

## Layoff and Short Time Considerations in the Current Health Crisis

Dublin is approaching the end of its first week of the additional restrictions under Level 3 of the Resilience and Recovery Plan which has seen a high proportion of workers remaining in a remote working space. Within the county the additional restrictions have had an impact on a number of sectors with reduced services affecting both employers and employees alike. With increasing numbers of the virus now a concern throughout the country recommendations from NPHE has meant that Donegal is the latest county subject to the additional restrictions under Level 3.

The fallout from the current health crisis has led to employers adapting strategies, priorities and work practices to ensure sustainability within their organisations and with the additional restrictions of Level 3 now in place and speculation that other counties may follow Dublin and Donegal, employers may have to make difficult decisions in respect of their organisations and employees.

### **Considerations of Layoff/ Short time**

One such decision which may impact on the Community and Voluntary sector is that of layoff and short time. The Redundancy Payments Acts 1967-2014 make provision for a period of layoff or short time to be applied where the employer is of the belief that such measures are temporary and is unable to provide an employee with work for which they are contracted, either in a full time capacity or for a lesser period as laid out in the definition of short time.

Steps involved in the consideration of layoff/ short time

- Check for the existence of an express or implied term and condition that layoff or short time can apply.
- Where neither an express nor implied right exists, the employer must consult with the employee and seek their agreement to apply a period of layoff or short time.
- Employer should act in a reasonable manner, explain the rationale, apply fair and objective selection procedures, provide a reasonable period of notice.

### **Selection**

Where employers are considering implementing layoffs or short time arrangements, it is imperative that they act in a reasonable manner and apply fair and objective selection procedures. If the entire organisation is temporarily being closed, then presumably all employees will be affected by layoff and a selection process will not necessarily be used.

However, where short time or lay off is being applied to only some, employers should exercise care when selecting employees for layoff or short-time, applying objective selection criteria and treating every decision in this respect in a transparent manner so that discriminatory treatment,

directly or indirectly, on any of the nine grounds prohibited by the Employment Equality Acts 1998-2015 cannot be alleged.

It is essential that employers act in accordance with fairness and natural justice in order to select which employee may be affected. Consideration should be given to any agreed selection procedures in existence or the custom and practice of certain selection procedures previously used by an employer, such as last in first out otherwise known as LIFO. However, where LIFO has not previously been used or where it is not seen by the employer as a means to objectively and fairly select an employee, a selection matrix should be used.

In this instance it may be necessary to utilise a selection matrix that can demonstrate a reasonable and fair approach, one which identifies the ongoing needs of the organisation to illustrate the specific departments which must continue to operate and the skills and experience required. Any deviation from a fair and reasonable process could result in a claim under the Employment Equality Acts, 1998 – 2015 for discriminatory treatment, the Unfair Dismissals Acts, 1977 – 2015 or the Redundancy Payment Acts 1967- 2014.

### **Notice**

Where an express or implied term of the right to apply a period of layoff or short time exists, the employer must then provide the affected employees with notice to this effect. It is the responsibility of the employer to notify the employee before the reduction in hours or remuneration commences.

While the legislation does not specify a minimum period of notice, in the present circumstances, employers should demonstrate that they have acted reasonably in the provision of notice and ensure the rationale for the layoff or short time has been provided. It is also important to commit to ongoing communication with the impacted employees, so they are aware of the position of the organisation as the weeks unfold.

### ***Post-Emergency Measures in the Public Interest (Covid-19) Act, 2020***

With the introduction of the 2020 Act, the ability of an employee who has been placed on layoff or short time for a period of (i) 4 or more consecutive weeks, or (ii) 6 or more weeks within a 13-week period of which not more than 3 are consecutive, to give notice of redundancy after 4 weeks has been removed for the duration of the pandemic.

Originally this meant that it was not permissible for an employee on layoff or short time to provide notice of redundancy during the period 13 March 2020 to 31 May 2020. The 2020 Act makes provision for this period of time to be extended, a measure which has been taken up a number of times. Most recently, the Minister for Employment Affairs and Social Protection has secured government approval to extend the suspension of redundancy provisions relating to temporary layoff and short-time work, which arose as a result of Covid-19, until November 30, 2020.

While the 2020 Act has temporarily removed the right of an employee to claim redundancy it does not mean that this right will not be reinstated, therefore it would still be best advice to issue the RP9 form when notice of either layoff or short time is given to an employee.

## **Payment**

Any term relating to layoff, without pay, should be expressly provided for in the written statement of terms and conditions of the employee or alternatively a custom and practice to apply lay off without pay should exist. On this basis an employee will not be entitled to payment from their employer during a period of temporary layoff. During this time an employee may be entitled to payment of the Covid-19 Pandemic Unemployment Payment.

Following announcements by government this payment will remain available to all employees and the self-employed who have lost employment due to a downturn in economic activity caused by the current health crisis.

## **Rate Changes to the Pandemic Unemployment Payment**

Since September 17, 2020 the Pandemic Unemployment Payment has moved to 3 rates of payment.

The rate a recipient will receive will depend on the amount they previously earned:

- if they earned over €300 per week - they will now receive €300 per week
- if they earned between €200 and €300 per week - the rate of the Pandemic Unemployment Payment will now be €250 per week; and
- if they earned less than €200 per week - the rate of the Pandemic Unemployment Payment will be €203 per week.

Where an employee has been placed on short time then they may be entitled to a payment from the Department of Employment Affairs and Social Protection called *Short Time Work Support* which is a form of Jobseeker's Benefit and an application for same can be made by the employee through [www.welfare.ie](http://www.welfare.ie) while the restrictions are in place.

## **Key Take Aways**

- Determine if a rationale to legitimately place employees on layoff or short time exists.
- Ensure an express or implied term for the purposes of layoff/ short time exists.
- Clearly communicate the rationale to the employee affected and ensure the rationale is noted within the letter of formal notice.
- Ensure the correct supports are in place to maintain two-way communication with impacted employees so the position of the organisation is communicated to them following review every few weeks.

*Disclaimer – The information in this section is provided for reference purposes only to assist Employers with the government protocols and guidance and must be read in that context and should not be used for or interpreted as a legal definition of any of the information provided. Some of the information provided is per information published on the government websites at [www.gov.ie](http://www.gov.ie). Professional advice should always be sought before making any such decisions.*

# Medtronic



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