Covid-19 Coronavirus Update

Lay-off and Short Time Working

This week has seen a number of developments regarding the spread of the Covid-19 Coronavirus with many governments taking stricter measures to control the spread of the virus.

It is important to note that the situation is very fluid and government guidance is changing daily. We can therefore only provide a general guide that should be used with care. Furthermore, as we are not medical professionals, we cannot provide any medical advice on the virus, its treatment or transmission. This guidance is current for 19 March 2020.

Introduction

We are starting to see businesses consider how they will respond to a significant reduction in work, including a national lockdown.

If an employer decides to close its business, for example due to the numbers of staff off sick or self-isolating or due to lack of customers, it must pay employees as normal unless there is a contractual right to lay-off employees or put them on short-time working temporarily.

- A Lay-off is where employees are not provided with work by their employer and the situation is expected to be temporary.
- Short-time working occurs when employees are laid off for a number of contractual days each week, or for a number of hours during a working day.

Lay-offs and short-time working are frequently used by employers as a useful way of handling temporary work shortages and adverse trading conditions without having to resort to redundancy. An employee is laid off during a particular week if the employer does not provide any work for them for that week because there is a diminution in the requirements of the employer's business for work of the kind which the employee was employed to do, and the employee is not paid as a result. An employee is considered to be on short-time working for a week where they work for some of the week, for proportionately less pay, but are laid off for the remainder of the week.

There is a statutory scheme available under which employees can claim a redundancy payment when laid off or put on short-time working, provided that they comply with a complex statutory procedure and provided that the lay-off or short-time working falls within the statutory definitions contained in the Employment Rights Act 1996. This is considered in further detail below.

First, this article explains how employers can legally implement a lay-off or short-time working and when statutory guarantee payments will be payable.

Implementation of a lay-off or short-time working

The employer needs to start by checking the employee's contract of employment (or a collective agreement that is incorporated into individual contracts of employment) to ascertain if it contains an express contractual right for the employer to impose a lay-off or short-time working with no pay for time not worked. If the contract does contain such an express term, it is binding on the employee. As a result, the employer can simply impose a lay-off or short-time working, always having regard of course to the implied term of mutual trust and confidence that exists between employer and employee.

It may also be possible to imply a term where imposing lay-offs or short-time working has been the clear and certain custom and practice of the employer, although there is an element of risk in relying on an implied term of this nature should the employee seek to challenge it. This is because, if an employer lays an employee off or puts the employee on short-time working without having an express or implied contractual right to do so, this will amount to a fundamental breach of the contract of employment, enabling the employee to resign and claim unfair constructive dismissal if they have been employed for at least two years. If the reason for "dismissal" was redundancy, the employee can claim a statutory redundancy payment as well as claiming unfair dismissal.

As an alternative to resigning and claiming constructive dismissal, an employee who has been laid off or put on short-time working in breach of contract may choose to remain employed but claim any shortfall in pay under the unauthorised deduction of wages provisions contained in part II of the Employment Rights Act 1996. This would be the usual remedy for employees who do not have the requisite length of qualifying service to claim unfair constructive dismissal. As a final option, an employee may choose to sue the employer for damages for breach of contract.

Employers should note that, even where there is a contractual right to lay an employee off, it is arguable that there may also be an implied contractual term that any lay-off will be for only a reasonable period of time and not indefinite.

Where there is no contractual right to lay an employee off, the express, informed consent of the employee will be needed.

- The employer should first make the employee fully aware of what they are being asked to consent to (for example, how many weeks of lay-off or short-time working are likely to ensue and what this means with regard to the employee's pay).

- The employer should then ask the employee to give their consent in writing for the avoidance of doubt. Following discussions with the employee, written consent can usefully be obtained by way of a letter to the employee explaining the implications of the proposed lay-off or short-time working and asking them to sign and return a copy of the letter signifying their agreement.

- Thereafter, the lay-off or short-time working should be kept under continual review and further consent may need to be obtained at a later date if the lay-off or short-time working lasts longer than originally envisaged.

We have produced a template letter that can be used to write to employees to propose the amendment which is available upon request.

Statutory guarantee payments

Most employees are entitled to a statutory guarantee payment for any complete day of lay-off. This is known as a "workless day". Guarantee payments are limited to a maximum of five days' payment in any three-month period. If the employee is normally contractually required to work less than five days per week (i.e. they are part time), the entitlement cannot exceed the number of days that the employee is required to work under their contract.

The amount per day of a guarantee payment is based on the employee's normal daily rate of pay, up to a statutory maximum (currently £29 per day rising to £30 per day from 6 April 2020), which changes on 6 April each year in line with the retail prices index. Any salary that an employer pays under the contract of employment in respect of a workless day can be offset against the employer's liability to make statutory guarantee payments. This would be the case where, for example, the employer has contractually promised to maintain full salary, or a percentage of full salary, for a defined period of lay-off.

When informing employees about a period of lay-off, the employer should explain how it will affect their pay and the circumstances in which they will be entitled to guarantee payments. It should advise them to contact their local Jobcentre Plus to find out if they may be entitled to any benefits while they are not receiving their full pay.

Employers should note that if they provide some work, although not the usual amount of work, during a particular day, that day is not considered a workless day, therefore no guarantee payment is due. This is the case even if the work is provided outside normal working hours. Thus, one way to implement short-time working is to have the employees working all their usual working days but for only a part of each of those days. That way, they will be paid for the hours they work but guarantee payments will not be payable.

Certain employees are not entitled to statutory guarantee payments, these being:

- those who have worked for the employer for less than a month ending with the day before the workless day;

- those who unreasonably refuse an offer of suitable alternative employment for the workless day (this need not be work that they are required to perform under their contract);

- those who fail to comply with the employer's reasonable requirements to be available for work; and

- those who are not provided with work because of a strike, lock-out or other industrial action.

If an employer dismisses an employee for seeking to enforce their statutory right to a guarantee payment, the dismissal will be automatically unfair, regardless of the employee's length of service.

Redundancy payments for lay-offs or short-time working

For the purposes of the statutory scheme, a week of lay-off occurs where not only is no work provided by the employer for the employee but also the employee receives no pay under their contract of employment for that week in circumstances where the employee's contractual pay depends on their being provided with work to do by the employer. A week of short-time working takes place where the employee receives less than half a week's pay for work done, because of the diminution in work. Statutory guarantee payments do not constitute pay for these purposes.

The statutory scheme enabling an employee to resign and claim a redundancy payment where they have been laid off or put on short-time working is complicated. In order for the scheme to trigger, the employee must have been laid off or kept on short-time working either for four consecutive weeks or for a total of six weeks (no more than three being consecutive) in any period of 13 weeks.

A redundancy payment may be claimed only if the employee gives the employer a written notice of intention to claim a redundancy payment in respect of lay-off or short-time working. The notice does not need to be in a specific format as long as it indicates the employee's intention to claim a redundancy payment. This notice must be given within four weeks of the last of the weeks of lay-off or short-time working.

Employers are able to contest liability to make a redundancy payment if they do not wish to meet the claim. In this case, the employer must serve a written counter-notice within seven days of service of the employee's notice of intention to claim. As a minimum, the notice should state that the employer intends to contest liability for a redundancy payment. It does not have to set out the details of the grounds on which a redundancy payment is opposed. However, in order for the counter notice to be upheld by an employment tribunal, the employer must be able to show that, at the date of service of the notice of intention to claim, it reasonably expected to be able to provide a period of at least 13 weeks' continuous employment (i.e. without further resort to lay-offs or short-time working), to begin within the next four weeks.

Where an employer has served a valid counter-notice, the employee must apply to the employment tribunal to decide the matter.

Finally, the employee must terminate their contract of employment by giving the employer the contractual period of notice or one week's notice, whichever is greater. This notice of termination of employment must be given within three weeks of the employer's failure to give, or withdrawal of, a counter-notice (or, if the case has been contested, within three weeks of the employee being notified of the decision of the employment tribunal). This notice to terminate need not be in writing.

In Conclusion

The above represents a consideration of the current legal position. What we cannot take into consideration is what policies the government will enact in order to assist businesses. There have been a number of suggested policies designed to help keep staff in employment being discussed and as such it is likely that additional help to cover such costs will be forthcoming

We will or course continue to monitor any developments in order to keep members informed. Don't forget, as a MILS member you have access to the MILS Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

Motor Industry Legal Services (MILS Legal Ltd) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.