

LAY OFF & SHORT-TIME WORKING – A HEADLINE SUMMARY

What is lay off and short time working ('LOST')?

Lay off is defined as any week in which an employee receives no payment under their contract (excluding statutory guarantee payments - below). Short-time working is any week in which an employee receives less than half of their normal pay

Can an employer impose LOST?

Not unless there is a pre-existing contractual to do so or the employer secures a collective agreement¹ or individual agreement² to reduce hours & pay.³

Are there minimum payments which must be made in respect of LOST?

Yes. Regardless of the LOST arrangements which are agreed, employers must pay employees⁴ a statutory guarantee payment (currently maximum of £30 per day) for the first 5 workless days in any 3-month period.

Entitlement to claim redundancy pay

Employees who are laid off or kept on short-time working for 4 consecutive weeks or 6 weeks in any 13-week period may claim for a statutory redundancy payment.⁵ An employer can resist this by giving counter-notice.⁶

Practically therefore employers may wish to ensure that LOST arrangements do not result in employees receiving less than half their normal pay to insulate themselves against claims for redundancy pay. Alternatively, employers may wish to invoke their right⁷ to give employees notice to take statutory leave to extend the aforementioned 4/6-week thresholds.

Prior to 31st October 2020, when the CJRS Scheme is due to end, an alternative to consider before any Covid-19 related redundancy may be to agree the employee becomes a "Furloughed Worker" (Please see our separate guide on this). From 1st November 2020 Employers may wish to consider using the Job Support Scheme which provides for an Employee to work at least 20% of their contractual hours but receive 73% of their pay, subject to a cap ("JSS" - again please see our separate guide on this). In summary, these alternatives may have a number of advantages: - For the employees, they will have an income (subject to the cap) and greater job security. For the business:, it will potentially avoid redundancy costs; it will avoid recruitment time and costs when the current crisis is over and ensure you are ready for the recovery period to follow; and, if the dismissal

¹ With a trade union recognised for the purposes of collective bargaining

² For those not covered by collective bargaining arrangements

³ Unilateral imposition of a pay reduction may result in claims for an unlawful deduction from wages, breach of contract, wrongful dismissal, constructive dismissal and if 20 or more employees are affected at one establishment, a protective award claim

⁴ With one month's continuous service, provided they have not refused an offer of alternative work

⁵ Within 4 weeks

⁶ Issued within 7 days of the employee's claim and confirming that within 4 weeks of their claim they shall commence a 13-week period of employment during which they shall not be subject to LOST

⁷ Reg 15 WTR 1998

results in a claim, Tribunals are likely to expect these options to have been “conscientiously considered” when it determines whether the dismissal was fair and reasonable in all the circumstances.

Empirical industrial relations evidence of trade union and employee reaction to Coronavirus

There appears to be a willingness amongst trade unions and individual employees to enter into collective or individual agreements, respectively, to reduce hours of work and pay in order to reflect business needs and contribute to their ultimate survival.

What form should LOST agreements take?

Any collective agreement made with a trade union to reduce hours/pay must be communicated to affected employees before coming into effect. Individual agreements for those outside collective bargaining arrangements should be covered by written confirmation of a temporary variation to terms and conditions re hours and pay.

What if employees object?

Collective agreements will be binding on employees within the bargaining unit even if they object. If employees who fall outside collective bargaining arrangements refuse to agree temporary variations to their terms and conditions further advice should be sought about how best to respond and the commercial options available.⁸

Vista Employer Services Ltd

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⁸ The current climate does not lend itself to following the conventional approach of collective consultation (if required), individual consultation and termination (with notice) and re-employment on varied terms.