

Guide to Lay Off & Short time

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Legal Framework

The Redundancy Payments Acts 1967-2014 make provision for a period of lay-off or short time to be applied where the Employer is of the belief that such measures are temporary and that the Employer is unable to provide an Employee with work for which they are contracted either in a full time capacity or for a lesser period as laid out in the definition of short time.

Definition

Lay off/Short time

People often use the term 'lay off' to refer to redundancies. Lay off in this context is not the same as a redundancy. Lay off and short time are temporary situations where an Employer is no longer able to retain the Employee in their normal capacity. This may be viewed as a favourable alternative to redundancy.

Lay off occurs where Employees are not required to work for a specified period of time, until trading conditions improve, or until the reasons behind the lay-off no longer exist. Advance notice of lay off must be given.

Short time occurs where an Employee's weekly hours are reduced to less than half the normal weekly working hours or the Employees pay is less than half their normal weekly pay due to a reduction in the amount of work to be carried out.

Process

For an Employer to consider whether or not to apply a lay off or short time situation in the first instance, there must be a reasonable belief that the situation is temporary by nature.

Next it is necessary for there to exist an express or implied term and condition that lay-off or short time can apply. This means that the Employees contract of employment should contain a clause explicitly providing for lay off without pay or short time with reduced pay. Where no such clause exists, there should be an implied right to place an Employee on lay off without pay or short time on reduced pay. This means that an Employer should be able to demonstrate a custom and practice in the applicability of lay off or short time.

Where neither an express nor implied right exists, the Employer must consult with the Employee and seek their agreement to apply a period of lay-off or short time. To do otherwise could expose the Employer to a breach of contract and/ or claim under the Payment of Wages Act, 1991. It is worth noting at this point that where neither an express or implied right exists and the Employee refuses to agree to a

period of lay off or short time then this could result in the Employee being put at risk of redundancy. Expert advice should be sought if this situation arises.

Selection Process

In any situation of lay off and/ or short time an Employer must always act in a reasonable manner and therefore fair and objective selection procedures should apply. Where the entire business is temporarily being closed and presumably all Employees are to be affected by lay off a selection process will not necessarily be used.

However, where short time or lay off is being applied to only some Employees. Employers should exercise care when selecting employees for lay-off or short-time, apply objective selection criteria and be mindful of not discriminating, directly or indirectly, against employees on any of the nine grounds prohibited by the Employment Equality Acts 1998-2015.

When an Employer is proceeding to Short Time and/or Layoff they must act in accordance with fairness and natural justice in order to select which Employee may be affected. Cognisance should be had to any agreed selection procedures in existence or the custom and practice of certain selection procedures previously used by an Employer, such as last in first out otherwise known as LIFO. However, where LIFO has not previously been used or where it is not seen by the Employer as a means to objectively and fairly select an Employee a selection matrix may be used.

In this instance it may be necessary to utilise a selection matrix that can demonstrate a reasonable and fair approach identifying the on-going needs of the business to illustrate the specific departments which must continue to operate and the skills and experience necessary. Any deviation from a fair and reasonable process could result in a claim under the Employment Equality Acts, 1998 – 2015 for discriminatory treatment, the Unfair Dismissals Acts, 1977 – 2015 or the Redundancy Payment Acts 1967-2014.

Notice

Upon establishment of the right to apply a period of lay off or short time the Employer must then provide the affected Employees with notice to this effect. It is the responsibility of the Employer to notify the Employee before the reduction in hours or remuneration commences.

The legislation does not stipulate a minimum period of notice, however, in the present circumstances Employers should demonstrate that they acted reasonably in the provision of said notice.

Exceptional circumstances, such as the COVID-19 pandemic, are likely to justify a short notice period.

A period of lay-off should not be confused with sick leave or a period of self-isolation in accordance with current HSE guidelines.

It is incumbent on the Employer to explain to the Employees the reason for the lay off or short time working as well as maintaining contact with affected Employees in order to keep them informed of the situation during this time.

It is best practice that the Employer provides written notification of the notice and the rationale for the lay off or short to the Employee as well as completing the Redundancy form RP9, both of which can be found in the attached toolkit.

Pre-Emergency Measures in the Public Interest (Covid-19) Act, 2020 (the 2020 Act)

Prior to the enactment of the Emergency Measures in the Public Interest (Covid-19) Act, 2020 an Employee could have acted on their right to claim redundancy in certain circumstances. This was owing to the fact that any period of lay off or short time is temporary in nature and therefore an Employer would have been cognisant of the time limits that are placed on the duration of these arrangements prior to an Employee being able to claim redundancy.

Prior to the 2020 Act if an Employee had been laid off or put on short-time for (i) 4 or more consecutive weeks, or (ii) 6 or more weeks within a 13-week period of which not more than 3 are consecutive, the Employee could have notified their Employer in writing of intention to claim a statutory redundancy payment, on the assumption that they satisfied the qualifying criteria, by having at least 2 year's continuous service.

In these circumstances the notice would have been given after 4 weeks of the lay-off or short-time commencing.

Prior to the 2020 Act an Employer would have been able to provide counter notice, within 7 days of the Employee's notice, contesting liability to pay a redundancy payment. This applied in circumstances where it was reasonably expected that within 4 weeks of the Employee's notice the Employee would have been provided with at least 13 weeks for full time work without being laid off or placed on short-time for any week.

Prior to the 2020 Act, one repercussion for the Employee in proceeding in this manner, was that the claim would have been viewed as voluntary in nature and the Employee would have lost any right to notice from the Employer under the Minimum Notice and Terms of Employment Acts 1973-2005.

Post-Emergency Measures in the Public Interest (Covid-19) Act, 2020

With the introduction of the 2020 Act, the ability of an Employee who has been placed on lay off or short time for a period of (i) 4 or more consecutive weeks, or (ii) 6 or more weeks within a 13-week period of which not more than 3 are consecutive, to claim redundancy after 4 weeks has been removed for the duration of the effects of the measures taken due to Covid-19. This means that it is not permissible for an Employee who is on layoff or short time to claim redundancy during the period 13 March 2020 to 31 May 2020. The 2020 Act also provides for this period of time to be extended.

While the 2020 Act has temporarily removed the right of an Employee to claim redundancy it does not mean that this right will not be reinstated, therefore it would still be best advice to issue the RP9 form when notice of either lay off or short time is given to an Employee.

Payment

As discussed above a period of lay off without pay should be expressly provided for in the written statement of terms and conditions of the Employee or alternatively a custom and practice to apply lay off without pay should exist. On this basis an Employee shall not be entitled to payment from their Employer during a period of temporary layoff. During this time an Employee may be entitled to payment of COVID-19 Pandemic Unemployment Payment.

<https://www.gov.ie/en/service/be74d3-covid-19-pandemic-unemployment-payment/>

This new payment will be available to all Employees and the self-employed who have lost employment due to a downturn in economic activity caused by the COVID-19 pandemic. The payment will be made for a period of 6 weeks at a flat rate payment of €350 per week.

Where an Employee has been placed on short time then the Employee may be entitled to a payment from the Department of Employment Affairs and Social Protection called Short Time Work Support which is a form of Jobseeker's Benefit and an application for same can be made by the Employee through www.welfare.ie while the restrictions are in place.

Please note that the measures applying by virtue of the Emergency Measures in the Public Interest (Covid-19) Act, 2020 relating to the prevention of claiming redundancy or providing counter notice for those on lay off or short time are temporary in nature. The provisions explicitly linked to the prevention of claiming redundancy in these circumstances are outlined in the 2020 Act as applying from March 13, 2020 – May 31, 2020. However, this timeframe may be

extended by Government and we expect updates on this sometime in May 2020.

Questions & Answers – Layoff and Short Time

How long can an Employer put an Employee on layoff or short time before a right to claim redundancy exists?

By their very definition any period of layoff or short time is temporary in nature. However, with the enactment of the 2020 Act an Employees' right to claim redundancy, where they have 4 or more weeks of continuous lay off or short time or the Employee has a series of 6 or more weeks (of which 3 weeks were consecutive) within a 13 week period, has been removed from March 13, 2020 – May 31, 2020. The 2020 Act provides for the right of the Government to extend this date. From a practical point of view Employers should continue to complete the RP9 form as the removal of the right to claim redundancy is temporary.

What happens if an Employee gives written notice to claim redundancy whilst on a period of layoff or short time?

Following the enactment of the 2020 Act, where an Employee is on a period of layoff or short time for 4 or more weeks or the Employee has a series of 6 or more weeks (of which 3 weeks were consecutive) within a 13 week period, then the Employee cannot give notice to claim redundancy to the Employer from the period of March 13, 2020 – May 31, 2020. It is worth noting that provisions are contained within the 2020 Act to also extend this date.

How much notice of layoff or short time should an Employer provide?

The legislation does not detail the amount of notice to be provided but an Employer must give as much notice as is reasonable and practicable to do so and must be prior to the Employee being laid off or being put on short time.

Does an Employer have to provide written notice of layoff?

No, however it is strongly recommended to put notice and rationale of layoff in writing in advance of the arrangement commencing as well as completing the RP9 form.

Does an Employer have to implement layoff over consecutive weeks?

No, layoff can be applied in a manner that suits the business needs of the Organisation as long as it is temporary in nature. For example, an Employer could place an Employee on layoff one week on, one week off. In any arrangement of layoff an Employer must understand the timelines in which an Employee may claim redundancy.

What State Payments can an Employee apply for during a period of layoff or short time?

During a period of layoff an Employee may be entitled to the Covid-19 Pandemic Unemployment Payment which can be accessed through an online application form on www.welfare.ie.

Where an Employee has been placed on short time then the Employee may be entitled to a payment from the Department of Employment Affairs and Social Protection called Short Time Work Support which is a form of Jobseeker's Benefit and an application for same can be made by the Employee through www.welfare.ie while the current restrictions are in place.

What can an Employer do if there is no express or implied right to place an Employee on layoff or short time?

Where neither an express nor implied right exists, the Employer must consult with the Employee and seek their agreement to apply a period of lay-off or short time. To do otherwise could expose the Employer to a breach of contract and/ or claim under the Payment of Wages Act, 1991. It is worth noting at this point that where neither an express or implied right exists and the Employee refuses to agree to a period of lay off or short time then this could result in the Employee being put at risk of redundancy.

What changes to lay off or short time have been implemented by virtue of the Emergency Measures in the Public Interest (Covid-19) Act, 2020?

The primary difference for those who have been placed on lay off or short time is that the right to claim redundancy, where an Employee has been placed on lay off or short time for 4 weeks or more or 6 or more weeks in a 13 week period (where 3 of those weeks are consecutive), has been temporarily removed. This has the knock-on effect that Employers will, for a temporary period, not be in a position to provide counter notice.

How long will the right to claim redundancy be removed under the 2020 Act, while on a period of lay off or short time?

This right has temporarily been removed from March 13, 2020 – May 31, 2020 with provision under the 2020 Act to further extend this date owing to the impact of Covid-19.

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