



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

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# COVID-19: Strategies for Employers Coping with a Temporary Downturn in Business

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In stark contrast to the almost full employment rate enjoyed by Ireland recently, many employers are now faced with the sad and urgent reality of seeking solutions to keep their business afloat in a climate of forced closure of workplaces or a fall-off in business as a result of the COVID-19 pandemic.

Whilst no one yet knows how long the pandemic will last, it is hoped that it is temporary in nature and that life can return to normal in the medium term. We consider some potential options to help employers cope with a temporary downturn in business and to weather the COVID-19 storm.

## Lay-off, Short time and Government Supports

An employer may be able to quickly and temporarily reduce its salary overheads by placing employees on short time or lay-off.

A lay-off situation arises when an employer suspends an employee's employment because there is no work available and the employer expects the cessation of work to be temporary.

Short time is when an employer, because there is less work available for an employee than is normal, reduces an employee's earnings to less than half the normal week's earnings or reduces the number of hours of work to less than half the normal weekly hours. Short time working can only be implemented when an employer expects this reduction to be temporary.

There is no minimum notice period stipulated in legislation, but employees should be given as much notice as is reasonably practicable of the implementation of a period of lay-off and/or short time. The COVID-19 pandemic is an exceptional occurrence, which is likely to mean that in some instances, employers will be able to give very little, if any, notice. However even in circumstances necessitating urgent or immediate lay-offs, employers should explain to the employees the reason for the lay-off or short time working and keep employees informed of the situation during this time.

Prior to making a decision to place an employee on lay-off or short time, an employer should ensure that it has a contractual entitlement to do so or that there is an established custom and practice for such lay-off or short time within the business. If there is not, an employer would have to get the individual consent of the employees to be placed on lay-off or short time. Where there is no entitlement or agreement to place an employee on lay-off, the current emergency health situation may constitute an exceptional circumstance such that an employer must place an employee on lay-off for as long as the crisis persists. Placing an employee on lay-off in these circumstances could potentially result in claims being brought by employees in respect of deductions to wages pursuant to the Payment of Wages Act 1991 or breach of contract but such claims may not be viewed favourably by a court given that many businesses are being forced to shut down in the interests of extraordinary public health concerns. Furthermore, employees may be willing to accept unpaid lay-off or short time in order to preserve their employment status and avoid being made redundant. This is particularly likely if the closure of business is intended to be a short-term measure to curb the spread

of COVID-19 and in circumstances where financial supports have been put in place by the Government to alleviate the hardship for employees arising from such lay-offs.

The Government has introduced the COVID-19 Pandemic Unemployment Payment for employees who have been placed on lay-off due to the impact of COVID-19. The payment is €350 per week (increased from €203 on 24 March 2020). The payment is made at a flat rate regardless of the earnings of the employee. The payment was initially to be made for a six week period but this has now been extended by the Government for the duration of the COVID-19 emergency.

On 24 March 2020 the Government also announced the introduction of a new National COVID-19 Income Support Scheme which will support eligible employers to continue paying staff whose jobs have been impacted as a result of the COVID-19 pandemic. The full details of the scheme are yet to be published but the outline provides that the Government will reimburse an employer up to 70% of an affected employee's take home income up to a maximum weekly tax free payment of €410 (i.e. 70% of take home weekly income of €38,000 per annum).

In return for the subsidy, the employer is expected to make best efforts to maintain as close to 100% of the employee's normal income as possible for the subsidised period. In order to qualify for the scheme, employers must self-declare to Revenue that they have "experienced significant negative economic disruption due to Covid-19, with a minimum of 25% decline in turnover, and an inability to pay normal wages and other outgoings, in accordance with guidance to be issued by Revenue". The employee must have been on the payroll in February 2020.

This scheme is open to impacted employers in all sectors of the economy.

Employees who have their hours reduced as a result of the effect of the COVID-19 pandemic or who are placed on short time may apply for a Short Time Work Support payment under the Jobseeker's Benefit scheme for the days/hours the employee is no longer receiving work. The employee's entitlement under the Short Time Work Support payment is subject to the terms of that scheme including that the employee must have sufficient PRSI contributions, have his/her hours reduced to three days or less per week having previously worked full-time, be under 66 years of age and be available for full-time work.

The benefits to an employer of implementing temporary measures of lay-off or short time in what we hope to be a temporary crisis include: maintaining the employment relationship so that the business is in a position to reopen once the emergency has passed, and avoiding the up-front costs associated with implementing redundancies.

However, employers should be aware that where an employee is on lay-off or short time for four or more consecutive weeks, or six or more weeks within a 13-week period, of which not more than three are consecutive, the employee can seek to be made redundant.

An employer can contest the request for redundancy by serving a counter notice on the employee within a period of seven days of receipt of the notice. The counter notice can only be validly served where the employer can guarantee not less than 13 weeks' continuous employment, without any period of lay-off or short time, starting within four weeks of the date of the employee's notice.

It should be noted that the Government published a Bill on 24 March 2020 regarding the introduction of emergency legislation to deal with the Covid-19 Pandemic. This Bill includes an amendment of S.12 of the Redundancy Payments Act, 1964 regarding an employee's right to trigger redundancy in the circumstances of lay-off or short time outlined above. If enacted, the employee's entitlement to trigger redundancy under this section would have no effect for the duration of the period of the Covid-19 emergency which is currently defined as 13 March 2020 to 31 May 2020.

## **Parental Leave**

Where an employer is seeking to make savings on overheads due to a temporary downturn in work and where some staff may be encountering difficulties in respect of childminding whilst creches and schools remain closed (closures now extended until 19 April 2020), a potential solution for both parties might be for an employee to take a period of parental leave. Parents of children currently have the right to 22 weeks'

unpaid leave in respect of each child (this period will be extended to 26 weeks on 1 September 2020). The leave must be taken before the child is twelve years old (subject to exceptions) and may be taken as a continuous period, in portions or, with the agreement of the employer, by working reduced hours.

The request for parental leave should be made by the employee. An employer cannot force an employee to take parental leave.

An employee's entitlement to annual leave continues to accrue during periods of parental leave but there is no entitlement to receive salary.

## **Annual Leave**

Employers could also consider encouraging requests from employees to take annual leave (provided the employer has the cash flow to pay for such annual leave) to cover periods of absence by the employee which would otherwise be unpaid e.g. time off to mind children who are out of school.

An employer could also consider requiring employees to use a period of annual leave if it is experiencing a downturn in business. In accordance with the Organisation of Working Time Act 1997, the employer must consult with an employee (or the trade union of which he/she is a member) not later than one month before the day on which the annual leave (or portion thereof) is due to commence; and the employer must take into account the "opportunities for rest and recreation available" to the employee as well as the need for the employee "to reconcile work and any family responsibilities".

Whilst the taking of annual leave will not improve the employer's cash flow situation in the short term, it may prevent a situation arising whereby employees have vast accrued leave entitlements in the second half of the year which they may wish to take at a time when the business is back up and running and requires staff.

## **Reducing Pay**

In the early days of the recession of 2008/2009, employers seeking a reduction in employee salary as a measure to try to stave off potential redundancies was commonplace. Seeking a temporary reduction in pay across an entire workforce may produce sufficient savings for an employer to enable it to manage through the COVID-19 pandemic without job losses or lay-offs.

Because pay is a fundamental term and condition of employment, it cannot be varied unilaterally. Therefore, in order to implement a valid reduction in pay, employers need to obtain the express written agreement of each affected employee. Implementation of a pay reduction without consent could result in a claim pursuant to the Payment of Wages Act 1991 in respect of the unlawful deduction of pay, a claim for breach of contract or a claim for constructive dismissal pursuant to the Unfair Dismissals Acts 1977-2015.

A reduction in pay cannot bring the average hourly rate of pay of an employee below the statutory minimum rate of pay which is currently €10.10.

From a practical perspective, early and frequent communication and buy-in (i.e. explaining that the rationale is to avoid/minimise lay-off and redundancies, etc.) may assist in obtaining employee agreement.

## **Redundancy**

In certain circumstances, the above measures may be insufficient and in such cases it may be that certain roles will be redundant. Employees with two years or more continuous service will be entitled to a statutory redundancy payment calculated at two weeks' pay (capped at €600 per week) per year of service plus a bonus week. An employer should ensure that there is a genuine reason for redundancy and that any termination is effected only following conclusion of a fair process.

When effecting large scale dismissals, employers should also be mindful of collective redundancy legislation. A collective redundancy means dismissals arising from redundancy where an employer in a period of 30 consecutive days dismisses:

- (a) at least 5 employees in an establishment normally employing more than 20 and less than 50 employees;
- (b) at least 10 employees in an establishment normally employing at least 50 but less than 100 employees;
- (c) 10% of employees in an establishment normally employing 100 but less than 300 employees; or
- (d) At least 30 employees in an establishment normally employing 300 or more employees.

Where a collective redundancy is triggered, additional steps will need to be followed prior to effecting redundancies. In particular, no notice of redundancy should be served on any employee prior to the expiry of at least the 30-day period from notification to the Minister as to do so may expose an employer to a fine of up to €250k.

## Final Thoughts

In these challenging times, clear and transparent communication with staff is of fundamental importance to maintain good relations, achieve buy-in for the measures proposed and to ensure that staff are treated fairly in a time of great stress for all.

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

<https://www.gov.ie/en/service/c20e1b-short-time-work-support/>

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*This article was [first published](#) as part of Legal-Island's Employment Law Hub.*

For more information, please contact Elizabeth Mara at [emara@lkshields.ie](mailto:emara@lkshields.ie). To view our cross-disciplinary coverage of business continuity during the COVID-19 outbreak, please visit our dedicated [special insights page](#) and sign up to our mailing list by [clicking here](#).

## About the Author