SLAUGHTER AND MAY

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COVID-19: JOB SUPPORT SCHEME

30 September 2020

Executive summary

On 24 September 2020, the Chancellor unveiled a new Job Support Scheme (JSS) as part of his Winter Economy Plan. The JSS is intended to protect 'viable' jobs in businesses who are facing lower demand over the winter months due to COVID-19, and to help keep their employees attached to the workforce.

In a nutshell, employees must work at least 33% of their normal hours, and be paid as usual for those hours by the employer. The cost of hours not worked will be split one third each between the employer, the Government (through wage support) and the employee (through a wage reduction). The government has published a Jobs Support Scheme Factsheet, the key points of which are summarised in the first half of this briefing, although more detailed guidance on the JSS is expected in the coming weeks.

The JSS will start on 1 November, immediately after the Coronavirus Job Retention Scheme (CJRS) finishes. However, the JSS is by no means a clear successor to the CJRS, and there are important differences between the two schemes which employers need to be aware of when deciding whether and how to utilise the JSS. This is considered in more detail in the second half of this briefing, along with some practical steps which employers should be considering now.

Who is eligible for the JSS?

Employers

As with the CJRS, employers must have a UK bank account and UK PAYE scheme in order to utilise the JSS. The JSS will be open to employers even if they have not previously utilised the CJRS.

Large businesses will need to meet a financial assessment test, as the JSS is only available to those whose turnover is lower now than before experiencing difficulties due to COVID-19. It is not yet clear how this financial assessment test will operate (for example, whether there will be a minimum percentage reduction in turnover, and over what period the reduction will be measured).

There will be no financial assessment test for small and medium enterprises (SMEs). As yet, there is no definition of SMEs for these purposes; the government could adopt the same criteria used for the existing coronavirus business interruption loan scheme, i.e. any business with an annual turnover of up to £45m.

The factsheet states that "*Our expectation is that large employers using the Job Support Scheme will not be making capital distributions, such as dividend payments or share buybacks, whilst accessing the grant*". Further guidance on this aspect of the JSS has been promised, and at this stage it is not yet clear how this “expectation” will operate; whether it may render a company ineligible for the JSS, or require repayment of a JSS grant, if they do make such a distribution. There would in any event be reputational issues for companies who chose to make capital distributions whilst utilising the JSS, as we have seen with CJRS.

As yet, there is no suggestion that companies accessing the JSS will need to exercise any kind of restraint in relation to executive pay. This was never a condition of entitlement to claim under the CJRS, but it was for some of the other COVID-19 support financing arrangements (and was imposed after the initial announcement of these schemes). This may therefore be another area to watch – and one where reputational issues can also arise.

Employees

Eligible employees must:

- be registered on the employer’s PAYE payroll on or before 23 September 2020. This means a Real Time Information (RTI) submission notifying payment in respect of that employee must have been made to HMRC on or before 23 September 2020; and
- work at least 33% of their usual hours. The government will consider whether to increase this minimum hours threshold after the first three months of the scheme (i.e. at the end of January 2021).

Employees will be able to cycle on and off the scheme, and 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.

What amounts are payable under the JSS?

The employer must continue to pay the wages for the hours their employees work.

For the hours not worked, the employer and the government will each pay one third of the employee’s usual wages. The government contribution will be capped at £697.92 per month. Grants can only be used as reimbursement for wage costs actually incurred.

The employer will need to meet all its National Insurance contributions and statutory pension contributions (including it seems those relating to the government contribution).

The JSS factsheet includes the following table to illustrate the allocation of costs where employees are working 33%, 40%, 50%, 60% or 70% of normal working hours:

HOURS EMPLOYEE WORKS	33%	40%	50%	60%	70%
Hours Employee Not Working	67%	60%	50%	40%	30%
Employee Earnings (% of normal wages)	78%	80%	83%	87%	90%
Government Grant (% of normal wages)	22%	20%	17%	13%	10%
Employer Cost (% normal wages)	55%	60%	67%	73%	80%

The factsheet also states that: "*Our expectation is that employers cannot top up their employees' wages above the two-thirds contribution to hours not worked at their own expense*". It is not yet clear if this is a mere expectation or a legal restriction, but it may reflect the thinking that if an employer can afford to top up wages in this way, they should not be utilising the JSS. Many employers will have topped up employees' wages during furlough under the CJRS, so this may require a change of approach.

More detailed guidance will be published on how to calculate "usual wages" for these purposes, although it is expected that this will follow a similar methodology as for the CJRS. What is clear at this stage is that employees who have previously been furloughed will have their underlying usual pay and/or hours used to calculate usual wages, not the amount they were paid whilst on furlough.

Operating the JSS

The JSS will run for six months from 1 November 2020 to 30 April 2021. Employers will be able to make a claim online through Gov.uk from December 2020. Grants will be paid on a monthly basis in arrears, meaning that a claim can only be submitted in respect of a given pay period, after payment to the employee has been made and that payment has been reported to HMRC via an RTI return.

Employers will need to put in place new short-time working arrangements with employees in order to utilise the JSS. In most cases this will require employees to agree to a change to their contractual hours, although there may be some scope for utilising existing contractual flexibility, or agreeing the changes collectively with a trade union. The fact sheet states that "*Employers must agree the new short-time working arrangements with their staff, make any changes to the employment contract by agreement, and notify the employee in writing. This agreement must be made available to HMRC on request*". This is similar to the position which was (after much uncertainty and several iterations of the guidance) laid down in relation to the CJRS.

Importantly, employees cannot be made redundant or put on notice of redundancy during the period within which their employer is claiming the JSS grant for that employee. This is different to the position under the CJRS, where it was (again, eventually) clarified that employees can be given notice of redundancy whilst on furlough. The JSS requirement does not however appear to operate as an outright ban on redundancies, since it seems that employees could be moved out of the scheme during the six month period in order to be made redundant.

It is also clear that the JSS will operate in addition to the Job Retention Bonus (JRB), so that where employees are retained until at least 31 January 2021 (having been previously furloughed), the employer can claim an additional £1,000 per employee through the JRB scheme.

As for the CJRS, HMRC will check claims under the JSS, and payments may be withheld or need to be paid back if a claim is found to be fraudulent or based on incorrect information.

How does the JSS compare with the CJRS?

Recent data from HMRC suggests that around three million people are still on furlough, with only around 20% of those furloughed undertaking any work via the "flexible furlough" option introduced in July. The low take up of flexible furlough may be in due in part to the complexity of calculating claims; the JSS could be blighted by similar problems if similar wage calculations are used. If utilisation of the JSS reflects the number of employees currently on flexible furlough, it seems that the Treasury's internal projections of between two and five million employees utilising the JSS could be a significant overestimate.

Despite the differences between the two schemes, the JSS may experience similar difficulties to the CJRS in relation to monitoring and fraud prevention. It will be difficult for HMRC to know how many hours employees are actually working (although the fact that JSS grants are only paid in arrears (whereas CJRS grants can be claimed in advance) may assist to some degree).

The JSS is undoubtedly a much less generous scheme than the CJRS scheme which it is replacing. It significantly reduces the government's contribution from up to 80% of employees' wages to a maximum of 22%. In October employers have to pay just 20% of an employee's normal wages and that employee need not work at all. From November, for an employee working a third of normal hours, the employer will have to pay 55% of the normal wage costs.

Other issues with the JSS

The JSS may be unattractive to employers for a number of other reasons. It actually makes short-time employees more expensive, since the employer will need to pay a third of the cost of the hours not worked.

There is nothing currently stopping an employer from agreeing with an employee to move them onto fewer hours outside the JSS, which would be less expensive for the employer. A well-advised employee may not agree such a change, and try to insist that the employer utilise the JSS to put the employee in a better financial position. However, if the employer refuses and redundancy is the only viable alternative, the employee's agreement may be easier to achieve. As with the CJRS, we don't think the fairness of a redundancy would necessarily be called into question simply because the employer decided not to use the JSS.

The design of the JSS provides an incentive for employers to keep fewer full-time employees than more short-time employees, which appears counterintuitive given the stated purpose of the scheme to encourage businesses to retain as many jobs as possible. It would cost an employer 33% cent more to employ two part time workers on the JSS than to hire one full time worker. This means that employers are likely to use the JSS only for workers on whom they place a high value. In that sense the JSS may operate as a form of redundancy selection process in itself.

The JSS also provides little support to employers who are unable to offer even 33% of normal hours to their employees. Sectors such as hospitality, retail or events management, the arts, entertainment and recreation are still under direct COVID-19 restrictions which mean that even part-time work for all their employees is not viable. The same may also be true for businesses which rely on city centre office workers, given the return of the "work from home if you can" message. It is also not clear what concessions (if any) may be made if local lockdown restrictions are imposed which prevent employees meeting the minimum 33% working hours.

Ultimately the JSS will not prevent some employers facing difficult choices in the coming months on whether job losses can be avoided any longer.

What should employers be doing now?

- Review your current workforce arrangements to identify which employees could be moved to short-time working under the JSS.

- Consider whether there is sufficient work to reinstate employees currently on furlough on at least a third of their normal working hours. If there is insufficient work to support this work pattern or the cost is unaffordable, employers may need to consider implementing redundancies.
- Consider how any changes to short-time working to utilise the JSS would be implemented. Ensure that any consultations with unions, works councils or employees directly are undertaken in good time.
- The pensions aspects of implementing the JSS also need to be considered. For DC schemes, employers will need to check how reduced pay is dealt with in the scheme rules and whether any salary sacrifice arrangements should be unwound. For DB schemes, the terms of the part-time rule will need to be checked.
- Look out for more guidance on the detail of the JSS. The Chancellor said in his announcement that over the next few weeks the further details will be worked through with businesses and unions. As was the case for the CJRS, this may result in some significant changes of approach, which employers should be prepared for.

How does the JSS compare with other wage subsidy schemes?

The JSS bears some similarity to wage subsidy schemes that have existed for some time in countries such as France and Germany, where they have broadly proven effective at encouraging employers not to cut jobs during periods of temporarily depressed demand.

There are a number of interesting differences with the German *Kurzarbeit* scheme, including that the German scheme in its current form (with amendments related to the COVID-19 pandemic):

- does not require employers to pay anything towards the hours that the employee is not working (this is also broadly true of the equivalent French schemes);
- requires employers to show that the reduction in hours is “unavoidable”, by doing everything in their power to reduce the loss of working hours (for example, by redeploying employees to other areas of the business, and granting annual leave);
- requires at least 10% of the workforce to be affected by a loss of remuneration of more than 10%;
- entitles employees to between 60-80% of the difference in their normal and adjusted wages via state subsidy, the amounts increasing as the length of short-time work increases (and is higher for employees with children);
- entitles employers to top up the short-time work allowance to typically between 80% and 100% of the employees' regular net income;
- includes reimbursement of social security contributions for hours not worked; and
- is available until at least 31 December 2021.

The JSS is more similar to proposals put forward by CBI, although that scheme would have required employees to work at least 50% of their normal hours, and would have lasted up to a year. It bears fewer similarities to the TUC’s proposed scheme, which would have seen employees guaranteed a higher proportion of normal wages, and 100% if they were only paid the national minimum wage.

If you would like further information about this topic, please speak to your usual Slaughter and May contact.

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