



Update for employers - COVID-19/Coronavirus

Current as of 30 March 2020

We as a country are now firmly in level four of the four stage COVID-19 alert system, implemented at 11:59pm on Wednesday, 25 March 2020. We are expected to remain at level four for at least four weeks as we work to contain the spread of COVID-19.

The closure of all non-essential businesses and the tight travel restrictions on all New Zealanders spells a significant economic impact on businesses nationwide. This situation is unprecedented and is creating a lot of uncertainty and anxiety for employers and employees alike. In the past weeks the government has introduced an Economic Relief Package which encompasses a number of resources aimed at keeping as many employees as possible in employment despite the strain on businesses.

The difficulty has been that the hasty introduction of those resources caused much confusion for employers. On Friday, 27 March 2020 the government provided some clarity, which we share with you below.

This document is intended as general information/generic answers to questions that we are regularly seeing. If you have further questions or would like advice specific to your unique situation, please feel free to contact a member of our employment team (contact details located at the end of this document).

Legal and contractual obligations

Importantly, and we cannot stress this enough, there has been no change to employment legislation or general legal principles, which will continue to apply throughout this period and irrespective of whether the Economic Relief Package is tapped into.

Many businesses are far from their usual operation at present due to a situation entirely outside the employer's control, however, that does not release employers from their legal and contractual obligations to staff. It will be important to check your employment agreements, policies and any other employment documentation for anything possibly relevant to any path you are considering.

Changes to any term or condition of employment (including both terms in the employment agreement, and any terms "implied" through custom and practice) must be by agreement only. That means that necessary

adjustments to hours of work, place of work and pay, can only be lawfully made with the employee's consent. Ideally that would be written consent, but there may be some justifiable leeway in some situations.

Privacy

An employer's legal obligations concerning employee privacy also continue to apply. If you are contemplating applying for the wage subsidy you must discuss this with the staff that you intend to claim the subsidy for, and get their consent (ideally in writing) to share their information for this purpose.

Please contact us if you would like a template consent form.

Essential services

During the lockdown, only essential services will operate. In determining whether your business is an "essential service" we recommend checking the list of businesses considered "essential" [here](#).

This list is continually being updated, so it is important to continue regularly checking that your business has not been reclassified.

If you are not sure whether your business is considered essential, you can seek clarification by emailing essential@mbie.govt.nz or calling 0800 22 66 57 between 9am and 5pm.

If your business is considered "essential" you are expected to introduce alternative ways of working to ensure that employees are kept safe while at work. This may mean moving to shift based work to reduce the number of employees working together at any one time, staggering rest/meal breaks, observing physical distancing protocols, and standardising good hygiene measures.

Non-essential services

If your business is not considered "essential" you will be faced with the requirement to shut your doors. There has been some confusion about whether that means non-essential employees can continue working from home or will need to stop working completely. It has now been made clear that the requirement is that non-essential services cease any face-to-face function and allow their employees to remain at home.

Combination

It may be that only part of your service is essential. There is no issue with that part continuing to function while the non-essential component is shut down.

To pay or not to pay

Where employees can work from home they may do so. Essential employees whose work is such that they cannot do it from home should be the only people leaving their house to work. With sweeping disruptions across the workforce, revenue streams and employee's pay packets will inevitably be impacted. However, there is a lot of confusion as to what exactly employers are allowed/expected to do in these unusual circumstances.

As a general principle, an employer is required to pay their employees if they are *ready, willing and able* to work, even where a third-party directive means that working is not possible.

This means that when a non-essential employee cannot work from home, the employer continues to bear the burden of paying their usual wage/salary despite the fact of them not working, unless an alternative arrangement has been agreed.

An issue that many employers are grappling with is what to do with essential employees (for whom work is available) who are either; a 'vulnerable person' due to their age and/or an underlying health condition; live with a vulnerable person; are refusing to work; or any combination of these factors.

Employers have a primary duty under the Health and Safety at Work Act 2015 to ensure employees' health and safety in the workplace so far as is reasonably practicable. Exposure to COVID-19 is a risk in the workplace which is heightened for those who are 'vulnerable' people. Employers must seriously consider whether their implemented measures minimise the risk to this particularly vulnerable group effectively. The penalties for getting it wrong (not to mention the human consequence) can be severe.

Employees who are 'vulnerable', or are living with a 'vulnerable' person, will need to be considered on a case-by-case basis. If they want to work but the employer is not willing to wear the risk of having them in the workplace, the obligation to pay for that time not working sits with the employer. If the employee is not willing to work but there is work available that they could safely do, there is no longer any obligation for the employer to pay, but it may still do so, or at least partly do so, in good faith.

Where an employee who is not a vulnerable person is not willing to work there is no obligation on the employer to pay, unless they have a founded concern for their health and safety in the workplace and that is the basis for the refusal.

Wage subsidy

On 17 March 2020 the government announced a wage subsidy available to businesses impacted by COVID-19¹ as part of its wider Economic Relief Package. Full eligibility criteria can be found [here](#).

The wage subsidy is paid to the employer in a lump sum for 12 weeks, the rate of:

- \$585.80 per week for employees who work 20 hours or more per week; and
- \$350.00 per week for employees who work less than 20 hours per week.

The initial cap of \$150,000 per business has been removed. The Ministry of Social Development has also announced that it will publish names of organisations/people that have accessed the subsidy.

Initially, employers claiming the subsidy were required to make best endeavours to retain employees for whom the subsidy was claimed, and pay them at least 80% of their normal wages/salary. These obligations have since been tightened up. Employers submitting their application after 5pm on 27 March 2020 are now *required* to retain employees for whom the subsidy has been claimed.

Best efforts to pay 80%

'Best efforts' means just that; employers must try their hardest to ensure that the employees for whom a subsidy has been claimed are paid at least 80% of their usual earnings for the subsidised period. This may well mean topping an employee up out of the business' pocket where the subsidy rate does not equate to 80%.

¹ 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. Exceptions for businesses less than a year old and high-growth firms.

The fact that the wage subsidy requires best efforts be made to pay 80%, does not override the requirement at law to pay 100% unless otherwise agreed. You cannot unilaterally decide to drop pay to 80% based on the subsidy eligibility criteria.

Where unable to pay 80% employers may come to an alternative arrangement with employees, so long as they pay at least the subsidy amount. The only exception is where the subsidy amount is more than the employee's usual wage/salary, in which case the usual wage/salary amount may be paid.

We anticipate that some employers could be stuck between a rock and a hard place whereby they find themselves unable to top up pay past a certain level, say no more than 60% of usual earnings but the employee refuses to agree to that compromise. In that situation the employer will be faced with either making the employee redundant – a breach of the new subsidy obligations, or unilaterally impose payment at the reduced amount – a breach of legal/contractual obligations. The government does not appear to have considered this difficulty, but we will update you if further clarification is provided.

Any alteration to pay amounts for migrant employees with work visas containing conditions tying them to their employer will require careful consideration. This could put the employee in breach of their visa conditions, which could have serious consequences for their immigration status, and sanctions for the employer. Michelle Urquhart has expertise in both immigration and employment matters. Please contact her (details below) to discuss any migrant employee matters.

Drawing on leave and holiday entitlement

Employees and employers are to agree when annual holidays are to be taken. Where agreement cannot be reached an employer may direct an employee to take annual holidays by giving 14 days' notice. This applies to annual holidays only (not any other form of leave) and only to actual entitlement (not accrued leave or leave taken in advance).

Employers may ask employees for whom a wage subsidy is claimed, to use annual holidays or other paid leave balance due to top up from the subsidised amount to the required 80%. This is not expressly prohibited, so long as it occurs by consent.

Where no wage subsidy is claimed and employees are asked to reduce hours in order to get through the difficult period, the employer may offer to pay out annual holidays/other leave entitlement.

Redundancy

If you do not qualify for the wage subsidy, the subsidy would not be enough to get you through, your employee(s) do not agree to alternative arrangements, or the work has simply fallen away and is not anticipated to return, you may need to look at making redundancies.

Redundancy is the last resort – all other options must be considered/exhausted first.

Even in these unprecedented times, all legal obligations, including good faith requirements and the expectation of a fair and proper process, remain in force. Ultimately, any decision that an employer makes must meet the "test of justification", which is essentially what a fair and reasonable employer could have done in the circumstances at the time. Please contact us if you would like more specific guidance on correct processes for your specific circumstances.

Some may have already confirmed redundancies under prior versions of the wage subsidy scheme, and now wish to re-employ those staff and access the wage subsidy for them. This is fine so long as the employees are

re-employed before the application for the subsidy is submitted; the employees were employed by the employer as of 17 March 2020; were terminated due to the impact of COVID- 19; and there has been no previous subsidy application for them. It is expected that employers would re-hire these employees on at least equally favourable conditions as their previous arrangement – this is not an opportunity to reduce wages or other entitlements.

Employees sick with COVID-19

Initially, the Economic Relief Package provided a 'leave payment scheme' aimed at supporting employees self-isolating, sick with COVID-19, or caring for a dependent who is self-isolating or sick with COVID-19. From 5pm on 27 March 2020 the leave payment scheme is no longer available. An alternative method of support for unwell or isolating essential workers is to be announced shortly; no details have been released as yet.

Please contact our [Employment Team](#) for further specialist assistance

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