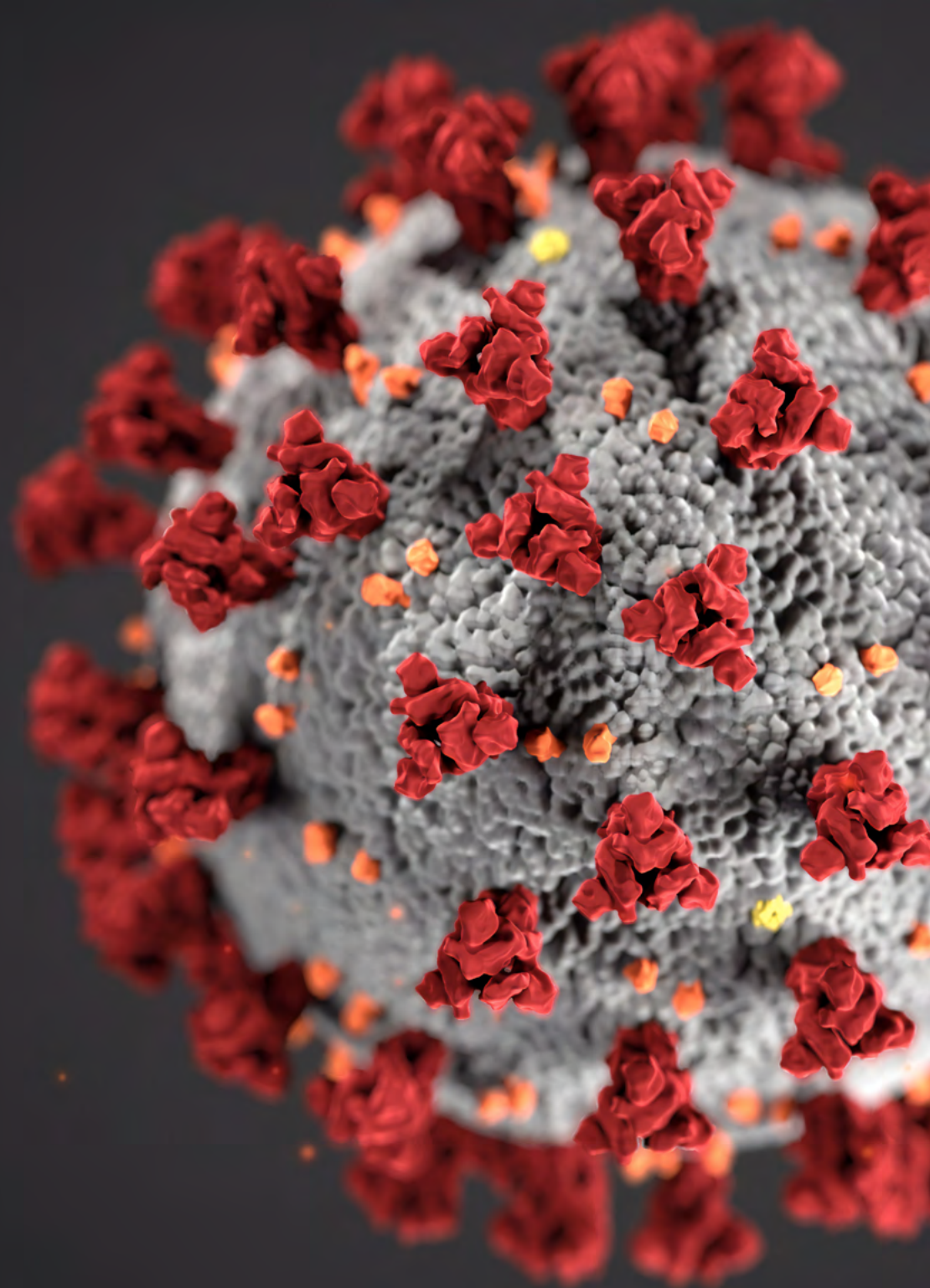


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Coronavirus:

How to approach
an unexpected
downturn in work



Introduction

Covid-19 (the Corona virus) pandemic has led to unprecedented times across our workforces. With the Government advising the public to avoid public interaction many industries and sectors have noticed a dramatic drop in business leaving many unable to pay staff and considering redundancies.

This guidance seeks to examine the options available for employers faced with the need to make changes to their workforce by considering when and how an employer may implement lay offs or short time working.

At the end of this guidance we cover some frequently asked questions and provide links to websites providing up to date information and guidance.

DISCLAIMER: The contents of this publication are not intended to serve as legal advice or opinion. It should not be considered as a substitute for taking legal advice.



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Lay-offs and short time working

Lay-off is where for a period of time an employer provides no work and no pay to staff while retaining them as employees.

Short time working means providing employees with less work and consequently less pay for a period of time while retaining them as employees.

The regime is generally temporary in duration and only used in circumstances which have led to a temporary reduction in work.

When can I use lay-off or short time working?

An **express contractual right** within an employee's contract of employment will permit an employer to lay off employees or put them on short time working.

The right to lay-off employees or place them on short time working may also be implied if it can be shown it has been established over a long period of time by custom and practice for example: TLR routinely requiring its employees in the car manufacturing industry to work a short working week during the quieter summer period.

In the absence of an express or implied contractual term which allows lay off or short time working, an employer risks litigation, such as a breach of contract. In such circumstances, the employer will need to **seek the agreement** of its staff in order to impose a period of lay-off and/or short time working.



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Implementing lay-off or short time working: no express clause in contract of employment

In the absence of an express clause in the contract of employment which permits the employer to lay off staff or put them on short time working, both the employer and employee must agree to alter the terms of the contract so that the lay-off and/or short time working operates by mutual agreement.

THE IMPORTANCE OF MESSAGING

Great care needs to be taken around the messaging to staff and employers are encouraged where possible to consult or at the very least explain the basis for seeking to vary contracts. This may involve a virtual or face to face meeting with the entire workforce or affected department(s) at which the basis prompting the change is explained including the impact client demand, cancelled events etc. is having on the requirement for work of a particular kind. Employers should never assume employees are fully aware of the difficulties affecting an organisation and should always keep regular communication channels open during an unprecedented matter such as this.

Once the circumstances leading to the request have been fully explained to staff the employer can relay the options it considers are available under the circumstances such as a shorter working week and/or lay-offs without pay.

We would encourage employers to give employees the opportunity to make their own suggestions and to give due consideration to these before imposing any change. If time is of the essence a FAQ sheet addressing the likely questions to be raised shared amongst staff, a means for allowing questions to be raised and answered via Team Leaders will go some way to ensuring staff are kept up to date and listened to during this time all of which is likely to result in staff buy in and a mutual agreement being reached.

MUTUAL AGREEMENT REACHED

PLEASE NOTE: a mutual agreement to allow for a temporary period of lay-off or short time working will not necessarily mean the employee has agreed to vary the contract of employment to allow for future lay-offs/ short time working. Permanent changes to contract will require a greater period of consultation.



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Where an agreement has been reached this should be finalised in writing and kept on the personnel file. We recommend the employee make periodic updates about the current position and the impact this is likely to have on the period of lay off or short time working. Lack of consistency, transparency and communication is a breeding ground poor employee-employer relations which can lead to grievances and at worse claims.

No agreement

In the event of no agreement being reached and there being a reduced requirement for employees to carry out work of a particular kind, an employer may need to consider varying the contract without agreement by terminating the existing contract and re-engaging the employee(s) on a new contract with the revised terms which allow lay-off and/or short time working.

In such a situation an employee has the option to:-

- Accept the breach of contract and treat the contract as continuing, while claiming a statutory guarantee payment.
- Sue for damages for breach of contract in the civil court or employment tribunal.
- Bring a claim in an employment tribunal for an unlawful deduction of wages.
- Claim the employer's actions amount to a dismissal, giving rise to potential claims for unfair dismissal and/or redundancy pay.
- Claim the employer's actions amount to a fundamental breach of contract (i.e. Constructive Unfair Dismissal).

Varying a contract of employment without agreement carries with it some risk, although an employee who works under the varied terms for a period of time may be treated as having accepted the breach of contract which is likely to effect the merits of a claim for constructive unfair dismissal succeeding.



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Lay-offs/ short time working: an express clause in the contract of employment

Where the contract of employment permits the employer to lay staff off or enforce short time working, notice that this right will be invoked should be sent to affected staff. Again and if time allows, rationale for the decision alongside regular updates should accompany notice of the change.

Entitlement to a statutory redundancy payment

Employers should be aware that if an employer exercises the right to lay off an employee or put them on short time working, there are circumstances where the employee may become entitled to claims for a statutory redundancy payment, those circumstances occur when:

- An employee satisfies the qualifying conditions to bring a claim for a statutory redundancy payment i.e. has been employed for at least 2 years and has been laid off or kept on short time working for at least 4 or more consecutive weeks: or a total of 6 weeks in any period of 13 weeks.
- An employee follows the statutory scheme which includes, serving to the employer a written notice of their intention to claim and resigning with notice.

Specialist employment advice should be taken when proposing any change(s) to contracts of employment even if such changes are permitted by an agreement. Any changes which are likely to impact 20 or more employees should be referred to a us for specific advice and assistance on the basis such changes are likely to trigger statutory obligations as they apply to collective consultation.



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Taking Holiday

Employers can require employees to take holiday at times chosen by them. For example, you can decide to close for two weeks and everyone has to use their holiday entitlement during the office closure.

If you decide to do this, you must tell staff at least twice as many days before as the amount of days they need to take.

For example; TLR Ltd want to close for 10 days, it should tell everyone at least 20 days before.

Again remember your messaging. Employees are likely to be disgruntled by the fact they have to take holiday outside of the periods they planned. To minimise fall out ensure you:

- Explain the need for the requirement.
- Explain what this closure is hoping to achieve (for them – jobs saved and for the business/customers - greater availability for staff to meet client needs when things are back up and running).
- Why some departments have been impacted and not others e.g. business critical teams may not be asked to take holidays.



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Frequently Asked Questions

How businesses are advised to tackle this matter will change day by day as we get further advice/guidance from the Government. Below are some of the common queries we have received and answers we have given over recent weeks.

Q Can I limit lay offs or short time working to departments where work has diminished?

A Yes, assuming you have an implied, contractual or mutually agreed right to impose such variations (see guidance above) changes may be limited to non business critical departments provided you can justify the reasons for doing so.

Q Our contracts do not permit the Company to impose lay off or short time working but we have no choice but to do so. The changes will impact 30 members of staff, where do we stand with the law around collective consultation.

A An employer is obliged to collectively consult if it is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. It is crucial to note that “redundancy” for these purposes has a much wider meaning than redundancy for the purposes of statutory redundancy payments or unfair dismissal and includes; a disappearing job, a disappearing workplace or a situation where the employer requires fewer employees to carry out work of a particular kind. Consequently where an employer changes employees’ terms and conditions of employment through termination and re-engagement (see guidance note around varying terms of employment in the event of no agreement) an employee will be treated



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as having been dismissed by reason of redundancy and a mandatory requirement to collectively consult will be triggered.

We would advise you to consider immediately the number of employees to be impacted before any attempts are made to effect a mutual agreement with staff, doing this will allow you to prepare for the worse case scenario in the event no agreement is reached. Thereafter seek agreement (see advice about how best to achieve agreement given in this guidance note), if agreement is secured variations can be made to contracts of employment without the need to dismiss and engage on new terms.

If no agreement is reached and dismissal and re-engagement is required, the statutory regime described above means no dismissal can take effect before a period of at least 45 days consultation has taken place (where 100 or more redundancies are proposed or 30 days where there are fewer than 100 redundancies).

There is a prescribed procedure which must take place and the advice required for this procedure is outside of the scope of this guidance note, please call a member of a team for specific advice.

Q

What about those employees who need to self-isolate but can still work from home?

A

Employees who need to self-isolate because they are unwell would be treated in line with an employer's sickness policy.

Employees who are well but need to self isolate can work from home if their employer can put provisions in place to enable a self isolated employee to perform their duties from home. If for any reason the business cannot offer remote working or the employee carries out work which cannot be performed at home, the employer's sickness policy will apply.

For employees who live with people "at risk" and who have concerns about exposure to/passing on infection, they would likely be allowed time off to care for dependants, which is unpaid leave unless the contract of employment says otherwise (e.g. company full pay for those taking care of dependants).

Employers are being urged to use their discretion in some instances when it comes to sick leave and pay and so consideration of other methods would be reasonable such as banking time to use as working days at a later date, using holidays or unpaid leave.



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Useful Links for Guidance on the Coronavirus

Acas

Guidance for employers and employees from Acas, the Advisory, Conciliation and Arbitration Service, an independent body funded by the Government, is available here:

<https://www.acas.org.uk/coronavirus>

NHS

Health-related guidance from the National Health Service is available here:

<https://www.nhs.uk/conditions/coronavirus-covid-19/>

Public Health Guidance

Public Health England including, eg, specific guidance for employers, educational and health-related organisations, and an option to receive updates directly is available here:

<https://www.gov.uk/government/organisations/public-health-england>

Public Health Wales

<https://phw.nhs.wales/topics/latest-information-on-novel-coronavirus-covid-19/>

Health Protection Scotland

<https://www.hps.scot.nhs.uk/a-to-z-of-topics/wuhan-novel-coronavirus/>

Public Health Agency in Northern Ireland

<https://www.publichealth.hscni.net/news/covid-19-coronavirus>

HMCTS

Information for users of Courts and Tribunals is available here:

<https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation>



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