

LAY-OFF AND SHORT-TIME WORKING (‘LOST’ – OTHERWISE KNOWN AS TEMPORARY REDUNDANCY)

Guidance Notes

These notes cover the concepts of lay-off and short-time working and what employers should do in this situation.

INTRODUCTION

Lay-off and short-time working, or LOST, are provisions used when there is a shortage of work, or insufficient finance available to fund full-time employment. LOST, otherwise known as temporary redundancy, is usually considered as an alternative to avoid compulsory redundancies, usually when there is a downturn in work or finance necessary to fund full-time employment.

DEFINITION OF LAY-OFF

In practice, lay-off is where the employer asks their employees to stay at home and not attend work. The law outlines that an employee has been laid off for a week where:

- their employment contract provides that pay is dependent on their employer providing them with work that they are employed to do, but
- they are not entitled to remuneration for that week because their employer has not provided them with work.

A period of lay off will only be classed as statutory lay off where it meets this definition ie they have not been paid for a week because their employer does not provide them with work, where their pay depends on carrying out work.

In addition, statutory lay-off will only take effect where the employee is available for work during the period of lay-off. For example, a period of sickness will not be classed as a period of lay-off because the employee was not available for work during this time. Additionally, the employee cannot turn down available work or frustrate their employer’s attempts to convey an offer of available work in order to be classed as laid off.

DEFINITION OF SHORT-TIME WORKING

In practice, short-time working is where the employer requires employees to work is still available, however, it is for fewer hours than the contract

An employee will be determined to be on ‘short-time working’ where the work that they are provided by their employer under their contract of employment has diminished, which results in their remuneration for the week being less than half a weeks’ pay.

The normal statutory definition of a ‘week’ is:

- the seven days ending on the day pay is normally calculated, for a weekly-paid employee or
- seven days ending on a Saturday, for all other employees.

In certain cases, an employer’s contract may provide employees with pay that is greater than half their weeks’ pay during periods of reduced working. In these circumstances, the employee would not meet the statutory definition of ‘short-time working’.

LOST CONTRACTUAL CLAUSE Overview

Employers who do not have the contractual right to place employees on lay-off or short-time working (LOST) without pay will breach their employment contracts if they do not pay employees during this period. This is because there is an implied right for employees to be paid. As such, it is best practice for employers to include an express contractual provision allowing employees to be placed on unpaid LOST.



PENINSULA

In some organisations, however, there may be an *implied* contractual right to place employees on unpaid LOST. This will usually arise due to the existence of a custom or practice of placing employees on unpaid LOST. Common sectors may include, for example, manufacturing and agriculture where volumes of work are affected by outside factors such as volume of orders, weather, etc.

Absence of a contractual clause

If there is no express or implied contractual term entitling the employer to place employees on unpaid lay-off or short-time working (LOST), the employee will be entitled to full pay even when they aren't working.

In the absence of a contractual term, placing employees on unpaid LOST will be a breach of the employees' contracts of employment. As a fundamental breach, employees could choose to resign in response to the breach, and subsequently claim they have been constructively dismissed by their employer.

Employers could seek a mutual agreement with employees to go on to unpaid LOST. This may only be agreeable as a method to avoid compulsory redundancies because individuals are unlikely to agree to be placed on unpaid leave.

ENTITLEMENT TO STATUTORY GUARANTEE PAY

Overview

Employees who are placed on unpaid lay-off or short-time working may be entitled to claim a statutory guarantee payment (SGP).

SGP is a legal payment set by the government to be paid on workless days. Days spent on lay-off or short-time working will usually fall within the statutory definition of a 'workless day'. Payment of SGP is limited to a maximum of one working week, again subject to a five day maximum within any three-month period.

The rate of SGP is set by the government and increases every April. To pay employees who are on LOST SGP, this will need to be outlined in their contract or a separate agreement reached

with them.

Eligibility for statutory guarantee pay

Subject to exclusions eligible employees are entitled to a statutory guarantee payment (SGP) where, on a day they are normally required to work under their contract of employment, they are not provided with work by their employer because of:

- a reduction in the organisation's requirements for work of the kind the employee is employed to do or
- any other occurrence which affects the normal working of the organisation regarding this kind of work.

This is also known as a "workless day". For SGP, a day is defined as the 24-hour period starting at midnight and ending at midnight. For night shifts where work takes place before and after midnight, only one day will count depending on in which 24-hour period more work is carried out.

As such, employees who are placed on statutory lay-off or short-time working may be entitled to receive SGP. However, SGP may be payable in other circumstances for example, where an external occurrence, such as flooding, means the workplace closes and employees cannot carry out normal work during a working day.

The entitlement to SGP is subject to exclusions. SGP will not be payable where:

- the employee has less than one month's continuous employment counted on the day before the period they are claiming SGP in relation to
- they were not provided with work on the day because of a strike, lock out or other industrial action affecting their employer or an associated employer
- they were offered suitable alternative work on this day by their employer, taking into account all the circumstances and not limited to the employee's normal role, but the offer was unreasonably refused



- the employer places reasonable requirements on the employee to remain available for work, if such work becomes available, and the employee fails to comply with these requirements.

ENTITLEMENT TO STATUTORY REDUNDANCY PAYMENT

Overview

Whilst placing staff on lay-off or short-time working (LOST) is a practical consideration for organisations who are suffering a downturn in work or finance, organisations need to consider that using these measures could result in employees becoming entitled to a statutory redundancy payment (SRP).

An employee becomes entitled to a redundancy payment if they have been placed on lay off or short-time working. To be entitled, the employee has to have:

- a minimum of two years' continuous service
- been placed on LOST for the required period of time
- followed the required statutory procedure to claim their entitlement
- resigned with appropriate notice.

The employee's length of continuous service is calculated up to the last day of the week of LOST they are relying when making their claim for SRP.

The required period of time to have been placed on LOST is split into two sections. The employee is entitled to a redundancy payment where they have been placed on lay-off or short-time for either:

- four or more consecutive weeks, or
- six or more weeks within a period of thirteen weeks, where no more than three weeks are consecutive.

These weeks may be either made up solely of lay-off, short-time working or a combination of both. Any weeks not worked due to strike action do not count.

Statutory procedure to claim redundancy payment

In order to claim a statutory redundancy payment, the employee is required to follow a strict statutory procedure which includes detailed time limits. The employer can also follow a statutory procedure to contest the employee's claim. A brief overview of the procedure is below:

- employee provides notice of intention to claim to their employer
- if they choose to contest the claim, the employer provides counter-notice to the employee
- if counter-notice is not withdrawn, the employee can refer the matter to an employment tribunal to determine their entitlement
- employee resigns with notice.

In order to receive their statutory redundancy pay (SRP), the employee has to provide their employer with statutory notice of their intention to claim this payment.

This notice has to be in writing and state that the employee is making a claim for a redundancy payment in respect of being placed on lay-off and/or short-time working. There are no further statutory requirements for the contents of the notice.

In order to serve the notice on the employer, this must be posted or hand-delivered to the employer's address that the individual works at; given to a nominated person; left at or posted to a designated place or address. This must take place either:

- on the last day of the week spent on lay-off or short-time, on which the employee is basing their claim on, or
- within a four-week period of the above date.

This time limit is strictly applied meaning it cannot be extended, even by an employment tribunal, and a notice which is served too early will also not be valid. There is, however, nothing within the statute to prevent the employee from serving a second notice at a later date to comply with the time limit.



For example, if an employee serves the notice before the last day of the week spent on LOST this notice will not be valid. The employee can then serve a further notice of their intention to claim and this will be valid so long as this is received by the employer within four weeks of the last day of the week they rely on.

Counter-notice to contest the claim

Employers may wish to contest their employees' claims for statutory redundancy pay, however, there can only contest this in limited circumstances and they are required to follow a statutory procedure.

A claim can be contested under the statutory defence where it is reasonably expected that:

- the employee will be provided with a period of employment lasting at least thirteen weeks
- they will not be placed on lay-off or short-time working for any of these weeks and
- this period of employment will start within four weeks of the date the employee's notice to claim was served.

Where the employee is reasonably expected to be provided with work, the employer needs to serve a counter-notice explicitly stating that they contest the liability to pay a statutory redundancy pay. The counter-notice has to be served on the employee within seven days of service of their notice of intention to claim, and must either be given to the employee by hand, left at or posted to their normal address.

As with the employee's notice to claim, the time limit for the employer serving the counter-notice will be strictly applied and cannot be extended. Additionally, any counter-notice which does not state that the employer is contesting the liability will not be valid, for example, if this merely informs the employee that they can return to work at a specific date.

Contesting the claim, even after serving the required notice, will automatically fail if the employee is not provided with the minimum

period of employment within four weeks of their notice to claim, ie they remain on lay-off or short-time working for this four-week period (subject to the exception relating to industrial action).

The employer can decide to withdraw their counter-notice, for example, if they become aware that there is no possibility of the employee being provided with the required period of employment or that this will not become available within four weeks of the employee's notice of their intention to claim. To withdraw the counter-notice, the employer has to provide the employee with written notice of their withdrawal and this can take place at any time. Where the employer does not withdraw the counter-notice, the employment tribunal will determine whether the employee is entitled to receive redundancy pay.

Recourse to the employment tribunal

Where an employer serves a counter-notice on the employee contesting their entitlement to a statutory redundancy payment, and this counter-notice is not subsequently withdrawn by the employer, an employee can apply to the employment tribunal to determine whether they are entitled to a redundancy payment, or not.

The employee can make this application to the tribunal whilst they are still employed; they are not required to resign before the tribunal determines their redundancy pay entitlement. The tribunal will examine whether there was a reasonable expectation of the employee being provided with the minimum period of employment within four weeks of the date of the employee's notice to claim. This assessment will focus on this period, and it will not matter whether there is work available to the employee at the time the tribunal is assessing the merits of the claim.

Resigning from employment

Once it is determined that the employee has a right to be paid a statutory notice payment, they are required to resign from their employment within a specified time period, and provide the required period of notice, to be entitled to receive their redundancy pay.

The period of notice that the employee must give when resigning is a minimum period of one week but will differ dependent on the notice terms set out within the employee's contract of employment, as below:

- where the employee's contractual notice to resign is greater than one week, the employee must provide their contractual notice to resign or
- where the employee's contractual notice to resign is silent or less than one week, the employee must provide one week's notice to resign.

Although the employee has to provide a minimum period of notice of their resignation, this notice must also be received by the employer within a specified time period. This period differs dependent on whether the employer served a counter-notice to their notice of intention to claim, and whether any subsequent withdrawal took place. These time limits are strictly applied and cannot be extended.

The time periods for the employee to provide notice of resignation are as follows:

- where the employer does not serve a counter-notice within seven days of the employee's notice of intention to claim, the employee has three weeks from the end of this seven-day period to provide their notice to resign
- where the employer serves a counter-notice within seven days of the employee's notice of intention to claim but decides to withdraw the counter-notice, the employee has three weeks from the date they were provided with written notice of the withdrawal to give their notice to resign

- where the matter is referred to the employment tribunal because the employer serves a counter-notice within seven days of the employee's notice of intention to claim and does not withdraw this, the employee has three weeks from the date the tribunal informs the employee of their decision to provide their notice to resign. This period is not affected by the employer appealing the tribunal's decision to the Employment Appeal Tribunal.

Dismissal by the employer

An employee who is dismissed by their employer will not be entitled to receive a redundancy payment on the grounds that they have been placed on lay-off or short-time working.

They will, however, remain entitled to a statutory redundancy payment if they have been dismissed by reason of redundancy, and they meet the eligibility requirements.

Statutory redundancy pay calculation

The amount of statutory redundancy pay to be paid to entitled employees, who have followed the strict statutory procedure, is calculated in the same manner as when an employee is dismissed by reason of redundancy.

The payment is calculated on the basis of an employee's age, length of service and weekly pay subject to a weekly maximum, rates of which are set by the government and increase every April.

When the employee has been placed on lay-off or short-time working, the 'relevant date' to determine the employee's period of continuous employment is the last day of the lay-off or short-time working period.