



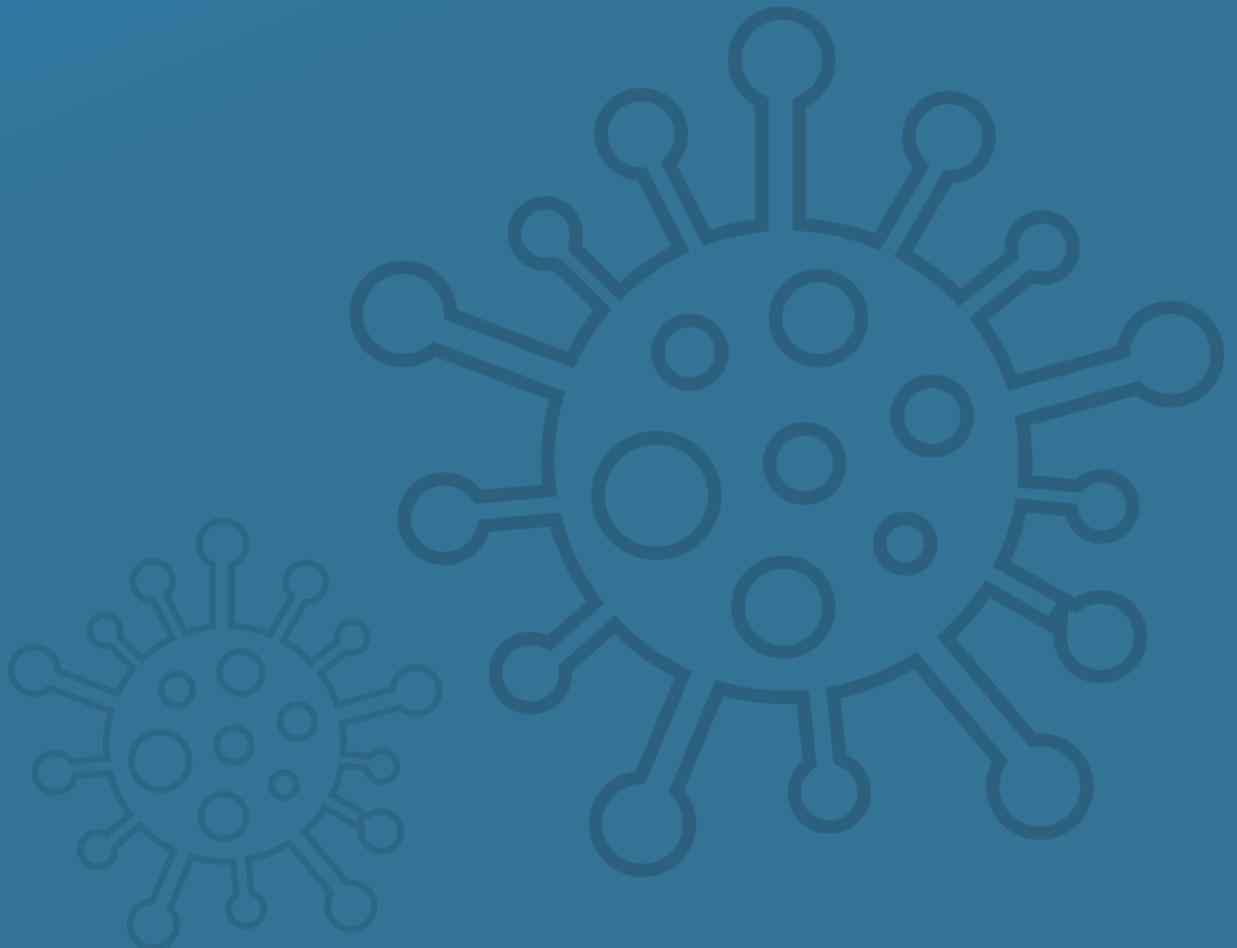
Fáilte Ireland

National Tourism Development Authority

WEBINAR 2

FAQ

HR Planning and Restructuring for the Off Season





PLEASE NOTE

The information in this document was correct at the time of publication.

Check www.gov.ie for the latest updates in relation to the deadlines for application for the PUP, EWSS and in relation to the minimum wage and the employee's right to request redundancy.



Restructuring Requiring Contract Changes

Over the following 14 pages
these 13 topics are presented in an FAQ format.

1. Reducing
Pay

2. Changing
Contracts

3. Bonus

4. Equality

5. Enforcing
Retirement

6. Short Time
Working

7. Layoff

8. Redundancy

9. Rehiring

10. Taking a
Claim

11. Annual
Leave

12. RP50

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Redundancy
Calculator

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1. Reducing Pay

1. What is the recommended approach for managing employee pay cuts?

Employees have a contractual entitlement to a particular salary (for example), that cannot be reduced unilaterally. One of the most basic rules of contract law in Ireland is that if two parties to a contract have negotiated certain terms, one party cannot unilaterally amend those terms – to do so would be breach of contract. In the employment setting, that obviously means that an employer cannot unilaterally reduce an employee's salary. The following is advised:

- Engage on an individual level indicating the business requirement changes
- Put forward the business case for the suggested changes
- Communicate the proposed changes to the employees' terms and conditions of employment
- Follow up in writing to ensure you have a paper trail with the reasoning for changes and the proposed changes for agreement, including a proposed change or implementation date
- Give the employees time in which to consider the changes and/or revert with reasonable alternatives
- Remember that any change may be significant to their home life in terms of mortgage repayments, rent, bills, childcare etc. therefore the timeframes are necessary to be reasonable given the unusual circumstances both you, the business and the employees are facing.
- You should seek agreement or compromise on changing a term and condition of employment
- All changes, permanent or temporary, should be set in writing for confirmation purposes. Is this change permanent for the foreseeable future or is this change for a set period? This should be confirmed in your meetings and follow up in writing.
- Ultimately, if the employee does not consent to their contract of employment being varied, they cannot be compelled to make the change. In cases like this, you are going to have to go back to the drawing board and consider your options.

2. What can a company do in the instance whereby a pay cut is a necessity to ensure the position can continue and it cannot be agreed via consultation?

Contract terms cannot be changed without negotiation and consultation. If you cannot gain agreement on the changes to the terms and conditions of employment you may implement a period of short time/lay off or seek to make certain roles redundant/structure such roles.



1. Reducing Pay (cont.)

3. What can a company do in the instance whereby a pay cut is a necessity to ensure the position can continue and it cannot be agreed via consultation?

Contract terms cannot be changed without negotiation and consultation. If you cannot gain agreement on the changes to the terms and conditions of employment you may implement a period of short time/lay off or seek to make certain roles redundant/restructure such roles.

4. If an employee refuses to accept a reduction in pay or hours via consultation, is the option of temporary redundancy available to ensure the viability of the business moving forward?

There is no such thing as 'temporary redundancy'. Redundancy is the permanent action. Contract terms such as pay cannot be changed without negotiation and consultation. If you cannot gain agreement on the changes on the terms and conditions of employment you may implement a period of short time/lay off or seek to make certain roles redundant/restructure such roles. You should implement redundancy in line with its own process and ensure your selection criteria are fair and not solely dependent on the fact that the employee refused a pay cut/hours. In the event where an employee refuses a reduction in hours you can implement short time hours if it applies rather than redundancy as your first option.

2. Changing Contracts

1. Can a contract of employment terms be amended and renegotiated due to a genuine reduction in turnover?

The reduction in turnover is a reason as to why you would engage in a strategic overview of all the positions within your business. Contract terms cannot be changed without negotiation and consultation. If you cannot gain agreement on the changes to the terms and conditions of employment you may implement a period of short time/lay off or seek to make certain roles redundant/restructure such roles.



3. Bonus

1. If a bonus scheme, as per the contract, cannot be paid what is the next step for the employer?

If the bonus is a core part of an employee's remuneration and a part of the contract of employment, then perhaps a claim under constructive dismissal or a change to their terms and conditions of employment could arise here in this instance. However, if you have not changed their terms and the bonus scheme is eradicated solely by the change/demand to business requirements then you as the employer have not committed a wrongdoing. It is still vitally important the employee would still receive minimum wage per hour of work, even if bonus is eradicated.

2. Should employers have to restructure the bonus scheme now if the benchmarks are not achievable due to COVID-19?

Expenses owed before lockdown/lay off relate to work the employee completed during their employment and therefore are still owed. These can be paid to the employee either when they return to work after layoff has ceased or in the event the role is made redundant, as part of the final payment.

In respect to bonus earned it is more likely that this is already accrued for sales/other criteria that were reached in advance of COVID19/lay off period and the same would be due for payment to the employee. Again, this can be paid to the employee either when they return to work after lay off or in the event the role is made redundant, as part of the final payment.

In respect to a bonus – during a period of lay off it obviously does not apply as the employee is not contributing to the business or earning a wage.

If a bonus is a core part of the remuneration and a part of the contract of employment, then perhaps it would be a change to their terms and conditions of employment process that we need to engage in on the return to work. However, it is still vitally important the employee would still receive minimum wage per hour of work, even if bonus is eradicated, which presumably is the case.

However, if you have not changed terms and the bonus is eradicated solely by the change/demand to business requirements (for example: the employee received 10% of sales made if the business growth was XX%) then you as the employer do not have to change the bonus scheme.

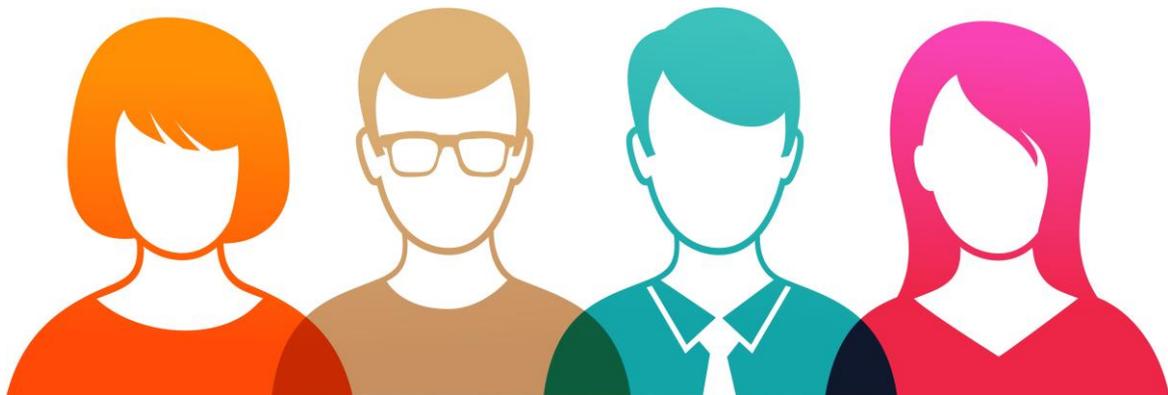


4. Equality

- 1. In the situation where one employee is contracted for a minimum of 32 hours and another for a minimum of 14, with both currently both working 5 days a week how would the employer negotiate a reduction? Is it on their typical rostered hours or their contractual hours?**

In negotiating the reduced hours, you would base it on their typical rostered hours or average of the same. It would not be ideal to be breaching the minimum hours noted in the contract however if you can seek agreement on the same for a temporary basis this will suffice. In relation to the different employees if both roles are needed equally in the business, it would be important to reduce hours proportionally rather than taking 5 hours from each for example.

Where multiple roles are needed equally in the business, it would be important to reduce hours proportionally.





5. Enforcing Retirement

1. As part of 2020 seasonal restructure, how does a company encourage retirement in the circumstances whereby the employee is over the age of 66 and there is no contractual retirement age in Ireland?

There is no single fixed mandatory retirement age for employees in Ireland. Employers are lawfully entitled to set individual retirement ages in an employee's contract of employment. Employers are permitted to retire employees on attaining predefined retirement ages provided those ages are outlined clearly in the employees' contracts of employment and can be objectively justified.

It is very difficult to enforce/encourage an employee to retire, especially when the role is most likely continuing. Firstly, you should ensure all contracts for new staff incoming and your company handbook state a retirement age. Equality Tribunal case law makes clear that an employer who sets a mandatory retirement age must be able to justify the setting of such a retirement age by pointing to a legitimate aim of the business. It is important that an employer can objectively justify why you have a mandatory retirement age. It is more straightforward to do this in safety critical workplaces than it is to do in sedentary type workplaces. You must also demonstrate that the setting of such a retirement age is an appropriate and necessary means of achieving that aim.

It is recommended to invite the employee to a meeting in writing outlining that the purpose of the meeting is to future-plan for their retirement. Meet with the employee, confirm there was no retirement age in their documentation however, we need to put in place a plan for retirement. Ask open questions such as tell me about the role. Ask discovery questions: How are they finding the role?

Do they think they are physically capable to continue? What are their plans for retirement? What age would they like to retire at from the business? Are they happy to come to an agreed plan on retirement? Would they like to reduce their working week upcoming to full retirement etc. This will help establish the employee's intentions and guide you towards planning with the employee to cover the next 12 months. If there are no issues and the employee is accepting of the same, it is important to still make sure you have a paper trail documenting the meetings.

If the employee is not accepting and you still want to go ahead you run the risk of a claim of equality as you would be enforcing a retirement age, without sufficient documentation in advance confirming retirement, and the sole reason for the termination (retirement is still a termination of employment) is age, which is legislatively prohibited. This is a risky move and you should seek professional advice on the same.





6. Short Time Working

1. Can international employees on a Stamp 2 be placed on short time?

They can be placed on short time. However, they cannot avail of any benefits or use publicly funded services unless they have an entitlement via other means.

2. If an employee received a redundancy payment is there a requirement for them to cease their PUP payment?

To qualify for PUP the employee must have lost their job or be laid off because of COVID-19. If an employee is laid off and claiming PUP, and then is made redundant, before the end of March 2021, they have an entitlement to claim PUP until the scheme ends (currently 31st March 2021) or until they find alternative employment.

3. How should staff be communicated with in relation to short time working?

Short-time is when an employee's weekly hours are reduced because of a reduction in the work provided. You do not have the right to lay-off employees, put them on short-time working or make any reduction in pay unless there is an express term in the contract of employment. If there is no express provision in the contract of employment or there is no mutual agreement, if you are to impose a lay-off or short-time working, during which pay is reduced this will be in breach of the employee's contract. In these circumstances, the employee may claim an unlawful deduction from wages through the WRC, make a claim for breach of contract or resign and claim constructive dismissal through the WRC.

An employee is entitled to advance notice. Be sure to address the same with them personally firstly either via phone/socially distanced meeting etc. in advance of confirming the same in writing:

I am writing to you further to our **meeting/call on INSERT DATE**

The purpose of this correspondence is to confirm that the Company has placed you on short time working from **INSERT DATE**. This mean that your pattern of working has been reduced from **INSERT HOURS to INSERT HOURS**. **Your new working hours will be INSERT DAY, INSERT DAY, and INSERT DAY but is subject to change**

It is with great regret that the Company had to place you on short time. As discussed, this short time has arisen because of **a current downturn in business due to the COVID-19**

It has been hoped that the necessity for short time could have been avoided, however, given the reason listed above the Company was left with no alternative in the interest of the health and safety of work colleagues and the general public. The Company will keep you informed of relevant developments and a return to normal operations will be made as soon as circumstances permit



6. Short Time Working (Cont.)

Short-Time Work Support is a form of Jobseeker's Benefit and is an income support payment that you can avail of if you have been temporarily placed on a shorter working week. The payment is made in respect of the employee's regular salary for the days that they are no longer working. For example, if their working week has been reduced from a 5-day work pattern to a 3-day work pattern, you can receive support for the other 2 days. Short-time Work Support is paid for a maximum of 234 days. Your entitlement will depend on the number of social insurance contributions you have.

The quickest way to apply for Jobseeker's Benefit is through MyWelfare.ie. You should apply as soon as your days have been reduced otherwise you could lose some payment. Further information is available here: <https://www.gov.ie/en/service/c20e1b-short-time-work-support/>

Even when an employee has agreed to a lay-off or short-time working, he/she can claim redundancy if the situation continues for more than four weeks, or for six weeks in the last 13 weeks. The suspension of this right has now been extended until 31st March 2021.

4. Can an employee refuse a genuine business requirement to put the job on short time? Can the employee claim redundancy if they refuse short time?

Staff can disagree that a short time working situation applies to their role however there is not a mechanism in the legislation for refusal. Of course, they can always refuse but if the business has no/less hours to provide them there is no other alternative. An employee cannot claim redundancy unless they have been on lay off or short time for 4 weeks or more, or 6 weeks in the last 13 weeks.

The quickest way to apply for Jobseeker's Benefit is through MyWelfare.ie.



7. Lay Off

1. If an employee had less than 2 years' service in March when placed on temporary layoff but 2 years have passed now while they are on layoff, are they entitled to redundancy?

No, as a period of lay off does not classify itself as service.

2. Is there any indication if the PUP cutoff date will be pushed to a later date?

Current advice: the COVID-19 Pandemic Unemployment Payment will remain open to new applicants and continue to be paid until 31 March 2021.

8. Redundancy

- Selection Criteria

1. Is length of service better to choose as a selection criterion over other criterion?

It is the most used and safest method. This criterion for selecting for redundancy is hard to argue against as case law confirms that this is a fair method of selecting for redundancy.

2. Other than length of service what ways to identify selection criteria are fair?

Redundancy is about the role and not the person, so it is important to choose objective criteria. The assessment of skills should ensure that you have clearly identified the full range of skills that are required for the job role and in the business going forward to allow a fair selection process. Together with selected skills you may also consider:

- **Qualifications/Training:** This criterion should only be used in relation to qualifications and training for the specific role that is at risk of redundancy and justifiable for its use in the business going forward.
- **Performance Standards:** This method should only be used if targets or performance appraisals have been carried out consistently and fairly assessed and each person in the selection process has been given the same targets and appraisals. It is important to ensure that these assessments are based on objective measures. Avoid using this criterion if the business does not have the latter two (performance or targets) as this may become a subjective criterion and risk the redundancy being considered about the person.
- **Disciplinary Record:** In this case you should include disciplinary warnings that are currently active. Warnings that are expired, outstanding or unproven disciplinary actions should not be considered. This needs to be applied fairly across all employees at risk of redundancy. When applying this criterion, points are usually deducted for warnings or any relevant sanctions.

Length of service is the most used and safest criteria for selection.



Redundancy

- Notice

1. Is it acceptable for a strong consultation process and the notice period to run in parallel?

No as the notice period would imply that the redundancy is actually occurring, thereby defeating the purposes of the consultancy requirement.

Suspension of Right to Redundancy

1. Is there any means of protecting the company against a claim of redundancy due to lay off/short time being implemented for genuine COVID-19 related circumstances?

The current advice from the Government confirmed that the suspension on the right to claim redundancy is now extended until 31st March 2021. There is no mechanism to avoid employees invoking their right to instigate redundancy unless you can offer them a counter offer in giving their full job back with a guarantee of 13 weeks unbroken employment / an alternative comparable role with a guarantee of 13 weeks unbroken employment.

2. With casual staff how do we determine if they have been on short time/lay off for 4 weeks or more or for 6 weeks in the last 13 weeks?

If a lay off or short time working pattern has continued for 4 weeks or more, or for 6 weeks in the last 13 weeks an employee has rights under the legislation to request redundancy. The legislation does not differentiate in respect to casual employees and therefore the same would apply.

Redundancy

- Consultation and Process

1. Regarding individual redundancy and the requirement for consultation period – is the 30 days consultation period not mandatory if agreement with the employee on the redundancy of their position is reached?

The 30 days of consultation refers to Collective redundancy solely. Consultation is a requirement of the legislation relating to individualized redundancies. However, this consultation does not carry a time limit but must be reasonable and genuine/meaningful. There is no opt out clause for consultation provided for in the legislation, however it is still a legislative requirement regardless of whether redundancy is agreed to or not. The chances are: if you have agreed to a redundancy with your employee and they are happy to accept, then the chances of taking a claim are limited.



Redundancy

– Consultation and Process (Cont.)

2. In relation to the redundancy of a particular role what is the timeline and best process to follow when it comes to rehiring?

Consultation is a requirement of the legislation relating to individualized redundancies. However, this consultation does not carry a time limit but must be reasonable and genuine/meaningful. A week between each meeting may be important. If viewing alternatives and taking on board employee suggestions, as part of the redundancy process, this may take extra time from your employer perspective.

If an employee wishes to make a claim in respect to the redundancy of their role, they may do within 6 months of when the employment was terminated. This time limit may be extended to 12 months in cases where exceptional circumstances prevented the employee from lodging a claim within 6 months. Given that we are in a period of a pandemic, this fact alone could perhaps be deemed sufficient to meet the 'exceptional' bar in extending the time limit in which to take a claim. Therefore, we would not encourage recruitment for a particular role within that period.

3. What is the process around redundancy?

Redundancy is still a termination of employment therefore a risk is attached to it. Although a redundancy situation may exist, employees may have grounds for complaint, if the manner of the selection for redundancy was deemed unfair or that a genuine redundancy situation does not exist. An employee can take a case under the Unfair Dismissals legislation and be awarded up to two years of salary. This amount does not include preparation of the submissions for the day and legal costs for representation i.e. a HR Consultant / Solicitors etc.

Under the unfair dismissals legislation, selection for redundancy based on certain specific grounds is considered unfair. These include redundancy as the result of an employee's trade union activity, pregnancy or religious or political opinions. The [employment equality legislation](#) also prohibits selection for redundancy that is based on any of the following nine grounds: gender, civil status, family status, age, disability, religious belief, race, sexual orientation, or membership of the Traveller community.

To qualify for redundancy:

Employees must have worked continuously for at least 104 weeks over the age of 16 and the position they hold must cease to exist





Redundancy

– Consultation and Process (Cont.)

Remember; it is always the position not the person that is made redundant.

- The first step is to consult with the employees. Redundancy legislation requires this consultation take place as soon as is reasonably practical. Failing to hold a consultation period may result in a claim by the employee(s) to the Rights Commissioner who has jurisdiction to award up to four weeks' salary/wages. Failure to comply with any other requirement under the Redundancy Acts may result in compensation of up to two years' salary/wages or reinstatement or re-engagement of the employee.
- In selecting employees for redundancy, the Company must apply selection criteria that are reasonable and are applied in a fair manner.
- The Company should consider all options including alternatives. If an alternative position is available, it must be put to the employees. If they refuse a reasonable offer, then it may be a case that they lose their entitlement to a redundancy payment. An employee may take up an alternative on trial for up to four weeks.
- The next step is to meet with the employee to begin the consultation process.
- After the 1st meeting send a letter to the employee(s) outlining what was discussed.
- In advance of the 2nd meeting, fully review suggestions put forward by the employee and ensure you have answers to each suggestions as to whether they will work or not. Ensure that should these suggestions work, you have followed up clarifying queries, so that you can gauge the employee's expectations etc. for moving forward.
- Meeting two is then held. This meeting is to discuss any options the employee has put forward i.e. transfer to another department/take a cut in their hours etc. At this stage having reviewed their suggestions you will be letting each employee know whether their options are viable or not. If not, you will be letting the employee know that they will be made redundant and letting them know their calculations.
- It is important to ensure that the correct process followed is put in writing.
- The employee must get notification of the redundancy in writing.
- If an alternative agreement is reached rather than redundancy of the position it is very important that this is also communicated in writing and signed acceptance of the same is maintained on the employee file.
- It is advised that a waiver is issued to the employee. Should an ex-gratia payment be offered it can be a term that it will not be issued if the waiver is not signed.



4. If there is a requirement to move from lay off to redundancy because the viability of the role is no longer there, does the employer need to bring the employee back to work firstly?

No, because the business may not have work to provide them with their normal hours whilst the consultation process is ongoing. However, it would be best practice to ensure that the employee who engaged in consultation meetings be paid as part of their final payments from the company.

9. Rehiring

1. A company is closing down one of its departments that will have no work for at least a year. It is considering making 2 staff redundant but if, in 18 months there was demand, is the company OK to rehire?

Yes. The period in which to take an unfair dismissal claim is 6-12 months and we would not encourage recruitment for those roles within that time. From your question it appears the roles have been diminished for quite some time and therefore would most likely be genuine redundancies.

10. Taking a Claim

1. What is the timeframe that an employee must be eligible to take a claim of unfair dismissal due to perceived unfair selection for redundancy?

If an employee wishes to make a claim, they may do within 6 months of when the employment was terminated. This time limit may be extended to 12 months in cases where exceptional circumstances prevented the employee from lodging a claim within 6 months.



11. Annual Leave

1. How will holiday accruals be handled during the next six months?

As per normal like any other year not impacted by COVID19.

2. If someone is on temporary layoff, how long can this be for? Can the Company pay them any outstanding holiday without effecting their PUP?

Lay off can last indefinitely there is no timeframe. One of the key points for lay off is that it is 'expected to be temporary'. During a period of lay off an employee was entitled to request redundancy if it has continued for 4 weeks or more, or for 6 weeks in the last 13 weeks. This right was suspended to allow for the economy to recover from COVID19. The current advice from the Government confirmed that the right of claim redundancy is now suspended until 31st March 2021.

We would not encourage you to pay outstanding annual leave whilst on lay off. This may affect their social welfare payments. Accrued annual leave from the beginning of the year which they were unable to take before lay off, can be taken when they return to work, or if not returning to work, when the role is made redundant.

12.RP50

Is the RP50 still in place?

Yes. It is only applicable if the company is unable to pay the statutory redundancy entitlements.

13.Redundancy Calculator

The DEASP Redundancy Calculator can be accessed at

<https://www.welfare.ie/en/Pages/secure/redundancycalculator.aspx>

or click [here](#) to open it



14. Absence

1. If a staff member gets COVID and company does not have sick pay. Who pays them?

If there is a requirement for the employee to self-isolate because of COVID your employee will be entitled to claim the COVID Illness benefit from the State.

2. How is an absence to be treated if an employee is absent from work due to waiting result of a COVID-19 test for themselves or a family member?

This absence would be certified by their own GP due to the contract tracing requirements. It would then be classed by the Employer as certified sick leave.

3. Is an employee's contract automatically extended to account for the enforced COVID-19 lay off?

It is not necessarily extended. A fixed term contract it must correlate to a business reason and it must end for the same reason i.e. you are employed on a fixed term contract from **INSERT DATE** to **INSERT DATE** due to **the busy summer period/ the busy Christmas period/ a specific project of XX/ a specific contract won by the company of XX**. If the original reason the contract was commenced on has not yet finished because of missed time due to lay off, you could offer a new fixed term. If the end date of a fixed term contract ceased during lay off it is important you confirm that to the employee in writing as they will not be returning when your business/department reopens. All employees on contracts whereby they are currently on probation – you should pause their probation period considering the lay off period and you should confirm this to them in writing/email.

4. Up to now fixed term contract workers could expect a permanent contract after so many years. Does COVID-19 pause / affect this?

Employees cannot be employed on a series of fixed-term contracts indefinitely. If an employee whose employment started on or after 14 July 2003 has been employed on 2 or more continuous fixed-term contracts, the total duration of those contracts may not exceed 4 years. After this, if the employer wants the employee to continue in the job, they must be employed under a contract of indefinite duration. No change has been made to this legislation due to COVID-19.