



Employer Advice as at 30 March 2020 COVID19 FAQs

Paying employees during the lockdown

Do I have to continue to pay staff during the lockdown, if they are not working from home?

There is some debate about this issue (as ensues when such policy is handed down by way of announcement, not legislation). But, the most likely legal position is that you must continue to pay staff during the lockdown, even if they are not working from home.

We have had many employers ask if they could claim frustration of contract or use force majeure/business interruption clauses if they were unable to pay employees because of the lockdown, where they have exhausted all other options, but so far, this has not been tested in New Zealand and coupled with the availability of subsidies, would be a high-risk option. Any employers choosing to proceed down this path should do so with caution.

What if I cannot afford to pay staff during the lockdown?

In this case, an employer could suggest:

- Reducing the number of hours for which employees are required to work and for which they are paid;
- Employees are paid their accrued annual holiday entitlements for some or all of the period; and/or
- Employees take a period of leave without pay.

Each of these options requires the agreement of the employee(s) and can't be unilaterally implemented.

What if an employee does not agree to their hours and pay being reduced?

Where the employer needs to reduce the wage/salary outgoings to stay afloat, an employer could undertake a restructure to make these changes. We set out the steps for such a process in [last weeks' newsletter](#) (if you don't have it, please ask us). Should the role become redundant after consultation, employment agreement provisions with respect to notice periods and redundancy compensation will apply

Wage Subsidies

The wage subsidy scheme no longer has a \$150,000 cap, meaning larger businesses can now access the scheme under the initial criteria, being:

- your business must be registered and operating in New Zealand;
- your employees must be legally working in New Zealand ;
- the business must have experienced a minimum 30% decline in actual or predicted revenue over the period of a month when compared with the same month last year, and that decline must be related to COVID-19;
- your business must have taken active steps to mitigate the impact of COVID-19; and
- you must make best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period.

The Subsidy will be paid at a rate of:

- \$585.80 for people working 20 hours or more per week
- \$350.00 for people working less than 20 hours per week.

The Subsidy paid as a lump sum to the employer and covers 12 weeks per employee and is for wages only. The Government are driving home their message that the entire amount must be passed onto employees as the purpose is to help keep your staff employed.

Can employers use the wage subsidy to pay notice or redundancy compensation?

Redundancies based on wage costs may be a “no go” zone (see Restructuring **below**). However, if an employer has a wider business case and restructure consultation results in

redundancies, then the wage subsidy may be used to pay an employee’s notice but must cease when the notice period ends, i.e. the subsidy cannot be claimed for 12 weeks if notice is four weeks.

The subsidy may not be used to pay redundancy compensation.

Can you use wage subsidies for annual holidays?

Yes, as annual holidays are wages.

What do you pay employees who earn less or more than the per-employee wage subsidy amount?

While the wage subsidy is not an employee-specific entitlement, there is no obligation to pay the full “per employee” rate to each employee if that would amount to a greater sum than their usual earnings.

Conversely, if an employee earns more per week than the “per employee” subsidy rate, the amount paid to them may be higher than the “per employee” rate.

What can an employee do if they know their employer has accepted the wage subsidy but is making them redundant? Or isn't paying them?

The policy does not allow employers to receive the subsidy if employees are not being retained. If an employee is made redundant after receiving a subsidy, it is likely employers will need to repay part of the subsidy paid to them. We encourage all employers to keep good records in this respect, as they may be called upon at a later date to demonstrate compliance.

Working During Lockdown

What if an employee is not working as expected from home?

This is a real concern for many employers, especially where their staff have never worked from home in the past. Some employers are asking staff to complete timesheets setting out the hours they have worked and what they have been doing as a way of encouraging accountability.

If employees are otherwise not working as instructed, or not abiding by other existing company policies during this period, please speak to us and we can discuss any disciplinary process necessary.

Restructuring

If you are in the position where you need to consider commencing a restructure/redundancy process, please get in touch to discuss what such a process would look like for your business.

If you are receiving the wage subsidy, the justification for changes would need to be something other than the ongoing cost of wages. If the employee is prepared to agree to reduce their salary or wage to the value of the subsidy, the employer's wage cost should be zero and therefore any consultation would come to an abrupt halt (and the employer will have put staff through unnecessary stress at an already difficult time).

Can an employer decide to reduce an employee's pay to 80%?

Again, the way in which the Government handed down this initiative is causing difficulties for many of our clients. The current directive is, employers may be given the subsidy as long as they "make best efforts to pay their employees at least 80% of their normal income."

Nonetheless, the default position at law stands. Employers may not reduce salaries/wages without employee agreement. Therefore, consultation with staff is still required.

How should I deal with Contractors?

As mentioned in our last update, 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.

What happens if I receive the subsidy and still need to consider redundancies?

This situation is a reality for many businesses and something many will need to consider in the coming months. Employers should explore all other reasonable alternatives first, and only then, if a viable solution cannot be found/agreed upon with staff, should a restructure consultation commence.

Conclusion

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 your staff, please contact our employment specialists, director Linda Fox or associate Dayle Steele at:

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