

# GUIDANCE ON LAY-OFF AND SHORT-TIME WORKING

As the Covid-19 situation is developing on a daily basis, you should look out for updates on Government financial measures to ensure you access any relevant support which is available to you – whether or not in relation to lay-off and short-time working. For example, the Job Support Scheme, available from 1 November, provides financial support to enable employers to retain employees in 'viable' jobs on reduced hours, and you may therefore wish to consider using this as an alternative to short-time working.

## INTRODUCTION

In this uncertain time, businesses will be considering how they will be impacted by the disruption to supply chains, drop in demand and/or limited availability of employees even capable of attending work. At the time of writing, businesses in the manufacturing sector have not been required to close, but they may nevertheless be facing lay-offs.

The law relating to lay-offs and short-time working is complex. The approach you take will depend on the particular contractual arrangements you have with your individual employees, your relationship with your workforce and their representatives and the level of cost-savings you hope to achieve. Employers often find that in difficult times their workforces will come together in partnership to consider a whole range of options to save businesses.

Make UK has a huge amount of experience in advising companies through the process of putting protective measures in place. In addition to reading this guidance, we suggest that you take advice from Make UK if you are considering lay-off or short-time working.

### Note about terminology

Generally, the terms 'lay-off' and 'short-time' working (LOST) are used interchangeably throughout this guidance. For example, an employee who normally works five days a week (Monday to Friday) who temporarily does not work on a Friday because of a downturn, is on 'short-time working' for the week and 'laid off' completely on the Friday.

### CONTRACTUAL RIGHT TO LAY-OFF OR IMPLEMENT REVISED WORKING ARRANGEMENTS

An employee's rights differ depending on whether or not you have the contractual right to lay them off or put them on short-time working.

Many employers use 'lay-off' and 'short-time working' colloquially, and they may not mean the same thing to everyone. Consider carefully what you wish to do, for example, is it a:

- complete lay-off, without pay (save for a statutory guarantee payment (SGP), see the knowledge and resources section of our website for further details of the SGP);
- complete lay-off with a minimum underpin payment, above the SGP level, for example mirroring the statutory sick pay (SSP) rate;
- reduction in working hours (i.e. short-time working);
- week-by-week shutdowns;
- removal of a shift, for example, stopping the night shift and reallocating the employees to day shift only;
- fixed period of annual leave;
- reduction in pay, suspension of premia, bonus payments, etc;
- temporary redeployment to alternative duties;
- lay-off of agency workers, casuals, etc; or
- combination of the above, with different approaches for different categories of employee?

Where to look:

- Express terms of a collective agreement with a recognised trade union dealing with job security and redundancy proposals. Remember to consider the position for employees inherited under a TUPE transfer; their position may be different from the general pool of employees.
- A specific collective agreement introducing shift patterns (which may contain wording reserving a right for the company to, for example, alter shift patterns in some circumstances).
- Contractual parts of a company handbook or individual contracts of employment (rare).
- A national agreement or an industry level agreement incorporated into individuals' contracts of employment.
- A term implied by custom and practice in the company or the industry. If so, do you have evidence of the term being used on other occasions? There is no manufacturing/engineering industry custom and practice generally to put employees on short-time working.

Generally speaking, it will be difficult to rely on anything but an express lay-off clause, which will normally be found in a collective agreement or in individual contracts of employment.

Unless you have a contractual right to lay-off employees and to pay them less than their normal salary during the lay-off period, a lay-off will be:

- A repudiatory breach of contract which would entitle them to resign and claim constructive dismissal. If an employee decides to resign and claim constructive dismissal and the reason for dismissal is redundancy (which is probable in this situation), the employee may also claim a statutory redundancy payment.
- An unlawful deduction of wages, if the employees do not receive their normal pay.

If employees' contracts do not give you the right to lay-off, you will first need to get their agreement to your proposal (see below, as to how best to secure agreement).

### WHERE YOU HAVE THE CONTRACTUAL RIGHT - EXAMINE IT VERY CLOSELY!

Carefully consider:

- Which workers are covered by the right, i.e. is the clause incorporated into all of the relevant employees' contracts of employment?
- Are certain groups excluded? For example, does the clause exclude apprentices, or make special arrangements for them?
- If the LOST agreement or clause is very old, check that the description of workers in it matches the description of the workers presently used. Is it clear who is covered by the lay-off agreement?
- Check the construction of the clause. Does it apply to the current reason for lay-off? For example, does it apply to a downturn of business such as that caused by Covid-19?
- Do any conditions need to be satisfied before the employer can invoke the clause? For example, there might be express consultation requirements, a requirement to agree the period of alternative working with employee representatives, notice provisions, steps to be taken in mitigation, etc.

Even if you have a contractual right to impose lay-off or short-time working, this contractual right may well be restricted. For example, it is unlikely to extend to allowing you to unilaterally withdraw contractual sick pay or contractual maternity, paternity, shared parental or adoption pay during periods of lay-off or short-time working. However, although contractual wording is key, in practice, it is common for employers to negotiate and agree a position with employees on such payments that 'feels fair' to all parties.

### IMPLEMENTATION OF CONTRACTUAL RIGHT

Even if there is contractual authority to achieve the change, the agreement may not expressly deal with very practical issues such as: the treatment of employees who are already off sick, self-isolating, or not coming to work because they are in a high risk category in relation to Covid-19; holiday pay; or the position of apprentices. Think about your approach to these cases before announcing that the clause permitting the change is to be invoked.

Remember to inform and consult with your trade union/works council, even if the agreement does not expressly require you to do so. You should do so as a matter of good practice and also to comply with the implied term of trust and confidence. It is also advisable to communicate the business needs directly to the employees themselves and keep them informed regularly – think about preparing a leaflet/Q&A's for employees.

In theory, lay-off and short-time working arrangements can continue for lengthy periods, but you should not keep employees laid off or on short-time working for longer than necessary. Be aware that employment protection legislation gives qualifying employees the right to ask you for a statutory redundancy payment (payable on condition that they resign) if the lay-off or short-time working has gone on beyond a certain length of time (see the knowledge and resources section of our website for further details of when employees laid off or on short-time working can claim a statutory redundancy payment).

If you have reached the position where redundancies look more likely, remember your obligations to inform and consult collectively with appropriate representatives of the affected employees (if you are proposing 20 or more redundancies at one establishment in a period of 90 days) and individually with any employees at risk of redundancy. During this process you will be obliged to consider afresh alternatives to compulsory redundancy, even though you have already been using lay-off or short-time working.

## DRAWING UP A NEW LAY-OFF SHORT-TIME WORKING AGREEMENT/CLAUSE

If you do not have a lay-off or short-time working agreement/clause on which to rely in these unprecedented times of Covid-19, you will be making the agreement from scratch. For most of the areas to be covered in the agreement, there is no 'right or wrong answer' and the terms of the agreement will be what the parties negotiate. In our experience companies reach the most sustainable agreement, and most quickly, where they have done the following:

### Consultation, consultation, consultation

Communication is the key to success. Go to the workforce or, where appropriate, their representatives, as soon as you can, whether you have the power to enforce lay-off or short-time working or not. Try to avoid emergency meetings that give employees or their representatives next to no time to consult with each other and are therefore likely to raise suspicion.

The quality of your consultation is critical. Make sure you give as much information as you can about the reasons for your proposals and in particular, the trading conditions you face. You will need to convince employees and representatives that the measures are necessary.

Employers who already have effective workplace communications arrangements, whether with a recognised trade union or a works council/employee forum, often find it easier to reach swift agreement than those without such arrangements.

If you do not have a recognised trade union, or the union only covers part of the workforce, you will need to reach agreement with individual employees. In these circumstances you should consult your works council, if you have one. A works council cannot give you an agreement that binds individual employees in the way that a recognised trade union can for the employees in the bargaining unit, but it can be enormously influential in helping you to achieve an agreement with each affected employee.

Before you begin consultation, think ahead about how you plan to treat special categories of employees (for example, the treatment of employees who are already off sick, self-isolating, or not coming to work because they are in a high risk category in relation to Covid-19, apprentices, employees about to go on maternity leave, etc). Also consider how you will handle difficult issues such as pension contributions and holiday requests (both holidays that have already been booked and new requests that might be submitted, as well as planned shutdowns). Anticipate that there may be vulnerable employees for whom your representatives may ask for special considerations. If your cash flow permits you to, responding to such requests positively can help you get agreement from all employees. Where you can, offer solutions that feel fair to employees.

### Share the pain

'Share the pain' should be your guiding principle; as far as possible, share work around to minimise the financial impact on each employee. This will usually mean asking office based staff to agree to protective measures as well as shop floor/production workers. Many companies will also look to senior management to set an example by taking a reduction in pay.

### Commit to regular reviews, keep in touch

Make sure that what you have agreed is recorded in writing and, in particular, make clear which measures are temporary and which are permanent.

Agree a timetable for reviewing whether the preventative measures are still necessary and stick to diarised meetings with employee representatives even if market conditions have not changed; all employees, and especially your most marketable ones, need constant reassurance and communication to keep them connected to the company.

**See the knowledge and resources section of our website for a model Lay-off Agreement and information about when an employee on lay-off or on short-time working can claim a statutory redundancy payment.**

### **PAYMENTS TO EMPLOYEES DURING LAY-OFF OR SHORT-TIME WORKING**

#### **Rate of pay**

Employees are likely to want it made clear that, for example, the rate of pay applicable during a period of short-time working is a temporary rate only and will not be the rate used for calculating a statutory redundancy payment if they are eventually made redundant.

#### **Statutory sick pay**

Employees remain entitled to SSP if this coincides with periods of lay-off or short-time working. However, SSP will be based on actual pay during the relevant calculation period and therefore lay-off and short-time working during the calculation period can sometimes affect how much SSP an employee is entitled to. If an employee fulfils the statutory requirements for claiming SSP, including if they are self-isolating and the contract of employment subsists, then you should pay SSP which will be based on the actual pay during the relevant calculation period.

Note: employees are not entitled to a statutory guarantee payment for days they cannot work because of illness or injury (but the employer can be more generous if it wishes).

#### **Company sick pay**

The normal legal position is that you should pay sick pay to those who cannot work because of sickness or injury as long as they have fulfilled all the qualifying conditions for the benefit. Contractual sick pay can cause a particular problem. Some lay-off clauses/agreements expressly give you the right to withhold contractual sick pay during a period of LOST. However, even if withholding such a payment is not in breach of an express contractual term, it could potentially amount to a breach of an implied term of the contract of employment.

Normally the reason for the lay-off or short-time working (to preserve cash flow) will be thwarted if employees continue to receive contractual sick pay. Further, if you continue to pay contractual sick pay at the normal rate during a period of lay-off or short-time working, then this could encourage employees to falsely claim to be sick during such periods in order to secure additional pay. It is therefore common for employers to draw a line in the sand and, following consultation with the union or workplace representatives, announce that employees who were already on long-term sickness absence at the start of the period of lay-off or short-time working will continue to receive company sick pay, but no fresh claims will be accepted. Especially in these exceptional times of the Covid-19 pandemic, companies may want to take this approach, but we suggest that you take advice from your Make UK adviser before taking this step.

### SMP and other statutory family pay

Employees remain entitled to these statutory payments if they coincide with periods of lay-off or short-time working. However, these statutory payments are based on actual pay during the relevant calculation periods, so lay-off and short-time working during the calculation period can affect how much statutory pay an employee is entitled to. Unions often therefore ask employers to exclude pregnant employees or those who are soon to go on adoption or shared parental leave, etc. from lay-off or short-time working, if including them is likely to affect their statutory family leave payments.

### Enhanced family pay

As with company sick pay during a period of lay-off or short-time working, there is no firm legal position about whether you should continue to pay family pay contractual enhancements during a period of lay-off or short-time working unless you have already anticipated the scenario and the contract expressly (or impliedly) makes provision for it. So your approach should be based on pragmatism, common sense and what can be achieved through negotiation. How dire are your circumstances? How expensive is the enhancement? How many employees are there currently on, or due to go on, family leave? What approach are you going to be taking to people on sick leave (that, is consider whether there is going to be consistency of treatment)? These are relevant factors to be considered so that you are encouraged to take, and are seen to be taking, a fair, logical approach to lay-off or short-time working.

### Statutory holiday entitlement

Statutory holiday continues to accrue during a lay-off or short-time working period. It is common to restrict employees from taking (paid) holiday during a lay-off or short-time working period, but you may prefer not to do this if you are nearing the end of the holiday year and you do not want to have employees carrying over significant amounts of annual leave into the next holiday year (as is specifically permitted under regulations introduced by the Government in March 2020 if it has not been reasonably practicable for employees to take their leave due to Coronavirus) or if, for example, a popular holiday time is coming up such as Christmas. (See the knowledge and resources section of our website for more information about handling the carry over of annual leave that has not been taken due to Coronavirus.)

If you do allow statutory holiday to be taken, employees who work normal hours and whose pay does not vary with the amount of work done or the time that they work will be entitled to the same holiday pay that they would have got had they not been on short-time working or lay-off. The position is more complicated if you use the 52-week averaging rule to calculate holiday pay, but in most cases employees will be entitled to holiday pay at about the same level as if they were working normally.

### Additional contractual holiday

How you handle additional contractual holiday will depend on any contractual agreement or express agreement. Make UK can help you work out the best approach to dealing with holidays in your circumstances. Many employers allow employees to take pre-booked holiday, but do not accept any new requests from the date of the lay-off agreement.

### Pension contributions

Much will turn on whether you are operating a defined benefit or defined contribution scheme. Check the pension scheme rules and with your pension scheme administrator; what is the effect of a period of lay-off/short-term working on the employer and employee's obligations? It is common practice, though, for an employer to continue to pay employer pension contributions based on the normal salary/wages payable.

### Notice pay

The usual rules apply in relation to notice pay for employees who resign or are dismissed during a lay-off period or short-time working period. If the employee is only entitled to be given statutory minimum notice, you must pay notice pay as if they were working normally. But, if you are required to give contractual notice that is longer by one week or more than the statutory minimum period of notice, the statutory pay protection provisions during notice do not apply and you will only be obliged to pay the employee at whatever rate is applicable to the LOST arrangement during any notice period.

### Enhanced redundancy pay

If there is a contractual enhanced redundancy payment provision in an employee's contract, this will typically only be payable if you dismiss the employee. It will not be payable if an employee resigns in response to a period of contractual lay-off or short-time working, even if they qualify for a statutory redundancy payment following their resignation. Of course, you will not be able to hold this stance if the lay-off agreement/clause (or the redundancy/severance scheme itself) says otherwise.

### Failure to reach agreement on lay-off

If you are unable to reach agreement with your representatives, you may decide that you have no alternative but to unilaterally impose the new term as it is likely that you will need to drive through changes as quickly as possible. It goes without saying that this approach should not be taken lightly as the legal consequences are potentially significant. But given the current Covid-19 situation it may be that this is a decision which is crucial to the survival of the business. Assuming you have consulted the workforce, sought agreement first and then warned staff of the consequences if agreement cannot be reached, you may be able to reduce the risk of unfair dismissal and breach of contract claims arising. See the knowledge and resources section of our website for further details regarding the legal risks when changing employment terms and to download a useful strategy planner.

### **Note: Short-time working, lay-off and the EEF National Guarantee of Employment Agreement (NGA)**

Under the NGA, in the event of work not being available for the whole or part of the five-day week, employees are assured they will be paid earnings equivalent to their 'time rate' for 39 hours. Speak to your HRL adviser if you are a conforming member.

## HOW WE CAN HELP

If you need help or support to implement lay-off or short-time working in your organisation, our team of HR experts are here to advise and guide you.

Contact us on **0808 168 5874** or use our **online Live Chat** to discuss your options and explore ways you can mitigate risk to your operations in these unprecedented times

Make UK members who need HR or legal advice on a specific situation can contact their named adviser, or the **Make UK Advice line**.

More employment issues are likely to arise as the Coronavirus situation evolves. We will continue to keep you updated on relevant employment law questions via the **Coronavirus FAQs**.

## makeuk.org/business

*Disclaimer: This guide is accurate at the time of writing on 21 October 2020. It is intended to provide information and guidance on the HR and employment law implications of implementing lay-off or short-time working arrangements in the context of the Covid-19 situation. It does not constitute legal advice and should not be relied upon as such.*