

Coronavirus & Furlough: the next chapter - Q&A

We have listed the questions received prior to and during our webinar hosted on 15 October 2020. Please see our responses below.

Job Retention Scheme Bonus

- **Do the employees need to be furloughed until end of October to claim the bonus? If they returned earlier, do we still qualify?**

No, it is not a condition of the CJRS Bonus scheme that employees must have been on furlough under the CJRS as at 31 October 2020. They must, however, have been furloughed and you must have made a claim for them at some point under the CJRS.

- **In scenario three, were there remaining hours paid under flexi-furlough?**

Not in this particular scenario, but in any event it would not have changed the position in respect of their earnings in the relevant monthly periods for November, December and January under the CJRS Bonus scheme, as flexible furlough ends on 31 October, replaced by the JSS.

Job Support Scheme and Extension

- **If employees don't need to formally agree to the JSS / short time working, it's anticipated that it's still best practice to get them to sign a letter confirming they are accepting the shorter working hours (even though its not currently stated that is the case in the JSS details so far published).**

The latest Factsheet makes clear that agreement needs to be reached with the employee and the changes documented.

- **The JSS refers to a financial assessment for larger organisations to prove they have been financially impacted by Covid. If an organisation was in receipt of a grant or funding (e.g. Covid-19 response funding) which brings them back into the "black" financially: and without it they would be in the "red", is it likely they would qualify for the scheme? What's DMHS' view?**

The position isn't altogether clear, but our view is that if the organisation can prove it has been 'financially impacted' (almost certainly that has to be negatively) then the fact that the organisation is in 'surplus' should not be relevant.

- **Do we have an indication of when the HMRC or Government will be publishing the details of the JSS?**

No. Although the JSS will be live from 1 November 2020, claims can only be made in arrears. It may be that the detail will not be published until the first week of November.

- **What is the position for full time staff on fixed term contracts? Assume that the staff member has been on our payroll before 23 September 2020, (ie. the qualification date), but their full time contract was extended, but due to other unforeseen circumstances we now need to put them on short time working. Are there any restrictions to this employee being eligible for the JSS?**

Probably not in the scenario given, but employers should treat fixed term contracts with care – the clear intention of JSS is to support ‘viable jobs’. While there is no definition of that, it is presumably meant to support those jobs which could (but for coronavirus) be expected to continue for a number of (possibly at least six) months.

- **If employees are currently contractually full time - although temporarily on furlough - is it possible with employee agreement to reduce their contractual hours to, say, four days per week and still claim under the new scheme based on the new reduced salary/hours?**

Yes. Fresh agreement in terms of the reduction will need to be reached.

- **Any idea when we can expect more details on the "financial test" for large businesses in relation to JSS?**

As above, this may not be available until early November.

- **JSS Scheme and dividends - does this only apply to large companies?**

No, this provision seems to apply to all employers, irrespective of size. How this will be phrased in practice remains to be seen.

- **Where do you think the events industry falls given that they haven't been ordered to close, but they can't run events?**

Without an order to close, those employers will only be able to rely on JSS, not the extension scheme.

- **Is there a selection criteria if you were to place someone on JSS or can it be arbitrary?**

There is nothing within the scheme so far – remember the JSS can be adopted at the employer’s discretion (and the individual employee needs to agree). As with the furlough scheme it is generally easier to agree that the whole class/category of employees will use the scheme, rather than picking and choosing (and facing discrimination and/or constructive dismissal claims).

- **How does JSS work for those on zero hours contracts?**

We don’t yet have the detail but it looks like the approach to ‘normal’ hours will require either an averaging over a reference period (possibly the previous 12 or 52 weeks) or by looking at the equivalent period in the previous year.

- **If you paid staff under furlough full pay (i.e. top up) and want to use JSS where you can't top up - can that lead to discrimination issues with staff ?**

The current information regarding JSS is that the employer ‘cannot’ top up wages; it isn’t clear whether there is a prohibition on doing so. Selective topping up (assuming it is permitted under JSS) could give rise to claims of discrimination; the employer would need to be able to show a clear and pressing need to do so, and realistically the employer would also need to be able to show that the clear and pressing need couldn’t have been satisfied in some other (less impactful) way.

Revisiting alternatives to the Government schemes, such as private furlough

- **Can you put employees on layoff/short term working if there is NOT a clause in their contracts?**

Yes, if they consent. If they do not consent and you impose it then you would be in breach of contract and risk them resigning and claiming constructive unfair dismissal. In the current climate, most employees are giving their consent as it avoids them losing their job.

- **Aren't private furlough and short time working the same?**

Not necessarily. A private furlough scheme could involve staff not working at all, or working reduced hours – it is up to the employer how they want it to work. Short time working is reduced hours.

- **What's the situation as regards collective consultation where you have two rounds of redundancies, three months apart, where the total would be 20 and when the second round wasn't previously planned?**

If an employer makes less than 20 redundancies and then within a 90 day period proposes a second round of redundancies of less than 20 staff, then the employer will have to collectively consult on the second round if they had contemplated the second round when they were going through the first round. If the employer had not foreseen the need for the second round of redundancies, then the obligation to collectively consult on the second round should not be triggered. Specific advice should be sought as the rules in this area are complex.



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