



# How do I draft a lay-off and short-time clause in employee contracts; and how do I fairly negotiate these?

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*In light of the rapidly developing situation and government response, this memorandum is current as at 16 April 2020*

### **What is lay-off and short-time working and why might an employer wish to implement them?**

Lay-off is where the employer has no work for the employee to do and so temporarily lays the employee off. Consequently, the employee will not be paid although they may be entitled to a fixed amount of lay-off pay.

Short-time working occurs when an employee's hours and pay are reduced proportionately.

Both of these options provide a way for an employer to reduce their wage bill whilst still retaining employees. These options provide a temporary solution to the issue of a business having less work for employees to do.

### **Why is it important that the position is set out in the employee's contract of employment?**

An employer wishing to implement lay-offs or short-time working should consider whether there is a provision in the employee's contract that provides for this. If there is no express or implied provision, the employer will need to get the employee's consent to the lay-off or the short time working.

The right to lay-off employees or place them on short-time working will be express if the contract specifically says an employer is allowed to do so. For example, if the employee is on a zero-hours contract or if the contract allows for a reduction in hours. Alternatively, in some industries, this right is implicit through custom and practice.

If lay-off or short time working is implemented without the relevant provision being in the contract the employee will have the right to resign and claim constructive dismissal.

### **How to implement lay-off or short-time working in light of COVID-19**

If the right to lay-off employees or place them on short-time working is not expressly or implicitly provided for in an employee's contract of employment but an employer wishes to implement these measures due to a particular set of circumstances it is still possible to do so.

Depending on the circumstances, the employer may be able to rely on provisions in the contract more generally which allow the employer to vary the employee's hours.

If this is not possible, the change should be introduced with the consent of employees. This consent may be express or implied.

In light of COVID-19, it may be more appropriate to furlough employees and access the support available through the Coronavirus Job Retention Scheme rather than temporarily lay them off or introduce short-time working. If an employer wishes to claim furlough allowance from the government it is necessary for them to be able to prove that the employee agreed to be placed on furlough.

The following factors should be considered when deciding how to vary the employees' contracts:

- the extent of the reduction in hours;
- the extent of reduction in pay; and
- the length of period of lay-off or short-time working

### **How to change an employment contract to include a lay-off or short-time work clause**

If an employer wanted to include a general power to lay-off employees or reduce working hours the contract would need to be varied. Consent to varying the contract could be express or implied but in these circumstances express consent would be better.

- **Step 1 – Drafting the clause**

The clause must provide for the possibility of implementing lay-offs without pay or short-time working with proportionately reduced pay. The clause can be very simple.

An example of wording you may wish to consider using is:

'If there is a reduction in work, we may temporarily lay you off without pay or reduce your working hours and your pay proportionately [on giving [one week's] notice in writing]. Depending on the circumstances you may have a statutory right to a guarantee payment.'

- **Step 2 – Consulting with employees**

It will be necessary to get the consent of all employees to change their employment contracts. This can be done by calling a meeting of all employees or meeting with each person individually. These meetings can be held either in person or virtually.

The reason for the change should be explained to employees and any questions they may have should be answered. If they propose any alternative solutions it is necessary for these to be considered.

Careful minutes should be made of these consultation meetings.

- **Step 3 – Obtaining written consent**

Since the change to the contract is one that will impact negatively on the employees, it is necessary to ensure that written, not just oral, consent is received.

All affected employees should be given a document, either in person or by post, setting out the proposed changes to the employment contract. The employee should then sign and date this document to confirm their consent to the changes.

The document should then be returned to the employer.

It is possible that an email exchange would be considered sufficient evidence of written consent but there is currently limited authority for this and so signed written consent, as set out above, is preferable if possible.

- **Step 4 – Confirming the change**

Once the change to the contract has been implemented, a written notice should be sent to all employees confirming the details of the change.