

GUIDANCE

Managing the Downturn and Preparing for Recovery

A Short Guide

Here for everyone

Here for business

This short guide sets out how employers can use flexible working and manage redundancies fairly in the current climate. We hope it will help you understand your rights and entitlements as an employer as well as those of your employees – so that everybody, including you, is treated fairly and with dignity.

The Directory at the back of this guide points you to a lot of detailed information, but if you have any additional concerns you should ask a lawyer or HR professional for their advice. You can also contact one of our helplines, please see the back cover for details.

The Equality and Human Rights Commission is an independent public body that exists to promote fairness and equality and ensure the laws on equality and discrimination are upheld. Our remit is to be here for everyone, including business.

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Our message to employers

Making redundancies is one of the most difficult situations any employer can face. For owners of smaller businesses it can be particularly complex and worrying – at a time when this is just one of the many pressures they're dealing with.

If you don't have access to in-house professional advice, concerns about handling redundancies well – doing the right thing for your business and also following the law properly – can be stressful.

Nothing can remove the personal cost that both employers and those losing their jobs feel. But the process can be handled in such a way that ensures all those involved, including you, are treated fairly.

This guide is here to help you by setting out the basic steps that make redundancies fair, legal and as straightforward as possible for your employees, for your business and for you as an employer.

Hard as it might seem at times of economic difficulty, good times will return. Making the best decisions for your business now also means you will be well-placed to take advantage of the economic recovery when it comes. This guide therefore also sets out how best to ensure you are equipped for the recovery with a motivated workforce that has been treated fairly and wants to serve you well.

The hardest business decision

Any employer that has gone through a process of compulsory redundancy will tell you that it is the hardest and most difficult thing they've had to do. For owners of smaller businesses it is particularly tough: not only in terms of making the best decision for the future of their company, but also because they want to follow the law properly and, under difficult circumstances, do the best they can by their people.

At times of economic uncertainty many employers will be considering whether redundancies are the right option for stabilising their business. Whilst redundancies will reduce your overheads, there are associated costs which can affect your short-term cash flow, as employees may be entitled to redundancy pay.

Likewise the expertise and experience you lose cannot always be replaced and, when business does pick up again, replacing good people may not be easy.

If you decide that redundancies are not right for your business, encouraging 'flexible working' may mean you have more options such as keeping all your people on but reducing their working hours. These options are set out later in this guide and on our website.

Making compulsory redundancies

Redundancy is a type of dismissal used when:

- the need for an employee, or a group of employees, has diminished or ceased
- new systems in the workplace mean the same amount of work can be done by fewer people
- the job no longer exists because other workers are doing the work of the redundant employees
- the workplace has closed, or is closing down the location of the business moves.

When an employee is facing compulsory redundancy, they have a series of entitlements that you, as their employer, must provide. These apply to part-time staff in exactly the same way as they do to full-time staff. No employee can be made redundant on the grounds of their gender (including transsexual people), race, religion or belief, sexual orientation, age or because they are married or in a civil partnership, pregnant or disabled.

You must:

- use consistent, objective and fair criteria in deciding who to make redundant and who not
- try to find suitable alternative employment to anyone you are proposing to make redundant (even if it does not prove possible)
- give adequate notice: between one and 12 weeks, depending on how long the employee in question has been with you for. If their employment contract says they are entitled to a longer notice period if they are dismissed, this will apply instead of the shorter redundancy notice period.

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- provide a lump sum redundancy payment: the amount will depend on their age, how long they have worked for you and their current weekly wage*
- allow those being made redundant a reasonable amount of paid leave to search for a new job or to organise training that will help them get a new job (although the training would need to be taken in their own time).*

* These entitlements apply only to employees that have been with you for more than two years.

Exploring your options

Before you embark on making compulsory redundancies, it is worth ensuring that no other options give you a better outcome for your business and your people.

These include:

- **Reducing people's working hours**

Some or all of your employees may be prepared to reduce their working hours in preference to being made redundant. This is known as Short-Time Working. It means that people keep their jobs but work less and earn less. This may well suit and helps you to keep good, committed, experienced people on your books.

- **Offering early retirement**

Like redundancy, offering early retirement will cost you money but it can be far less disruptive. You would need to look at the comparative costs of both options, although early retirement has the added advantage that it is less likely to dampen staff morale or lead to legal action.

The impact of taking early retirement is greater, however, for the employee: if they retire before they are old enough to receive a state pension (60 for a woman, 65 for a man), their pension may eventually be smaller than if they'd carried on working. Likewise, if they pay into a company or personal pension, their pension fund will be smaller than if they'd carried on working.

- **Voluntary redundancy**

This option gives your employees the opportunity to choose to be made redundant. There may well be people you employ who, for family commitments or some other reason, would be prepared to give up their work if this was offered. Although this may be an option you should think about the skills and experience you may lose.

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Although voluntary redundancy payments are usually higher than compulsory redundancy payments, it can end up being less costly in the long run because it is self-selecting so nobody is forced to leave if they don't want to. This significantly lessens the chance of legal action being taken.

There is no obligation on you as an employer to accept any or all of the offers of redundancy made to you; and if your pool of volunteers is larger than necessary, you would not need to explain the criteria you have used for deciding which offers to accept.

Doing it right

If you decide to make compulsory redundancies, following the correct steps and procedures should mean you are legally protected.

Employment law on redundancies is complicated and it would be impossible to give you an exhaustive list of everything that you could/should do or avoid doing to prevent an employment tribunal claim. Getting into a legal dispute with an employee or former employee is the last thing you want to do; it is expensive, time-consuming and extremely stressful.

In general, there are certain things that you can do to avoid getting to the stage of legal dispute through a redundancy process:

- Keep a paper trail. At the time, make sure you write down everything you decide and discuss with employees about redundancy. Give employees written confirmation of what you have discussed and decided with them. This avoids misunderstanding and protects you by demonstrating the steps you have followed.
- If you can, you may want to discuss your redundancy proposals with your employees before beginning to make redundancies.
- Decide what your business needs from your employees and then assess where redundancies may fall. Don't just decide which individuals you'd prefer to let go and then build the business case afterwards.
- Treat each employee equally and fairly. Nobody deserves to be discriminated against and the law supports those who suffer discrimination.
- Make sure you follow each step of the redundancy process, set out below, carefully and diligently. Organisations such as ACAS and Business Link are able to guide you on this free of charge if you want them to. Their websites and telephone numbers are listed in the Directory at the back of this guide.

Selecting the employees who will be made redundant

- The key here is to be fair to all employees. Your criteria for choosing who is made redundant needs to be consistent across your workforce.
- You will need to assess which skills and roles your business really needs for the future. It may be that some employees have suitable skills and can be redeployed elsewhere in the business. Legally, you need to consider this.
- Decide the criteria you will use to identify redundancies. These need to be objective, fair and equally applicable across all employees. The most important of these is aptitude for the skills required in your business. But you may also consider criteria such as:
 - attendance levels (although maternity and paternity leave, as well as sickness leave due to disability, should not be used to count against any individual)
 - punctuality
 - qualifications
 - disciplinary record
 - adaptability for different types of work standard of work performance
 - length of service
- It is possible to be unfair to certain groups by not thinking through the consequences of using certain criteria. For example, some disabled people may have missed out on access to education and educational opportunities because of ill-informed assumptions about their capabilities, so it would be unfair to place too much weight on qualifications as a criteria. To ensure that you are fair to all employees you should choose more than one criterion and ideally a series of them. Rank your employees (perhaps through a points system) against the criteria. Doing so will, in itself, help you ensure that you are making the best decision for your business.
- Consider all your employees against the criteria you have set and decide which you intend to make redundant. Remember, this bit is critical and may be the crux of where any legal action will come. Make sure you are able to justify the decisions you make.

Sending a letter to those that may be made redundant

- You should set out in writing to all those you have selected that you are contemplating redundancy. You will need and want to personalise the letter for each person so it explains why redundancies are being contemplated and the selection process being used.
- You should think of this as a discussion and consultation stage and the language you use needs to reflect this: in other words, be clear through the language you use that the person's redundancy is still a proposal rather than a foregone conclusion and that you will listen to any alternative ideas they have.
- By law, you should use the letter to invite the individual to a meeting with you to discuss their potential redundancy.
- Remember to maintain clear and honest communication with all members of your team, not just those who are directly involved, so that everyone understands what is happening. Those who aren't being made redundant will look to you for information about why redundancies are being made and also for reassurance about the relevance of their role to the future of the business.
- If possible, you should be definite about the number of redundancies taking place. But it's not always possible to have all the answers when people want them; if you are unsure, it's better to be honest about this at the time than to say something you later have to retract.

Individual meetings with each person being made redundant

- The meeting needs to take place before the redundancy has been made and provide the employee with an opportunity to respond to the proposal to make them redundant.
- Most employers will find holding such meetings a difficult and worrying task which needs careful handling. While you will want to avoid being too abrupt, at the same time being unclear and unspecific will not help either. People should be treated with sympathy and clarity.
- You may find it useful to prepare notes in advance about what you want to say. This will help you to remember what you need to say even if it is a difficult meeting.
- You should set out the criteria for which they have been selected for redundancy as well as the timescales for the potential redundancy process, provide clear financial information including the amount of redundancy pay they would be entitled to, and encourage them to discuss the financial implications of redundancy with their family as early as possible. This will help them come to terms with their situation.
- Think about what additional help you can offer them. There is, for example, plenty of good advice available on the internet, both about redundancy and finding a new job, which you could point your employees to. A list of useful websites for those being made redundant is included in the Directory at the back of this guide.
- The more your employees are able to talk to you and the clearer they are about what they are entitled to and how you are addressing this, the easier it will be to keep your relationship with them on a trusting and open basis.
- It is likely that employees won't digest in full all the information you give them at the meeting. It is therefore a good idea to follow up the meeting with a note to individual employees setting out key information about their redundancy and any details of the additional help and advice you can offer them.
- You will then need to inform employees of the individual decisions you have come to and notify them that they have a right to appeal.
- You will need to give them between one week and 12 weeks' notice, depending on how long you have employed them for. If their contract states a paid notice period you will have to fulfil this if it is longer than their redundancy notice.

Appeals

It may be the case that an employee appeals against the decision to make them redundant. If this happens, you should set up a meeting with them to try to resolve their grievance. This is called an Appeal Meeting; the employee is entitled by law to bring someone with them to it. You might want to consider having someone there with you too; remember, at this meeting you need to try and be independent and think objectively to consider whether the decision you have made is fair.

If, after all these steps, an employee disagrees with you about the rationale for their redundancy or the way it was carried out, it can be taken to an employment tribunal on the grounds of unfair dismissal. ACAS will automatically try to get both sides to reach a settlement, but if this is not possible a tribunal hears the case. Both you and the employee would have the option to be represented by a solicitor. You may want to check your business insurance policy to see whether you are covered for employment litigation.

Remember to stay within the law after you have made redundancies

You should be mindful that, if there are vacancies available or likely to be available during the redundancy process which could be filled by those at risk of redundancy, they should be offered to them. If you start recruiting shortly after making people redundant any employment tribunal will carefully consider when such vacancies arose and if they were a suitable alternative for someone that has been made redundant.

Some difficult questions (and, hopefully, some straightforward answers)

Q: I think I'm going to have to cut back the workforce. Should I tell people informally that an announcement is imminent before I write to them?

A: You don't want to worry your employees unnecessarily but, at the same time, you want to explore all the options that are available to you and to them. As soon as you have made the decision to make redundancies, begin your conversations with employees. This enables your workforce to come to terms with the possibility of redundancy and provides them with the opportunity of coming forward with ideas which might reduce or limit the need for redundancies.

Q: Can I decide who is made redundant by their situation at home? I want to try and avoid making a family's main breadwinner redundant.

A: Even with the best of intentions, such an approach would be unfair on your other employees and potentially open you up to legal difficulties. You must adopt fair and objective selection criteria that are most suitable to your business and which ensure that the remaining workforce has the balance of skills and experience needed for your future requirements.

Q: Am I in trouble if I only make redundant those who work part time?

A: Not if it can be proved to be a reasonable response in the circumstances. For example, if the part-time posts are the posts which are carrying out the work which has ceased or reduced, then it would be a reasonable response to consider making those posts redundant.

Q: I pay some of my employees cash in hand. What are they entitled to?

A: Assuming you have been deducting their tax and national insurance they need to be treated the same as all your other staff. If, however, they have worked for you on an ad hoc or project basis, the situation may be different. If they do not work exclusively for you, or are a consultant to your business or take responsibility for their own tax and national insurance they are not technically your employee and therefore redundancy need not come into play.

Q: One of my staff is about to go on maternity leave. Is it ok to make her redundant?

A: A mother has a legal right to return to her job after maternity leave. If she is made redundant immediately before taking maternity leave it may well be seen as discriminating against her for exercising her legal right to maternity leave. This opens you up to both a sex discrimination and unfair dismissal claim.

But if you can clearly demonstrate that her job is no longer needed by your business, by carefully following the guidance above, it could be seen as reasonable within the law to make her redundant. However, if there is a suitable alternative job available within your company, you would be legally obliged to offer this to her in preference to anyone else. This applies even if the other person is more qualified for the alternative job.

Q: When I mentioned that there might be redundancies, one of my team said they were going straight to their lawyer. What can they actually do?

A: They can ask for advice in relation to the proposed procedure and potentially challenge the process. They may seek advice on making a formal grievance and if they are ultimately made redundant they may claim for example for unfair dismissal and/or discrimination in an employment tribunal. To do so, however, they would have to prove that the process has been mishandled.

Q: One of my staff has a disability. How can I make sure I don't discriminate against them in the redundancy process?

A: By making sure that the selection criteria used are not capable of having an adverse effect on them. For example, if you use attendance as one of your selection criteria you should be careful not to penalise an employee who has had to take time off work because of their disability. Using a range of criteria for selection should help make sure you are fair to everyone.

Q: Isn't it fairest to get rid of those who have been here the least time?

A: Whilst you do not need to give redundancy payments to employees who have been with you for less than two years, their length of employment alone is not a fair criteria for making them redundant. A last in first out procedure may also be considered to be age discriminatory if it penalises the youngest employees. So you can use length of service as one of your criteria, but you should use other criteria too.

Q: There is only one woman in my company of five people and her job is the obvious one to go. Is this legal?

A: Yes, if it is clearly her job that is no longer required. But you will need to be in a position to demonstrate the rationale for her post being identified as redundant. Potentially she could claim sex discrimination and you would have to show that this was not the case.

Q: Can I give a better pay off to those who have been with me longest?

A: You will need to adopt a procedure that applies to all those being made redundant. If you are paying above the minimum required by law you will need a rational and fair mechanism in place for calculating enhanced payments. You are allowed to make enhanced redundancy payments based on length of service as long as you can objectively justify this. You will need to show that this is a proportionate means of achieving a legitimate aim. The Commission's statutory Code of Practice on Employment explains objective justification in more detail.

Q: Can I use redundancy as an excuse to get rid of employees who aren't very good?

A: Your criteria for redundancy should include aptitude for the skills required in your business which, assuming it is done fairly, provides an opportunity for keeping those staff whose aptitude most suits your business needs.

However, redundancy shouldn't be used as an excuse for getting rid of employees who aren't doing their jobs well – if this is the case in your business, you should follow competency procedures to dismiss them.

Q: I employ members of my family. Am I allowed to save their jobs first?

A: All employees must be treated fairly and equally so the law does not allow you to save people's jobs because of their status as family members. In many family businesses, however, family members also serve as directors or have additional management responsibilities. These skills, experience and attributes may be criteria that you consider are important for the future needs of your business.

Q: I don't think I have the cash flow to pay redundancy payments. What can I do?

A: If your business would become insolvent as a result of making the basic redundancy payments, you can consider seeking assistance from the Department for Business, Innovation and Skills (formerly the Department for Business, Enterprise and Regulatory Reform).

Q: I'm worried about what will happen to those who lose their jobs and how they'll cope. What can I do to help them realise it's not their fault?

A: You can provide them with a detailed explanation of the reason why your business needs to reduce its workforce which will demonstrate that it is not a reflection of their work. You may also want to consider offering them assistance in securing alternative work. This could range from paying for training for them in updating their CVs and interview technique to full career counselling.

Q: How can I write a good reference for someone if it is clear I have just made them redundant?

A: The fact that someone has been made redundant should have no bearing on their reference. Their reference will be based on their performance and should be a true, accurate and fair reflection of their work and not mislead a prospective employer. In times of economic downturn there is no shame in being made redundant. Likewise, there is no shame as a business in having to make people redundant.

What will it cost?

The answer to this depends on how long the employee has held their job.

For employees that have been with you for under two years:

- You do not have to make a redundancy payment to these employees but any employee who has been with you for over a month is entitled to at least one week's paid notice.
- If your employees have contracts that state a paid notice period you will have to fulfil this if it is larger than their redundancy notice.

For employees that have been with you for more than two years (including part-time workers):

- These employees are entitled by law to a redundancy payment. The amount depends on their age, how long they have worked for you and their current weekly wage. To calculate how much it will be according to your circumstances, you can use Business Link's Redundancy Pay Calculator: www.businesslink.gov.uk.
- They are also entitled by law to time off with pay to look for a new job or to organise training that will help them get a new job (although the training would need to be taken in their own time).

Additional help and support

More often than not, making redundancies is a necessity, and not a choice. The vast majority of employers want to be fair and do what is right.

Making redundancies will never be easy. But it helps to be able to rest assured that you're treating your employees fairly and following the procedures correctly so that the law is on your side.

Understanding the law can be time-consuming and complex, but there are experienced organisations that will offer you free and impartial advice over the

phone. These include Business Link and ACAS. Their contact details are listed in the Directory at the back of this document.

For general information on what the law says about equality, please visit our website:

<http://www.equalityhumanrights.com/private-and-public-sector-guidance/organisations-and-businesses/businesses>

Could a flexible approach help?

The investment that good companies make both in recruiting and training their employees is often wasted when redundancies occur. Likewise as the economic climate improves and business picks up, you may need to expand quickly and have on board a committed, loyal and expert workforce. Encouraging flexible working both now and in the future gives you continuous access to good employees but without the costs of full-time working.

There are many different forms of flexible working, including:

- part-time working job sharing
- term-time working
- offering flexible working hours, rather than pay increases, to reward and retain your employees.

Each of these options allows you to keep good people on when times are slow, with the option of increasing their hours when things pick up.

Another model of flexible working is to allow your employees to work remotely from home some or all of the time. This won't suit everyone and every business, but the benefits of it to you are that it frees up office space which could help you cut costs.

Flexible working is often very popular with employees. Our lives are very different than they were a generation ago and the demands on our time are no longer simple to foretell and organise. Your employees may well embrace the opportunity to combine their jobs with their lives and your needs.

Directory

Further information on all the issues covered in this guide is available on our website: <http://www.equalityhumanrights.com/private-and-public-sector-guidance/organisations-and-businesses/businesses>

We have also listed a number of other websites below which we think could be helpful to you.

Advice for employers

ACAS

Offers guidance on how best to handle redundancies. Provides information on matters such as redundancy pay, length of notice and how to avoid making redundancies.

- www.acas.org.uk
- 0300 123 1100

Department for Business, Innovation and Skills

Offers comprehensive guidance on the rights of employees and the redundancy procedures employers should follow.

- <https://www.gov.uk/government/organisations/department-for-business-innovation-skills>
- <https://www.gov.uk/staff-redundant>

The Chartered Institute of Personnel and Development

Gives introductory guidance to employers on how to avoid making redundancies and the procedure they should follow to ensure they are acting within the law.

- www.cipd.co.uk

Smallbusiness.co.uk

Includes articles which offer guides and tips for employers on the rules of redundancy and how to avoid unfair dismissal claims.

- www.smallbusiness.co.uk

Where to direct employees

ACAS

Sets out the rights of employees who have been made redundant including how much notice they should be given and whether or not they can take time off work to find a new job.

- www.acas.org.uk
- 0300 123 1100

Citizens' Advice Bureau

Gives comprehensive information about redundancy including redundancy pay and the rights of employees.

- www.adviceguide.org.uk

JobCentre Plus

Provides help, guidance and support to people looking for a new job and explains the procedure for making benefit claims.

- www.jobcentreplus.gov.uk
- 08456 060 234 (Job search helpline)
- 0800 055 6688 (Benefit claim helpline)

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Trades Union Congress

Provides information for employees, including a leaflet about redundancy. Called 'Coping with the Economic Downturn', the leaflet has been written with input from the Citizens' Advice Bureau and includes advice about finding new work and accessing skills training.

- www.tuc.org.uk/sites/default/files/extras/downturn.pdf
- www.worksmart.org.uk

Information for employers making more than 20 redundancies

Department for Business, Innovation and Skills

- www.gov.uk/government/organisations/department-for-business-innovation-skills
- www.gov.uk/staff-redundant

Information on flexible working

ACAS

A detailed guide to flexible working, how to implement it and the benefits it can bring to your business.

- www.acas.org.uk
- 0300 123 1100

Chartered Institute for Professional Development (CIPD)

Includes many resources, including a report about how small companies are adopting flexible working practices and how they are dealing with the practical issues this raises.

- www.cipd.co.uk

Here for everyone
Here for business

We believe the overwhelming majority of employers want to do the best by their staff – and we want to be useful and relevant in helping them to do so.

Contact us

This publication and related equality and human rights resources are available from the Commission's website: www.equalityhumanrights.com.

For advice, information or guidance on equality, discrimination or human rights issues, please contact the **Equality Advisory and Support Service**, a free and independent service.

Website www.equalityadvisoryservice.com

Telephone 0808 800 0082

Textphone 0808 800 0084

Hours 09:00 to 20:00 (Monday to Friday)
10:00 to 14:00 (Saturday)

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