

Covid-19 : Employers - Lay-off / Short-time working guidance

Laying off employees means the employer provides no work (and no pay) for a period while retaining them as employees; placing employees on short-time working means providing less work (and less pay) for a period while retaining them as employees. Unlike dismissal, it is a temporary solution to the problem of no or less work due to an unexpected downturn in business or unforeseen circumstances, such as the current Covid-19 crisis.

The process of lay-off must also be approached with the Government coronavirus Job Retention Scheme in mind, under which employers can reclaim up to 80% of the salaries of staff who are 'furloughed' – in effect, laid off on part pay.

For further information in relation to eligibility as well as advice on accessing the Scheme, please see our separate guidance note: *Covid-19: Job Retention Scheme – FAQs for employers*

We set out below a brief overview of lay-off and short-time working and how they can be implemented. This is intended as a general guide and we recommend all employers seek specific advice.

Lay-Off

An employee has been laid off for a week if:

- The terms of their employment contract provide that whether or not they are paid depends on their employer providing them with work; but
- They are not entitled to any pay that week because their employer does not provide any work.

Short-time Working

An employee has been put on short-time working for a week where:

- Because of a reduction in the work provided by the employer;
- The employee's remuneration for the week is less than half a week's pay.

A week for these purposes is:

- In the case of a weekly-paid employee, the seven days ending on the day to which their pay is normally calculated.
- In the case of all other employees, the seven days from Sunday to Saturday.

Process

If employment contracts contain a lay-off or short-time working clause, the position is relatively straightforward – and employees may be laid off or placed on short-time.

Guidance correct at 14:00 on 31 March 2020.

The above is for guidance only and lay-off and short-time working issues are highly fact specific. We recommend you contact one of our employment team for guidance before taking action.

We recommend you meet employees to confirm the situation facing the business and explain that in order to try to protect continued employment they are to be placed on short-time or laid off temporarily – e.g. until the effects of the current pandemic are resolved or business increases.

Being open and transparent with staff will help to retain goodwill during this difficult time. Initial discussions may have to be carefully planned with social distancing requirements in mind. We recommend you ask all staff to provide up to date contact details and a preferred mode of communication during any lay-off or short-time.

We recommend keeping the arrangement under review – for example every two weeks and keeping employees informed at each review point.

You cannot enforce lay-off or short-time working if there is no contractual right to do so. Consent will be required and the process should be approached with care. Please contact us for further advice on the correct process to follow in that case.

Payment

An employee may be entitled to a statutory guarantee payment (SGP), which is a maximum of £29 a day, on up to 5 "workless days" in a three-month period (so £145 in total). If the employee usually earns less than £29 a day they'll get their normal daily rate. If they work part-time, their entitlement is worked out proportionally.

A "workless day" is a day during any part of which the employee would normally be required to work but is not provided with work because either:

- There is a reduction in the employer's requirement for work of the relevant kind; or
- There is anything else which affects the normal working of the business in relation to relevant work.

An employee will not be entitled to an SGP where:

- They do not have at least one month's continuous employment before the period for which they are claiming an SGP.
- The workless day is due to industrial action.
- The employee has unreasonably refused an offer of alternative work.
- The employee does not comply with reasonable requirements imposed with a view to ensuring that their services are available – e.g. a request to work from home.

The right to an SGP does not affect any contractual remuneration for the same period, which will be set off against employers' liability to pay SGP.

Eligible employees may be able to take on extra work during the time when they are laid off, provided it is not prohibited by their contract, or they may be entitled to claim benefits depending on their circumstances. Government guidance can be found online here:-

<https://www.gov.uk/lay-offs-short-timeworking/extra-work-or-claiming-benefits>

<https://www.gov.uk/jobseekers-allowance>

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<https://www.gov.uk/employment-support-allowance>

Employers may elect to make additional payments to staff who are laid off, in addition to minimum SGPs. Doing so may help minimise the likelihood of employees triggering redundancy (see below on redundancy and the Government's Coronavirus job retention scheme).

Holiday entitlement and sickness

The employee's contract remains in force during periods of lay-off and they will continue to accrue statutory holiday entitlement.

If holiday is taken during short-time working, it is likely that it should be paid at the normal hourly rate payable before the short-time working started. Contact us for advice if required.

Where an employee is temporarily laid off they can choose to take paid holiday instead and must be paid at their normal rate of pay before lay-off.

If an employee becomes sick before a period of lay-off, they cannot be laid off until they are fit, or return to work.

Time scales and right to claim a statutory redundancy payment

There is no maximum period of time which an employee can be laid off for, but an employee may bring a claim for a statutory redundancy payment if they have been laid off or kept on short-time working (or a combination of both) for at least:

- four or more consecutive weeks; or
- a total of six weeks (of which no more than three are consecutive) in any period of 13 weeks.

The four or six weeks may be made up of weeks of lay-off or short-time working or a mixture of the two.

For the purposes of claiming redundancy, an employee is laid off only if they are entitled to no pay at all under their contract during the week in question. Given the uncertainty of the timescales in the current coronavirus outbreak, there is a significant likelihood that lay-off or short-time working may last for longer than four or six weeks. Paying a small stipend during lay-off may therefore help to minimise the risk of redundancy being triggered. See also below on the Government's Coronavirus job retention scheme.

The employee must serve written notice of their intention to claim redundancy pay. If a resumption of normal working arrangements is imminent or likely, this can be resisted by the employer. Please contact us for further advice in these circumstances.

Coronavirus Job Retention Scheme

All UK employers are eligible to claim financial support for the salaries of employees who would otherwise have been laid off as a result of the coronavirus crisis. Detailed guidance can be found in our FAQs - *Covid-19: Job Retention Scheme – FAQs for employers*

To claim, employers must:

- Designate affected employees as 'furloughed employees'

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- Notify their employees of this intention – if no contractual entitlement to lay-off exists, consent will be needed
- Submit details of furloughed employees and their earnings via a new HMRC online portal

HMRC will reimburse up to 80% of wages of furloughed employees, to a maximum of £2,500 per month.

The support will be available for three months initially, backdated to 1 March 2020.

Where payment under the job retention scheme ensures employees are receiving over 50% of salary, employees will not be able to trigger entitlement to a redundancy payment.

Care does need to be taken over how the lay-off or furlough process is carried out and we recommend employers seek early advice.

For further guidance and support, you can contact:

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