



# FAQs for UK employers on saving employment costs

By **Cerys Williams** - 25 March 2020

As Governments across the globe announce emergency measures to stop and contain the impact of COVID-19, employers are also taking urgent steps to manage its financial impact and to survive, by cutting employment costs.

A raft of emergency legislation is currently passing through the UK Parliament to combat the crisis, including support for employers aimed at saving jobs under the Coronavirus Job Retention Scheme (JRS).

These FAQs cover the JRS and also the most frequently used options for cutting employment costs in the UK. Our Coronavirus FAQs for UK Employers [here](#) covers broader issues related to COVID-19.

## 1. How does the UK Government's Coronavirus Job Retention Scheme (JRS) Work?

The Government announced its JRS on 20 March. The scheme is also, confusingly, known as furlough but is very different to the US concept of furlough.

### What does the JRS cover?

Full details of the JRS are yet to be published but we know that the proposal is for employers to be able to recoup from HMRC employment costs up to the lower of 80% of pay or £2500 per month.

### How long will it last?

The scheme will last, initially, from 1 March to 30 May but may be extended.

### Who is eligible?

All employees paid via HMRC will be eligible if they are placed on "furlough" and would otherwise have been laid off and they do not

perform any work for the employer.

There is a complicated point as to the application of JRS to particular employees, that is not yet resolved. The JRS is intended to apply to employees who would “otherwise be laid off” (which we take to mean “would otherwise be made redundant”). It is unclear whether, to satisfy that requirement, it would be sufficient to show that “furloughing” staff is intended to avoid job losses generally or whether you have to show that this employee, specifically, would be made redundant. If it is the latter then that causes complication because, to arrive at a point where it is legally fair to say that an employee would be made redundant, a prior process is required. In some cases, that process can take substantial time, which would defeat the object of the scheme. As such, we hope that HMRC will take a high-level view on this, particularly in view of the urgency and absence of clear guidance.

Nevertheless, there is a risk that without following a redundancy process prior to “furlough”, (i) HMRC may take the view that this employee would not otherwise have been made redundant and/or (ii) an employee who is furloughed and subsequently made redundant may say that their selection for furlough shows that the redundancy process had been predetermined.

### **Can we impose furlough?**

Importantly, the guidance issued by the Government confirms that normal provisions of employment law will apply, which means that technically employees must consent to being put on “furlough”.

However, in reality, employers may elect to top up the payment to full pay and impose “furlough” given that this is (at worst) a technical breach of contract. Imposing furlough without topping up pay carries more risk but may still present substantial cost savings over continuing employment as usual. The risks and costs of that course will need to be weighed carefully and may depend on the income level of the affected employees.

The Government’s guidance on the JRS is [here](#).

## **2. Are we better off making redundancies than using the JRS?**

Making redundancies obviously removes the entire cost of employment, permanently. However, making redundancies may involve a lengthy process and triggers substantial up-front costs before any savings are realised. In particular, redundancies trigger the obligation to pay notice, accrued holiday and statutory redundancy payments.

As such, for employees paid at or near the pay cap for JRS (£37,500 per annum), the JRS is likely to deliver greater cost savings over the short term.

Where more than 20 redundancies are envisaged despite the JRS, it may be prudent to start consultation over those redundancies prior to furlough. This would allow any necessary redundancies to be implemented more quickly, after furlough.

## **3. What is the process for making redundancies?**

Employees with less than two years’ service generally do not have statutory legal protection against dismissal, unless discriminatory or linked to whistleblowing or a protected status. However, note that a blanket dismissal of short-serving employees is capable of amounting to age (and, potentially, sex) discrimination.

In general, where fewer than 20 redundancies are proposed, the process is relatively straightforward and can be completed in a couple of weeks. Essentially, it involves identifying at risk employees through a fair process of pooling and selection and consulting with the affected employees before any final decision is made. Alternatives to redundancy should be considered, including other available roles and the alternative route of placing the employee on “furlough” under the JRS.

Where 20 or more redundancies are proposed at one establishment, additional and detailed collective consultation obligations over minimum periods of up to 45 days will apply.

Redundant employees will be entitled to notice pay, accrued holiday pay and a statutory redundancy payment calculated according to a formula.

## **4. Can we lay off employees without pay?**

This is not generally permitted in the UK unless the right is already written into the contract (which is unusual).

### 5. Can we just cut employee pay?

In general, basic pay is fixed under employment contracts and therefore can only be reduced with employee agreement. A general right to change employment terms contained in an employment contract is unlikely to be sufficient to impose pay cuts, as very clear language would be needed to give an enforceable right.

Employees may be willing to agree pay cuts either voluntarily or where the alternative is potential job losses. You should not threaten to dismiss a particular employee for refusing to agree to a pay cut nor say that job cuts in general are inevitable if employees do not agree.

Where you are seeking to agree pay cuts, it's sensible to say that you may not proceed unless a sufficient number of the workforce agree. Agreed pay cuts should be recorded in writing.

Options that may increase the likelihood of employees agreeing to pay cuts include:

- Offering a corresponding reduction to working hours or even a proportionately more generous reduction (e.g. four days' pay for three days' work)
- Specifying a short time period for which the cut will apply, perhaps subject to review
- Offer entitlement to a bonus equivalent to the amount of the lost pay, which is either discretionary or contingent on specified factors (e.g. hitting revised financial targets)
- Agreeing that, if the employee is made redundant, their notice pay, holiday and statutory redundancy payments will be calculated by reference to their original salary

### 6. Our employees won't agree to pay cuts. What are the risks of imposing them?

In extreme circumstances, employers may decide to proceed with imposing pay cuts even though doing so is a breach of contract. Doing this will mean that employees potentially can bring a claim for the shortfall and that right will last for at least six years from the last shortfall.

In addition, pay cuts will usually amount to constructive dismissal. This means employees can elect to bring employment to an end by resigning but the legal effect is as if they have been dismissed and claims are potentially triggered.

If you intend to impose pay cuts despite the risks of doing so, then consider the following risk mitigation measures:

- Consult with employees. This can be as simple as a group video call
- Explain the business reason as clearly as possible
- Set a time limit or review period for the cut and consider whether it would fulfil the business need to impose a deferral (rather than total loss of pay) scheme or to replace the lost pay with a conditional or discretionary bonus

A related option is to impose a contractual variation to reduce pay by dismissing employees and offering them re-employment on lower pay. This will achieve a binding legal change to terms, but the dismissals may trigger claims and rights, so will need careful handling (particularly for employees who have two years' service or more). If more than 20 employees are dismissed and re-engaged then collective consultation obligations apply.

### 7. Can we withhold bonuses?

In most cases, there will be more flexibility to withhold bonuses than to withhold basic pay. However, this depends entirely on the wording in the bonus scheme or employment contract (whichever deals with bonuses).

Where bonuses are wholly discretionary, they can generally be withheld for a good reason (like the financial threat posed by Covid-19). However, where bonuses describe the factors that will be taken into account, relying on different criteria that are not listed will generally not be permitted.

### 8. Can we withdraw job offers?

Offers that have yet not been accepted can be withdrawn.

Offers that have been accepted cannot be withdrawn. However, it will generally be possible to terminate the contract by giving the applicable period of notice, even before the employment (and right to pay) starts.

#### 9. What other measures can we consider?

Other measures that you can consider, in order to cut employment costs, include:

- Reducing or removing discretionary or non-contractual benefits
- Allowing fixed term contracts to expire without renewal (noting that this amounts to a dismissal in law)
- Offering unpaid or part-paid sabbaticals
- Reducing overtime and use of contract labour
- Requiring employees to use up holiday before busier times resume. This has the additional benefit of reducing termination costs if dismissals become necessary

#### 10. Where can we get additional information?

- [Government Guidance on Business Support \(including the JRS\)](#)
- [Government Guidance for Employers on Coronavirus](#)
- [ACAS Guidance on Managing Redundancies](#)
- [ACAS Guidance on Changing Employment Terms](#)
- [ACAS Guidance for Employers on Coronavirus](#)