

Stratis Consulting – Guidance on Lay-Off and Short-Time for Employers - COVID-19

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1.0 Introduction

The Covid-19 pandemic is already having serious implications for employers and workers. Amidst strenuous efforts being made by employers to limit the impact on their business, many are having to evaluate the prospect of placing employees on lay-off or short-time. Some estimates suggest that up to 140,000 employees have been laid off already.

Under the Redundancy Payments Acts 1967-2014, **lay-off** occurs where an employer is temporarily unable to provide an employee with the work for which they were employed. **Short time working** occurs where an employee's hours of work or pay are reduced to less than 50% of normal weekly working hours or normal weekly pay.

In both cases the employer must have a reasonable belief that the situation will not be permanent and must give employees notice to this effect. There is no minimum period of notice required for either measure, however given what are the most unpredictable of circumstances due to the Covid-19 pandemic, a short period of *protective notice* is perfectly reasonable. The employer is however required to explain to the employees the reason for the lay-off in advance and keep employees informed of the situation during this time. Once implemented, the employer should also keep employees updated on all developments through regular communications.

Employers also need to be careful when selecting employees for lay-off or short-time and should only ever use objective selection criteria. They will need to exercise the selection criteria in a manner which avoids the risk of discrimination against employees on any of the permitted grounds precluded under the Employment Equality Acts 1998-2015.

Sample Text of a 'Protective Notice'

"Dear (Name)

Due to the deepening impact of the Covid-19 Pandemic (*this could be due to lack of customers, cancellation of orders, inability to provide services or to get to market etc*) unfortunately, we are unable to continue to provide the work for which you were employed. We believe that given the circumstances this will not be permanent but only temporary in nature.

The implications of this protective notice is that as and from (state date) we can no longer guarantee your continued employment. As a result, it is with deep regret that the company advises all employees that with effect from DATE, employment will be on a (day-to-day/week-to-week) basis. Any alteration to this unfortunate situation will be notified to all staff as soon as possible.

We will give you (*24 hours / one weeks*) notice prior to the introduction of (*temporary lay-offs or temporary short time working*). You will be only entitled to be paid for actual time worked during any periods of temporary layoff or temporary short time working.

We will be making every effort to minimise the need for (*short time working / layoffs*) and the duration for which these measures may be necessary. This will require a commitment from all of us to be completely flexible.

We will be briefing all staff over the coming days to help them to understand the business difficulties being faced and to explore all options available to us.

Should you have any queries please discuss with your immediate manager (or provide contact details).

Yours sincerely

Company Representative Name"

2.0 Some Key Questions

There are many alternatives to downsizing a business and to having fewer employees, but a key consideration is whether senior leaders believe that the downturn in business is temporary or permanent. Some key issues to consider include:

- Why does employment downsizing employment numbers make sense for the organisation?
- What is the business case for jobs downsizing?
- What is the problem that the organisation is trying to solve?
- If the problem is short-term cash flow, are there alternative ways to cut costs?
- Will prospective layoffs include hard-to-find skill sets?
- How will the downsizing affect high performers who are difficult to replace?
- Are there short-term benefits from a downsizing approach?
- What long-term threats to the organization's strategic success might there be?
- Do the long-term benefits associated with employment downsizing outweigh its short-term costs?

3.0 Consideration of other options

Given the impact on everyone involved, it is always worth considering what other options are available to deal with the situation at hand. These might include, eliminating overtime, reducing working hours, introducing a career break or job share arrangements, voluntary paid or unpaid leave, introducing a pay freeze and/or recruitment freeze, eliminating bonus payments (where applicable) or introducing pay reductions or other forms of salary sacrificing by agreement. Different options will need to be considered for different circumstances.

In terms of leave options, there are several options. An employer can decide when employees take their annual leave provided the employer takes account of the employee's family responsibilities, opportunities for rest and recreation and consults with employees (or their trade union) at least 1 month in advance.

Employers can also facilitate requests from employees to take annual leave in order to discharge family obligations e.g. that are due to the current school closures. Other options could be to facilitate parental leave or other unpaid leave or employees commencing maternity leave early.

4.0 Payment during a period of lay-off or short-time.

An employer cannot unilaterally place an employee on unpaid lay-off or short-time working with reduced pay unless this has been provided for in the contract of employment by way of an express contractual right to do so and also states that such period of lay-off is unpaid. If the clause does not state that the period of lay-off is unpaid the employer is at risk of being held liable to pay compensation for unpaid wages. (This could be via a case for an alleged 'unlawful deduction' under the Payment of Wages Act 1991).

This may be provided in the persons individual contract or in a unionised setting, may be provided for in a collective agreement which applies to the employee. Depending on the history of the employment, the employer might have an *implied* right to do so, due to a previous established custom and practice. If this cannot be relied on, an employer will need to secure the express agreement of employees to the proposed layoffs.

However, even where there was no contractual right to impose lay-off and without any evidence of custom and practice, we would expect that most people will be understanding of the situation employers now find themselves in and recognise that such decisions are necessary for the survival of the business. If staff are unwilling to voluntarily cooperate and were to legally challenge the employers right to introduce layoffs or short time working this could lead to the imposition of redundancies or even business insolvency.

As part of a range of measures introduced by the Irish Government, in response to the pandemic, a new COVID-19 Pandemic Unemployment Payment is available to all employees and the self-employed who have lost employment due to a downturn in economic activity caused by the pandemic. The payment has a simple one-page application form, can be accessed without a public services card and will be paid for a period of 6 weeks at a flat rate payment of €203 per week for jobseekers. It is designed to quickly deliver a social welfare payment to the unemployed and provide income security during this 6-week period and will be available to those temporarily laid off due to Covid-19.

Government has also stated that if employers pay at least the equivalent of the jobseeker rate of €203 a week they will be reimbursed by the Department of Social Protection. This new temporary refund scheme for employers will be available to all employees and the self-employed who have lost work as a result of the Covid-19 pandemic.

Those on short-time will have access to Short-Time Work Support payment if they have been temporarily placed on a shorter working week and is paid for a maximum of 234 days. The entitlement will depend on the number of social insurance contributions the person has. There may be an increased rate of payment for a qualified adult and qualified children and short-time Work Support is not taxable.

5.0 Entitlement to statutory redundancy payment.

If an employee has been laid off or 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 may notify their employer in writing of intention to claim a statutory redundancy payment assuming they satisfy the qualifying criteria, for example, having at least 2 year's continuous service. The notice must be given at the latest within 4 weeks after the lay-off or short-time has ended.

Within 7 days of the employee's notice, the employer can give counter notice contesting liability to pay a redundancy payment. This applies if it is reasonably to be expected that within 4 weeks of the employee's notice the employee will be permitted to work for at least 13 weeks without being laid off or placed on short time for any week.

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