



# CLIENT BRIEFING

## CORONAVIRUS JOB RETENTION SCHEME AND SSP RELIEF – OPPORTUNITIES AND LIMITATIONS

26 March 2020

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**“HMRC will reimburse 80% of wage costs of “furloughed workers”, up to a cap of £2,500 per month”**

### UPDATED CLIENT BRIEFING

On 26 March 2020 HM Government issued new guidance in relation to the Coronavirus Job Retention Scheme. This Client Briefing updates and supersedes our previous Client Briefing issued on 23 March 2020.

### OUR COMMENTS ON THE JOB RETENTION SCHEME AND SSP RELIEF

#### There is a financial incentive to furloughing

The Job Retention Scheme is available to all UK businesses, and it may be worth considering whether your business could benefit from the scheme. Numerous clients have made queries in relation to this novel scheme, and, as we have informed them, it is important to note that changing the status of employees remains subject to existing employment law and a careful analysis of whether any of your employees can be designated as “furloughed workers”, and the steps that are required to do so lawfully, will require to be undertaken prior to changing their status.

One aspect to note is that this may, pending further detail/changes, financially incentivise businesses to furlough part of the workforce (meaning those persons furloughed are not asked to work or asked not to work) rather than keeping all of the work force “working” when there is only sufficient work to keep everyone busy part time. To take a simple example, if available work fell by 50%, it appears to incentivise “furloughing” 50% of the workforce in order to secure the 80% relief with the other 50% presumably working full-time.

Furthermore, businesses in need of short-term cash flow support may also be eligible for a Coronavirus Business Interruption Loan, please contact us for more information on this.

However, on basis of the questions asked by Dr Luke Evans MP, it is our understanding that the scheme is backdated to 1 March 2020 with a view to covering those who have already been made redundant as a result of the coronavirus. Therefore, a significant caveat to the above is that an employer cannot furlough someone after hearing the announcement and then claim back to 1 March 2020 even though the employee(s) had been working the entire time.

#### Zero-hour and flexible contracts

Zero-hour and flexible contracts can cover a whole range of working arrangements. It is our understanding that the 80% grant is applied to the higher of:

- the earnings in the same pay period in the previous year; or
- the average earnings in the whole previous 12 months (or fewer if they have worked for less time than this, including a part month calculation if they were taken in February).

#### Furloughing employees for a short period of time followed by re-activation

A worker must be furloughed for a minimum of 3 weeks for their employer to be eligible to claim under this scheme. As such, it is not possible to furlough for 1 week only and then re-activate an employee.

However, it is our understanding that an employee may be furloughed more than once under the Job Retention Scheme, which means that an employee could potentially be furloughed for 3 weeks at a time with a review of the status at the end of each three-week period.

#### Terminating an employee while on furlough

An employer is still able to make an employee redundant while that employee is on furlough or immediately after. There is no requirement to bring the employee back to work after the period of furlough. If an employee is made redundant during the period of furlough, then grant payments will cease. However, in both cases normal redundancy rules and protections will apply.

Where a business feels that redundancy is the only option, it must still follow the rules which include giving a notice period and consulting staff before a final decision is reached.

#### Statutory Sick Pay relief does not cover contractual sick pay

The Statutory Sick Pay relief applies to statutory sick pay only and not to contractual sick pay. The Statutory Sick Pay relief covers up to 2 weeks’ Statutory Sick Pay per eligible employee for SMEs with less than 250

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employees. HM Government has yet to set out the specific criteria for this relief, and further information on the gateway for applications is expected to follow.

Both the Job Retention Scheme and the Statutory Sick Pay relief are still quite novel and, as noted above, further updates and guidance is expected, depending on the further impact of COVID-19 on UK businesses. As we continue to advise clients and partners on these novel frameworks, Rooney Nimmo will continue to monitor the developments closely.

## BACKGROUND

In March 2020, Rishi Sunak, the Chancellor of the Exchequer, announced a package of £330bn in loan guarantees and a £20bn fiscal intervention including further business rate relief for companies to support businesses affected by the novel coronavirus COVID-19.

These measures, which are unprecedented in scale, include, for example:

- the new temporary Coronavirus Business Interruption Loan Scheme for small and medium-sized businesses;
- a Coronavirus Job Retention Scheme (“Job Retention Scheme”);
- deferring VAT and Income Tax payments;
- a Statutory Sick Pay (“SSP”) relief package for SMEs;
- a 12-month business rates holiday for all retail, hospitality and leisure businesses in England;
- small business grant funding of £10,000 for all businesses in receipt of small business rate relief or rural rate relief;
- grant funding of £25,000 for retail, hospitality and leisure businesses with property with a rateable value between £15,000 and £51,000;
- a new lending facility from the Bank of England to help support liquidity among larger firms, helping them bridge coronavirus disruption to their cash flows through loans; and
- the HMRC Time To Pay Scheme.

The Chancellor committed himself to “do whatever it takes” to support UK businesses, including expanding these measures further should that be necessary.

This Client Briefing gives a general overview of the Coronavirus Job Retention Scheme and Statutory Sick Pay Relief package for SMEs. Please bear in mind that the framework may change rapidly.

## THE JOB RETENTION SCHEME

### General

The Coronavirus Job Retention Scheme is a temporary scheme open to all UK employers for at least three months starting from 1 March 2020. HM Government expect the scheme to be up and running by the end of April. It is designed to support employers whose operations have been severely affected by coronavirus (COVID-19). There is no limit on the amount of funding available for the scheme.

### The subsidy claimable

Under the Coronavirus Job Retention Scheme, UK employers will be able to access support to continue paying part of their employees’ salary for those employees that would otherwise have been laid off during this crisis. HMRC will reimburse 80% of regular wage costs of “furloughed workers”, up to a cap of £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage, provided that the individual employee remains employed by the employer. Fees, commission and bonuses should not be included in the calculation of the regular wage costs of the furloughed workers.

As such, at a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. An employer can also choose to top up an employee’s salary beyond this but is not obliged to under this scheme.

For full time and part time salaried employees this will mean the employee’s actual salary before tax, as of 28 February should be used to calculate the 80%. Fees, commission and bonuses should not be included.

If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, you can claim for the higher of either:

- a) the same month’s earning from the previous year; or
- b) average monthly earnings from the 2019-20 tax year

If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work.

If the employee only started in February 2020, the employer should use a pro-rata for their earnings so far to claim.

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In addition to the above, once the claimable amount in relation to the employee's salary has been calculated, the employer must then work out the claimable amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions.

The employers can use this scheme anytime during this period, and HMRC is currently working on setting up a system for reimbursement, as existing systems are not set up to facilitate payments to employers.

HM Government is expected to issue more guidance on how employers should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions, before the scheme becomes live.

### **Eligible companies**

The scheme is open to all UK employers that had created and started a PAYE payroll scheme on 28 February 2020. This includes:

- a) businesses;
- b) charities;
- c) recruitment agencies (agency workers paid through PAYE); and
- d) public authorities.

The employer must have created and started a PAYE payroll scheme on or before 28 February 2020 and have a UK bank account.

Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme.

### **Employees eligible for furloughing**

#### General

To be eligible for furloughing, the employee must have been on your PAYE payroll on 28 February 2020. Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme. However, the scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.

Employers should discuss with their staff and make any changes to the employment contract by agreement. As noted in our previous Client Briefing, when employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.

To be eligible for the subsidy employers should write to their employee confirming that they have been furloughed and keep a record of this communication. You do not need to place all your employees on furlough. However, those employees who you do place on furlough cannot undertake work for you. If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment.

#### Any type of employment contract

The employee can be on any type of contract, including:

- a) full-time employment contracts;
- b) part-time employment contracts;
- c) agency contracts (if the employee is not working); and
- d) flexible or zero-hour contracts employment contracts.

If your employee has more than one employer, they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

#### General prohibition on work while furloughed and volunteer work

To be eligible for the subsidy, when on furlough, an employee cannot undertake work for or on behalf of the organisation. This includes providing services or generating revenue. While on furlough, the employee's wage will be subject to usual income tax and other deductions.

A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of your organisation.

However, if workers are required to, for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

#### Reduced hours, unpaid leave and Statutory Sick Pay

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If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme and you will have to continue paying the employee through your payroll and pay their salary subject to the terms of the employment contract you agreed.

Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February.

Employees on sick leave or self-isolating should get Statutory Sick Pay but can be furloughed after this. Employees who are shielding in line with public health guidance can be placed on furlough.

#### Maternity Leave, contractual adoption pay, paternity pay or shared parental pay

Individuals who are on or plan to take Maternity Leave must take at least 2 weeks off work (4 weeks if they work in a factory or workshop) immediately following the birth of their baby. This is a health and safety requirement. In practice, most women start their Maternity Leave before they give birth.

If your employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first 6 weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from April 2020.

If you offer enhanced (earnings related) contractual pay to women on Maternity Leave, this is included as wage costs that you can claim through the scheme.

The same principles apply where your employee qualifies for contractual adoption, paternity or shared parental pay.

#### Employer National Insurance and Pension Contributions

All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

The employer can claim a grant from HMRC to cover wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on paying those wages.

The employer can choose to provide top-up salary in addition to the grant. Employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through this scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

#### National Living Wage/National Minimum Wage

Individuals are only entitled to the National Living Wage (NLW)/National Minimum Wage (NMW) for the hours they are working. This means that furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW.

However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

### **Tax treatment announced by HM Government**

#### Income tax and Employee National Insurance

HM Government has announced that wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

It has further been announced that employers will be liable to pay Employer National Insurance contributions on wages paid, as well as automatic enrolment contributions on qualifying earnings unless an employee has opted out or has ceased saving into a workplace pension scheme.

#### Tax Treatment of the Coronavirus Job Retention Grant

HM Government has announced that payments received by a business under the scheme are made to offset these deductible revenue costs. They must therefore be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.

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Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.

### How to apply

To apply for the Coronavirus Job Retention Scheme on HMRC's online portal (once this goes live) a submission of the following information will be needed:

- a) a list of the employees who have been designated as "furloughed workers" (the employees will need to be notified of their designation as such);
- b) a calculation of the amount you are claiming (per the minimum length of furloughing of 3 weeks);
- a) your ePAYE reference number;
- b) the claim period (start and end date);
- c) your bank account number and sort code; and
- d) the name and phone number of your contact person.

You can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1 March if applicable. HMRC will retain the right to retrospectively audit all aspects of your claim. Once HMRC have received your claim, and provided that you are eligible for the grant, HMRC will pay the grant via BACS payment to your designated UK bank account.

You must pay the employee all the grant you receive for their gross pay, no fees can be charged from the money that is granted. You should make your claim in accordance with actual payroll amounts at the point at which you run your payroll or in advance of an imminent payroll.

HMRC is expected to set out further details on the specific information required when applying for the scheme.

### When the scheme ends

The scheme will be open initially for at least 3 months but may be extend for longer if necessary. Once the scheme has been closed by HM Government, HMRC will continue to process remaining claims before terminating the scheme. When the scheme ends, you must make a decision, depending on your circumstances, as to whether employees can return to their duties. If not, it may be necessary to consider termination of employment (redundancy).

Employees that have been furloughed have the same rights as they did previously. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments.

### STATUTORY SICK PAY RELIEF

HM Government intends to bring forward legislation to allow SMEs and employers to reclaim Statutory Sick Pay paid for absences related to COVID-19, whether actual sickness absence or absence related to self-isolating in accordance with HM Government's guidance. The Statutory Sick Pay refund will cover up to 2 weeks' Statutory Sick Pay per eligible employee who has been off work because of COVID-19. The framework for the scheme will be as follows:

- a) employers will be able to reclaim expenditure for any employee who has claimed Statutory Sick Pay under the new eligibility criteria as a result of COVID-19;
- b) employers will be required to maintain records of staff absences and payments of Statutory Sick Pay, but employees will not need to provide a GP fit note; and
- c) the eligible period for the scheme will commence the day after the regulations on the extension of Statutory Sick Pay to those staying at home comes into force

Please note that the relief applies to Statutory Sick Pay only and not to contractual sick pay. Accordingly, some companies may therefore be liable for the full contractual Statutory Sick Pay without being able to access the relief prior to the employee moving onto Statutory Sick Pay when the relief would be expected to be available.

### Eligibility

Only employers with fewer than 250 employees will be eligible. The size of an employer will be determined by the number of people they employed as of 28 February 2020.

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### **How to apply**

HM Government has announced that it will work with employers over the coming months to set up the repayment mechanism for employers as soon as possible. Accordingly, further updates and guidance is expected.

### **GET IN TOUCH**

Should you have any questions to the topics covered in this article, please get in touch with your usual Rooney Nimmo contact or any of the persons below.

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