



With New Zealand now in effective lock down, many businesses are having to consider implementing urgent staff cuts in order to stay afloat. This is our interpretation of the situation and subsidies as announced by the Government on 23 March 2020, noting this has not been handed down to us in legislative format.

Employment law continues to apply, and the legal test an employer will be measured against remains the same – was the employer's actions and how the employer acted, "fair and reasonable employer in all the circumstances"? "All the circumstances" will now include the economic effects of COVID-19 on the business. That may mean the process to implement redundancies can justifiably be shortened, and other obligations such as the information disclosure requirements may be more easily met. Although every situation is different!

#### **What you need to pay....**

##### **1. Where the employer requires staff to stay away due to lack of work or health and safety concerns:**

This employee is "*ready, willing and able*" to work, but as you are preventing them from doing so, they should be paid and you may utilise the government assistance programme to assist you here (assuming you meet the criteria); and

##### **2. Where tomorrow L4 lockdown precautionary measure requires the employee who is not sick, to stay away from the workplace:**

For those who can't work remotely, there is no entitlement to be paid, although these employees can use their sick leave entitlements by agreement and of course, their annual leave is available (as is the option of paying their leave in advance by agreement).

However, the first step here is to work through the Government's support package to ascertain whether it can help your business either by use of the COVID-19 Wage Subsidy or the COVID 19 Leave Payment. If that is not adequate, the employer should be able to justify why it cannot sustain its staff, with reference to real numbers in terms of its business sustainability and work flow.

Word and Income's Fact Sheet on the subsidies currently available is available through the link **below**:

<https://workandincome.govt.nz/documents/eligibility/emergencies/covid-19/wage-subsidy-and-leave-payment-employer-support-factsheet.pdf>

please note that to qualify for the wage subsidy you must 'make best efforts' to retain employees and pay them a minimum of 80% of their normal income for the subsidised period. This does not provide an unqualified right to simply reduce employees' rates of pay. Employment law and usual consultation obligations continue to apply despite these extraordinary circumstances.

## **Consultation with employees**

Employers and employees must discuss in good faith the implications of COVID-19 on their working arrangements. Where changes to current working arrangements are proposed by an employer, there are specific good faith requirements that must be followed.

**Step one** – Work through the Government’s support package to ascertain whether it can help your business. If that is not adequate, the employer should be able to justify why it cannot sustain its staff, with reference to real numbers in terms of its business sustainability and work flow.

**Step two** - Check Employment Agreements and policies for any agreed approaches to restructures/redundancies/variations.

**Step three** – Clarify genuine business reasons to make changes and gather any available evidence of the need for change. Genuine business reasons will include: financial reasons and shifts in customer or market requirements.

**Step four** – Draft proposal and invite effected employees to meeting to discuss. This step will still be required even with C19 precautions in place. We suggest this meeting be held by way of digital meeting room. The proposal must include your business case and what changes may result from the lockdown (e.g. merging roles, refocussing aspects of a role, removing a role that is not needed, or a combination of the above). This should be set out as options for discussion and employee provision of other ideas should be encouraged (i.e. feedback sought).

**Step five** – Once consultation meeting held, give time for any additional employee feedback, consider all options and then make your final decision and announce it.

## **Contractors’ position**

Contractors are exempt from the above process as their employment relationship with the employer is defined in the terms of their Contractor Agreements. If their services are no longer required, generally the relationship may be terminated by giving the required notice stipulated in the Agreement. The wording of the Agreement should be checked carefully. Also check for any Force Majeure or frustration of contract provisions which may bring an immediate end to the relationship.

## **Preserving ability to re-start quickly**

An unpaid stand-down may be implemented by agreement when all other available options are exhausted. Should the subsidy not sufficiently supplement your cash flow, then the stand-down option is a stage 1 conversation to have. Then, should things not pick up again once the L4 directive lifts, then stage 2 would be engaging in a redundancy process. NB If the redundancy process is begun later and not solely because of the government directive, then the business case for the redundancies will need to be more robust, as work may actually be available for at least some employees.

The above are general guidelines and we suggest employers take advice on their specific obligations relating to the management of COVID-19.

If you have any questions or concerns relating to employment and/or health and safety obligations arising from the outbreak of COVID-19. Please contact Director Linda Fox or Associate Dayle Steele at:

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