

## Lay-offs, short-time working and guarantee payments

### Introduction

If an employer is experiencing a temporary shortage of work for employees to do (caused, for example, by disruption at a supplier, severe weather or a number of other causes beyond the employer's control such as the coronavirus outbreak), they may decide to lay employees off temporarily. A lay-off is where there is no work provided to the employees and, consequently, they are paid no salary or wages. An alternative to lay-off is short-time working, where employees' working hours are reduced and, as a result, they are paid salary or wages that are reduced in proportion.

### There must be a contractual right

An employer cannot lay employees off or put them on short-time working unless the Contract of Employment states that there is a right for the employer to do so or the employee specifically agrees to being laid off or put on short-time working. If in doubt, Ellis Whittam's Employment Law Advisers can provide practical advice on implementing lay-off or short-time working.

### What about the new Coronavirus Job Retention Scheme?

On 20 March 2020, the Chancellor announced a new Coronavirus Job Retention Scheme that will allow all UK employers to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis.

Government guidance so far is scarce. We know that all UK businesses are eligible to apply. To access the scheme, employers need to designate affected employees as "furloughed workers" and notify them of this change. We take the term "furloughed" to mean laid off. Please note that changing the status of an employee is subject to existing employment law, i.e. you must either have the contractual right to lay off or you must reach agreement with individual employees to be laid off.

Employers can then submit information to HMRC about employees that have been furloughed. We have no further detail in relation to this process at the moment but do know that HMRC will reimburse 80% of furloughed workers' wages up to a cap of £2,500 per month.

### What happens now if I want to lay off my employees?

In the first instance, you should check their contract for the existence of a lay-off clause. If there is one, and it allows you to lay off an employee in these circumstances, then you can send your employees home. That would normally be without pay, but in view of the government's announcement, you should apply to HMRC for payment under the scheme.

If there is no lay-off clause in the contract, you will need to seek agreement from your employees in order to lay them off on reduced or nil pay. Once the scheme is in place, and workers will be guaranteed 80% of their pay up to £2,500 per month, most employees will probably agree to be laid off in line with the scheme, especially if the alternative was redundancy.

### Notice of intention to claim a redundancy payment

At present, we have no information about the interplay between the new Job Retention Scheme and the existing right to claim a redundancy payment whilst laid off.

At the moment, if a period of lay-off lasts for more than four consecutive weeks, or more than six weeks in any 13-week period, employees are entitled to serve notice to terminate their employment and claim a redundancy payment. The same applies to short-time working where the employees' remuneration is reduced by more than half for the same periods.

If this happens, the employee can claim that a redundancy situation exists and seek a redundancy payment. However, given the current guarantee to reimburse 80% of furloughed workers wage costs up to £2,500 per month, it is doubtful many, or indeed any, employees will choose to pursue the option of a redundancy payment.

However, if one did, the employer can object to this by serving a counter-notice stating that it expects to be able to provide the employee with at least 13 weeks' continuous work. If the employee does not withdraw his claim to a redundancy payment, the matter is referred to an Employment Tribunal, which will decide whether there is a reasonable prospect that work will be provided for 13 weeks. The procedure is complicated, so please take advice if an employee proceeds down this route.

### **Guarantee payments**

At present, we have no information about the interplay between the new Job Retention Scheme and the existing right to claim statutory guarantee payments (SGP) whilst laid off.

Currently, during a period of lay-off, employees may be entitled to SGP for days when they would normally be required to work under their Contract of Employment, but no work is available for them to do and the lack of work leads to no pay. Given that the new scheme will allow employees to receive a significant proportion of their wages whilst laid off, it may well be that the SGP will be suspended (which would require legislation from the government) or, more likely, employees simply will not request SGP given they are very modest amounts.

SGP is only required to be made for complete working days when no work (and no pay) is provided (workless days). An employee must not unreasonably refuse alternative work that is offered by the employer on a workless day.

A guarantee payment is not payable where the failure of the employer to provide work is caused by industrial action at the employer or a group company.

To qualify for SGP, the employee must have been employed for at least one month.

An employee is entitled to SGP for up to five days in any three-month period, except when the employee works fewer than five days per week. In those circumstances, their entitlement is limited to the number of days they work per week under their contract.

### **Amount of the guarantee payment**

The daily guarantee payment is calculated by dividing a week's pay by the normal working hours. There is a maximum daily limit of £29, however.

### **Common tricky areas**

- **Can I place just some of the workforce on lay-off or short-time? If it's short-time, does everyone have to have the same drop in hours?**

The employer has quite a wide discretion in relation to who is placed on lay-off or short-time working. Employers need to ensure that they do not exercise the lay-off clause in such a way that breaches trust and confidence, is discriminatory, or is for a protected reason, e.g. whistleblowing.

Therefore, you can place just some of the workforce on lay-off and/or short-time working. The employer should consider how they will do this fairly in order to avoid arguments of discrimination or repudiatory breach. In extreme circumstances, we have seen some employers who have decided to pull names out of a hat to decide who went off, although it is likely to be far more beneficial to work out who to retain based on business need.

- **How long can I lay my staff off for?**

There is no maximum time that staff can be laid off for. In theory, therefore, the lay-off could last indefinitely. However, please note the comments above about the right to claim redundancy pay for employees laid off for four consecutive weeks or any six weeks in a 13-week period.