access this scheme. However, if you wish to claim the Job Retention Bonus, you must have used CJRS.

What are 'usual hours' and usual wages'?

We are waiting for further guidance, but we expect the methodology to be similar to the CJRS. For employees that you have previously furloughed, calculations will be based on their usual (pre-furlough) pay. However, we don't know how the scheme will view permanent pay reductions that employees have agreed because of COVID-19. The reference date for 'usual' will be crucial.

What about paying for the hours that employees work?

The employee must work at least 33% of their usual hours. For the time they work, you must pay their normal contractual wage. For the time they don't work, the employee will be paid up to two-thirds of their usual wage.

Can employees work more than a third of their normal hours?

Yes. If employees work more than a third of their normal hours the JSS grant amount will be reduced as the unworked hours for which the grant can be claimed will be reduced. Here is the example from the Treasury Factsheet:

Proportion of normal hours worked	33%	40%	50%	60%	70%
Proportion of normal hours not worked	67%	60%	50%	40%	30%
Employee earnings (% of normal)	78%	80%	83%	87%	90%
Government grant (% of normal wages)	22%	20%	17%	13%	10%
Employer cost (% normal wages)	55%	60%	67%	73%	80%

Can employers claim the JSS grant and top-up employee wages?

No. Unlike the CJRS, the JSS factsheet states the Government's "expectation is that employers cannot top up their employees' wages above the two-thirds contribution to hours not worked at their own expense".

What if you make a mistake?

HMRC will check claims. If you submit incorrect information, it may withhold payments or make you return them. You can only claim the grant for wages that you have paid.

How should you agree to new short-time working arrangements?

Discuss and make any changes to the employment contract by agreement. The normal laws on fairness, equality and discrimination apply to your decision and process for agreeing to new arrangements.

What about redundancies?

Unlike the CJRS, you cannot make an employee redundant or put them on notice of redundancy during the period you claim the grant for that employee.

What about those on leave?

The Factsheet doesn't explain how the JSS will treat those on family-related leave, sick leave or who are self-isolating.

Redundancy payments and furlough

Many of you have furloughed employees but now plan to make them redundant. Calculating statutory redundancy pay (SRP) for employees relies on average weekly pay, alongside other factors such as length of continuous service and the employee's age. Average weekly pay is usually worked out by taking what you have paid over the 12 weeks before you notify the employee that you are making them redundant and dividing by 12 to get the average.

So how do you calculate those employees' redundancy payments?

Laws brought in on 31st July 2020 ensure that furloughed employees receive SRP based on their normal wages, rather than a reduced furlough rate. The changes also apply to statutory notice pay.

This legislation ensures that you must treat any weeks an employee spent on furlough in the 12-week reference period as if they were working, and on full (100%) pay.

This legislation does not affect any enhanced redundancy pay that may be in an employee's individual contract but applies to basic statutory redundancy pay and notice pay.

The statutory cap of £538 on a week's pay for calculating SRP hasn't changed so there's no impact on the overall maximum SRP that you must pay.

What about notice?

You can continue to claim a CJRS grant for a furloughed employee who is serving either a statutory or contractual notice period. So, you can use the grant towards paying for an employee's notice pay if they remain on furlough, but you'll need to fund the required top-up notice pay to ensure the employee receives a full notice payment. The grant can't, however, be used to fund either an SRP or an enhanced redundancy payment.

The CJRS grant won't cover you if you pay the employee in lieu of notice. The grant also won't continue to apply if the employee's furlough ends before the end of their notice period. Therefore, subject to complying with fair redundancy requirements, you might want to try to align the end of an employee's notice period with the end of the CJRS.

The regulations don't apply to employments terminated before 31st July 2020.

Test and trace support scheme

Alongside national rules, you also need to wrestle with local lockdown rules. So how do you deal with employees who can't come to work because they live in an area with a high rate of COVID-19 infection?

On 20th September 2020 a government press release confirmed a Test and Trace Support payment scheme paying £500 to both employed and self-employed people on low incomes who are required to self-isolate from 28th September. This is designed so that those on low income can self-isolate without breaking the rules and working away from home.

The scheme will therefore only support people who are asked to self-isolate by NHS Test and Trace.

Who is eligible?

To be eligible for a support payment the person must live in England and:

have been asked to self-isolate by NHS Test and Trace

-
- be unable to work from home and face losing income as a result
- be claiming at least one of these benefits: universal credit, working tax credit, income-related employment and support allowance, income-based jobseeker's allowance, income support, pension credit or housing benefit.

These self-isolation support schemes will be administered by local authorities and should be in place by the 12th October. People who self-isolate from 28 September onwards will have to receive backdated payments once the local authority establish the scheme.

Legal obligation to self-isolate

From the 28th September those asked to self-isolate by NHS Test and Trace are legally obliged to do so. Fines for breaking the self-isolation rules start at £1,000. There are similar penalties for those who break quarantine after international travel. The fine can increase to £10,000 for repeat offences. The increased fines also apply to employers insisting that self-isolating staff still attend work.

It is good practice to treat self-isolation as sick leave and follow your usual sick pay policy or agree that the time will be taken as holiday. You could also advise employees to work from home if possible. Treating the employee as being on sick leave or as working from home should avoid potentially infected people coming into work.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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