

## Employee's Rights in the COVID-19 context

*This note has been written by Sarah Burton of the Wellington Community Justice Project. It covers types of employment, income rights, leave rights, and workplace health and safety rights in the COVID-19 context.*

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### Your employment type

#### Am I an essential worker?

An essential worker is a person who works for an essential business.

An essential business is defined as a business which is essential to the provision of life, as well as the businesses that support them. A list of essential businesses by sector can be found on the [New Zealand Government COVID-19 website](#).

A non-essential worker is a person who works for any business that is not deemed essential.

#### What is my employment type?

You will likely fall into one of the following categories: permanent full-time worker, permanent part-time worker, fixed-term or temporary worker, casual worker, self-employed worker, or independent contractor.

A **permanent full-time worker** is an employee who is employed on an ongoing basis and has a guaranteed amount of work hours per week. For the purposes of the wage subsidy scheme, they work more than 20 hours a week in a regular work pattern (or on average).

A **permanent part-time worker** is an employee who is employed on an ongoing basis and has a guaranteed amount of work hours per week. For the purposes of the wage subsidy scheme, they work less than 20 hours a week in a regular work pattern (or on average).

A **fixed-term worker** is an employee who is full-time or part-time and has a guaranteed amount of work hours per week, but whose employment will end on a specified date or when a certain event happens. There needs to be a genuine reason based on reasonable grounds for the employment being fixed-term, which could include:

- cover for another employee on leave;
- cover for a seasonal peak; or
- to complete a project.

A **casual worker** is an employee who generally does not have set hours of work, a regular work pattern or ongoing expectation of employment. The employer does not have to offer the employee work and the employee does not have to accept work offered to them. Casual workers work when it suits both themselves and the employer.

A **self-employed worker** is a person who conducts business by themselves. They are not an employee of another party. Types of self-employment include:

- independent contractors;
- sole traders; or
- small business owners.

An **independent contractor** is a type of self-employed worker. They work for another party to perform a service under a contract. They are not an employee of the other party and are not paid a salary or wage. They earn money by charging the other party for their services.

For more information on employee types, see [the MBIE website](#). It is important to understand which category or categories your work may fall within, as different types of workers and employees have different rights and responsibilities. These categories are not always clear-cut and may not always align with what the written agreement says, depending on your situation.

## *Income Rights*

### **Can my employer stop paying me if I work for a business that cannot currently operate due to the pandemic and I cannot work from home?**

In general, if you are not 'ready, willing and able to work', then your employer does not have to pay you. If you are required to stay at home under the conditions of the current alert level and cannot complete any work, then you are arguably not 'ready' or 'able to work'. However, it is worth noting that this point is untested in the current COVID-19 context, given that your employer also cannot fulfil their obligations to you.

Even so, if your employer has had at least a 30% drop in actual or predicted revenue because of COVID-19, then they can apply for the wage subsidy for you. Your employer must tell you if they have applied for the wage subsidy on your behalf.

If your employer does not qualify, you can talk to them about whether you can use special paid leave or any other type of leave.

### **Can my employer stop paying me if I am now working from home?**

If you are still working the same hours from home, then you are entitled to the same amount of pay unless you and your employer have agreed otherwise.

### **What if my employer wants me to work reduced hours or for reduced wages from home?**

Unless your employment agreement says that your employer can change your hours of work, then your employer cannot reduce your hours or wages without your agreement. Even if your employment agreement provides for this, your employer must act fairly and reasonably when making changes that affect your employment.

Any changes must be made in "good faith" per the [Employment Relations Act 2000](#). This means your employer must:

- tell you their proposed changes and provide you with all relevant information;
- give you time to consider and give feedback; and
- genuinely consider your feedback before making a decision.

You do not have to accept reduced hours or pay, however, be aware that this may have consequences. For example, if no workers accept reduced hours or pay, your employer may have to consider redundancy. You are also entitled to be paid at least the minimum hourly wage rate for every hour worked. More information on the minimum wage can be found [here](#).

### **What if I cannot work as I am abiding by government requirements e.g self-isolating for 14 days?**

In general, if you are not 'ready, willing and able to work', then your employer does not have to pay you. Because you are required to stay at home to abide by government requirements and cannot complete any work, then you are arguably not 'ready' or 'able to work'. However, it is worth noting that this point is untested in the current COVID-19 context, given that your employer also cannot fulfil their obligations to you.

Even so, if your employer has had at least a 30% drop in actual or predicted revenue because of COVID-19, or their ability to support you has been negatively impacted by the COVID-19 restrictions, then they can apply for the [leave payment](#) scheme for you. If your employer does not qualify, you can talk to them about whether you can use special paid leave or any other type of leave.

### **Should my work be paying for work-related costs due to working from home, e.g my wifi bill?**

In general, no, if it is an expense that you would already pay anyway. However, if, for example, your wifi bill is higher than normal, you should talk to your employer about reimbursement. Some employment agreements or workplace policies may also provide for reimbursement of reasonable work-related expenditure.

### **Will I receive a bonus or benefits if I am an essential worker?**

No, unless your employer has decided otherwise. If your employer does provide you with a bonus or other benefit because of COVID-19, this does not change or reduce their normal employment obligations to you, including the duties they owe to you under the Health and Safety at Work Act 2015.

### **Will I receive payments for public holidays during the COVID-19 restrictions?**

If you are still working, you should receive public holiday pay if the relevant public holiday falls on a day of the week that would otherwise be a working day for you. This should be based on your work pattern pre-lockdown, unless you have since agreed to a new permanent work pattern with your employer. Likewise, the usual rights and obligations apply if you are required to work on a public holiday.

If you cannot work because of COVID-19 restrictions, you likely will not receive public holiday pay, as you cannot work and so the public holiday would not otherwise be a working day.

### **What type of income support can I get?**

You may be eligible to receive the following types of income support:

- the COVID-19 wage subsidy scheme;
- the COVID-19 leave support scheme;
- the COVID-19 leave payment scheme;

- the COVID-19 wage subsidy extension scheme; or
- the COVID-19 income relief payment scheme.

The Government's [COVID-19 financial support tool](#) can help you determine what support you are eligible for.

#### *What is the COVID-19 wage subsidy scheme?*

This is a scheme where the Government gives businesses money to help them pay employees in circumstances where they have been financially affected by COVID-19. It is designed to assist businesses with paying an employee's ordinary wages or salary for 12 weeks.

A business is eligible for the subsidy if:

- they are not a state sector organisation;
- they are registered and operating in New Zealand;
- their employees are legally working in New Zealand;
- they have or will lose 30% in revenue because of COVID-19;
- they have taken active steps to mitigate the financial impact of COVID-19; and
- they will keep the employees that they claim for, for the 12 weeks of the subsidy.

The scheme is also available to contractors. More information on eligibility can be found [here](#).

In order to access the subsidy, your employer must sign a declaration that contains a number of terms and conditions. This includes, but is not limited to:

- paying employees claimed for, at a minimum:
  - for any work they do at their normal rates;
  - at least 80% of their ordinary wages or salary if it is reasonably possible; and
  - the full wage subsidy, unless the employee usually earns less than that.

If your employer applied for the subsidy before 4pm on 27 March 2020, the full declaration of terms and conditions can be found [here](#). If your employer applied for the subsidy on or after 4pm on 27 March 2020, the full declaration of terms and conditions can be found [here](#).

They will receive:

- \$585.80 per week for full-time employees (before tax); and
- \$350.00 per week for part-time employees (before tax).

#### *What is the COVID-19 leave subsidy scheme?*

This was a scheme designed to help pay employees who had to self-isolate, were sick, or had to care for someone with COVID-19. It is no longer available as of 27 March 2020, but, if your employer applied for it before that date, then the application will still be processed.

#### *What is the COVID-19 leave support scheme?*

This is a scheme where the Government gives businesses money to help them pay employees who cannot come into work and cannot work from home.

A business can claim money for its employees if they:

- are not a state sector organisation;
- have or will lose 30% of their revenue because of COVID-19; or
- their ability to support their employees has been negatively impacted by COVID-19 restrictions;

and the employees they are claiming for are:

- at a higher risk if they contract COVID-19 and so are recommended to stay at home by the Ministry of Health; or
- required to self-isolate for 14 days because they have come into contact with someone with COVID-19 (or caring for a dependant or dependants falling within this category); or
- have tested positive for COVID-19 and cannot come to work until they are cleared by a health professional (or caring for a dependant or dependants falling within this category); or
- living with household members who are at higher risk if they get COVID-19 and so are recommended to stay at home by the Ministry of Health.

They will receive:

- \$585.80 per week for full-time employees (before tax); and
- \$350.00 per week for part-time employees (before tax).

#### *What is the COVID-19 wage subsidy extension scheme?*

This is a scheme where the Government gives money to businesses who are still significantly financially impacted by COVID-19 after the wage subsidy scheme ends. It is designed to assist businesses with paying an employee's ordinary wages or salary for a further 8 weeks. It will be available from 10 June 2020 until 1 September 2020. It cannot be received if an employee is receiving a different COVID-19 payment at the same time, such as the wage subsidy.

A business is eligible for the subsidy if:

- they have, or expect to lose, at least 40% in revenue for at least 30 continuous days in the 40 days before they apply, compared to the closest time period from last year;
- they have taken active steps to mitigate the financial impact of COVID-19; and
- they will keep the employees that they claim for, for the 8 weeks of the subsidy extension.

They will receive:

- \$585.80 per week for full-time employees (before tax); and
- \$350.00 per week for part-time employees (before tax).

Further information, and updates, about the extension scheme can be found [here](#).

#### *What is the COVID-19 income relief payment scheme?*

This is a scheme where the Government gives money to people who have lost their job because of COVID-19 to help them pay their living costs. You can receive the payment for up to 12 weeks as long as you qualify for the scheme. After 12 weeks, you can access the jobseeker benefit. The income relief payment scheme will be available from 8 June 2020.

A person is eligible for the payment if they:

Commented [SB1]: <https://www.workandincome.govt.nz/covid-19/wage-subsidy-extension/index.html>

Commented [SB2]: <https://www.workandincome.govt.nz/covid-19/income-relief-payment/index.html?fbclid=IwAR0VbuLVEWwv6XY-19OyqjqENzAt-IGgPlnErQGsxFioYnUuPGe0RK90inY>

- are a New Zealand citizen or resident who normally works and lives in New Zealand;
- are at least 18 years old, or are 16 or 17 years old and financially independent;
- have lost their last job or self-employment because of the impact of COVID-19 between the period of 1 March 2020 to 30 October 2020; and
- normally worked for at least 15 hours per week for at least 12 weeks before losing their job.

A person is not eligible for the payment if they:

- receive a redundancy payment of at least \$30,000, before tax;
- get or used to get private income protection insurance payments for the job that they lost;
- receive earnings-related ACC payments;
- left their job for a different reason, such as resignation or retirement; or
- still have a job.

While receiving the payment, you should:

- actively search for work;
- accept suitable job offers or redeployment or training opportunities; and
- inform WINZ when your situation changes, as you may no longer be eligible for the payment.

You will receive:

- \$490.00 per week if you had been working for at least 30 hours a week (untaxed); or
- \$250.00 per week if you had been working for 15 to 29 hours a week (untaxed).

There are more eligibility requirements in the following situations:

If you are **in a relationship** with a partner, both of you can receive the income relief payment if you both meet the criteria. You are not eligible for the payment if your partner earns at least \$2000.00 per week in wages or salary before tax.

If you are **already receiving a benefit** you can choose to change to the income relief payment from 8 June 2020 if you meet the criteria.

If you are **receiving another COVID-19 payment**, like the wage subsidy or leave payment, you are not eligible until that has been paid out, as you cannot receive both at the same time.

If you are **receiving NZ Super or Veteran's pension**, and you meet the criteria, you can get the income relief payment as well as your pension if you:

- are over 65 years old;
- do not have a non-qualified partner included in your NZ Super or Veteran's pension; and
- are not a qualified partner yourself.

You can get the income relief instead of your pension if you:

- are getting the Veteran's pension while under 65 years old; or
- are a non-qualified partner included in your partner's NZ Super or Veteran's pension.

If you are **receiving a student allowance**, you can only receive the income payment alongside your allowance at the part-time rate of \$250.00 per week. If you lose a full time job, you can choose to switch to the income payment instead of your allowance.

If you are **self-employed**, you can receive the income payment if you meet the criteria, and your business is no longer viable because of COVID-19, with no upcoming work or income. You are not eligible if you have received or are awaiting approval of a loan from the Small Business Cashflow Loan.

Further information, and updates, about the payment can be found [here](#).

### **How do I get the wage subsidy?**

Your employer can apply for the scheme through the [Work and Income website](#). If your employer has a lot of employees, they can apply [using a CSV file](#).

Your employer needs your consent to share your information with the Ministry of Social Development. This includes your:

- first name;
- last name;
- date of birth;
- Inland Revenue number; and
- number of hours you work per week or fortnight.

More information on what you are consenting to can be found on the [Work and Income website](#).

#### *How do I get the wage subsidy if I am a casual worker?*

Your employer can still apply for the wage subsidy for you if you are a casual worker. They can work out whether to apply for the part-time or full-time subsidy by averaging your hours for your last year of work. If you have worked for less than a year, then they can average your hours from the time that you have been employed.

#### *How do I get the wage subsidy if I am self-employed or an independent contractor?*

If you meet the criteria, you can apply for the wage subsidy for yourself on the [Work and Income website](#).

### **How do I know if my employer has applied for the wage subsidy scheme?**

You can search for your employer on the [Work and Income website](#). However, if you cannot find them, talk to your employer as:

- their application may not have been processed yet;
- they may not have applied;
- they may have been declined;
- they may not have been added to the list yet; or
- they may be listed under a different name.

### **What do I do if my employer is withholding my wage subsidy?**

Your employer must pass on the wage subsidy if they have applied for you. Firstly, talk to your employer and, if it cannot be resolved, you can make a complaint to Employment New Zealand. More information and the complaints page can be found [here](#).

### **Do I pay tax on the wage subsidy?**

Yes. Because payments from the wage subsidy are wages, your employer will deduct money for things like PAYE, KiwiSaver, student loans, or ACC.

### **Does my employer have to pass on the full wage subsidy?**

Yes, unless your weekly income is normally less than the amount of the wage subsidy. In that case, your employer is only required to pay your normal salary.

### **How do I get the leave payment scheme?**

If you meet the criteria, your employer can apply through the [Work and Income website](#). If your employer has already received the wage subsidy on your behalf, they will not be able to apply to receive the leave payment on your behalf at the same time.

#### *What does my employer need from me to apply?*

Your employer needs your consent to share your information with the Ministry of Social Development. This includes your:

- first name;
- last name;
- date of birth;
- Inland Revenue number; and
- number of hours you work per week or fortnight.

More information on what you are consenting to can be found on the [Work and Income website](#).

To apply on your behalf, your employer must sign a declaration that contains a number of terms and conditions of the scheme. This includes that you have advised, and they agree, that you are eligible for the scheme. Neither you nor your employer are required to provide medical or other verification to the Ministry of Social Development. However, your employer may want to satisfy themselves that you are in fact eligible for the scheme. What this means in practice will depend on the circumstances, including your employment agreement and workplace policies. This does not necessarily mean that you have to provide your employer with anything that they ask for.

## ***Leave rights***

### **Can my employer make me use my annual leave?**

You and your employer must agree on when to take leave, per the [Holidays Act 2003, s 18](#). They must consult with you in good faith. If you still do not agree on when to take leave, they must give you 14 days' notice before they require that you use your annual leave.

### **Can my employer make me use my sick leave?**

No. Your sick leave can only be used if you, your partner, or someone dependent on you is sick, per the [Holidays Act 2003, s 65](#).

### **What is special leave?**

Special leave is a form of leave that you may agree upon with your employer.

- For example, your employer may allow you to take discretionary leave. Discretionary leave is given to you by choice of your employer. You and your employer can negotiate how long you will take leave, whether or not you will be paid for the leave, and, if so, how much you will be paid. Some employment agreements or workplace policies provide leave and holiday entitlements that are additional to the minimum statutory entitlements. Whether you have a contractual right to these, or whether they are only available at your employer's discretion, will depend on the circumstances and the particular wording used in your employment agreement.

It does not fall under any of the other minimum statutory entitlements to leave and holidays. Because there are no legal requirements for your employer to grant you special leave, you can only use it during the lockdown period if your employer agrees to it.

### **Can I voluntarily use my sick leave, annual leave, bereavement leave, or other leave at this time?**

Yes, if you satisfy the criteria. Existing laws related to leave still apply during the duration of COVID-19. Your holidays and leave entitlements will depend on the circumstances, including your employment type and length of employment.

#### *Sick Leave*

You can use your sick leave if you, your partner, or someone dependent on you is sick, per the [Holidays Act 2003, s 65](#).

Your employer may require that you provide proof of sickness or injury, like a certificate from a health practitioner, if you need to take off three or more days. They can also ask you to provide proof if you need to take off less than three days as long as they:

- tell you as early as possible; and
- agree to pay for your reasonable expenses to get the proof.

#### *Annual Leave*

You can use your annual leave if you and your employer agree on when it will be taken. Your employer cannot unreasonably say no.

#### *Bereavement Leave*

Bereavement leave can be used as it is needed and is not limited to a total number of days in the same way as sick leave and annual leave.

You can use three days of bereavement leave if you suffer the death of your:

- spouse/partner; or
- parent, parent-in-law or grandparent; or
- child; or
- sibling; or
- grandchild.

You can use one day of bereavement leave if you suffer the death of someone accepted by your employer as a bereavement. Your employer must consider the relationship between you and the deceased, as well as any other cultural or significant factors.

*What if it is difficult to obtain documentation e.g medical certificates due to the current alert level?*

Talk to your employer about whether it is practical to get documentation. If you do need a medical certificate, try your best to get one after a phone or online consultation.

### **Can my employer make me redundant?**

Yes, but there still needs to be a fair redundancy process.

The wage subsidy scheme requires employers to retain staff if they applied after 4pm on 27 March 2020, or use their best endeavours to retain staff for the period of the subsidy before 4pm on 27 March 2020. While your employer can still make you redundant or propose to make you redundant while accessing the wage subsidy, this would be a relevant factor in determining whether a dismissal is justified.

If you are made redundant, you may be eligible for the COVID-19 income relief payment scheme.

*What is the fair process my employer needs to follow to make me redundant?*

Their decision to make you redundant must be justified per the [Employment Relations Act 2000, s 103A](#) and grounded in genuine business reasons. They must comply with any workplace policies and the terms in your employment agreement.

They also must complete a full and fair consultation process with you, which includes:

- creating a proposal that provides you with all relevant information about the changes that is then shared with you;
- giving you time to consider the changes, seek advice and give feedback on how the proposal could be changed; and
- genuinely considering the feedback they receive before making a final decision.

They must give you notice of your redundancy. This notice must comply with the amount of time in your employment agreement or a 'reasonable' amount of notice if there is no clause in your agreement. They must also pay you any wages or salary and any accrued annual leave that is owing as at the date that your employment ends. You will not be entitled to additional 'redundancy compensation' unless your employment agreement or workplace policies provide for this.

## **Workplace Rights**

**I am an essential worker, do I have to work through the COVID-19 period?**

As essential businesses are open at all alert levels, you will have to work according to your employment agreement, unless you and your employer have agreed otherwise.

The exceptions to this are if you take leave or cannot come in to work because you:

- are at a higher risk of contracting COVID-19 and so are recommended to stay at home by the Ministry of Health;
- are required to self-isolate for 14 days because you have come into contact with someone with COVID-19;
- have tested positive for COVID-19 and cannot come to work until you are cleared by a health professional; or
- are living with household members who are at higher risk if they get COVID-19 and so are recommended to stay at home by the Ministry of Health.

Under the [Health and Safety at Work Act 2015](#), you can also stop working if you believe that it will expose you or someone else to a serious risk to your/their health or safety arising from an immediate or imminent exposure to a hazard. You can only stay off work if you tell the business, try to fix the issue, and then reasonably still believe that the risk remains.

### **Do I have to work my usual hours?**

You must work your usual hours unless you and your employer agree otherwise.

### **I am a non-essential worker; do I have to physically come into work?**

*At Alert Level Four:*

No. Non-essential workers must work remotely/from home or not work at all.

*At Alert Level Three:*

It depends. You must work from home if you can. You may have to physically come into work if you cannot work from home and your workplace reopens while abiding by the Level 3 restrictions, unless you and your employer agree otherwise.

From 1 May 2020, the Leave Support Scheme will extend to all businesses, organisations and self-employed people who experience hardship due to COVID-19 as a result of moving to Alert Level 3. You may be able to access this scheme if you cannot work because you:

- are at a higher risk of contracting COVID-19 and so are recommended to stay at home by the Ministry of Health;
- are required to self-isolate for 14 days because you have come into contact with someone with COVID-19;
- have tested positive for COVID-19 and cannot come to work until you are cleared by a health professional; or
- are living with household members who are at higher risk if they get COVID-19 and so are recommended to stay at home by the Ministry of Health.

See 'What is the COVID-19 leave support scheme?' under 'Income Rights' for more information.

*At Alert Level Two:*

All businesses are able to open at Alert Level 2 if they can do so safely. They are still encouraged to use alternative ways of working if they can. If your workplace opens while abiding by Level 2 restrictions, then you will have to physically come into work unless you and your employer agree otherwise.

You may be able to access the Leave Support Scheme if you cannot work because you:

- are at a higher risk of contracting COVID-19 and so are recommended to stay at home by the Ministry of Health;
- are required to self-isolate for 14 days because you have come into contact with someone with COVID-19;
- have tested positive for COVID-19 and cannot come to work until you are cleared by a health professional; or
- are living with household members who are at higher risk if they get COVID-19 and so are recommended to stay at home by the Ministry of Health.

See 'What is the COVID-19 leave support scheme?' under 'Income Rights' for more information.

### **Can my employer change my employment agreement because of COVID-19?**

No, unless you agree. Any changes must be made in 'good faith' per the Employment Relations Act 2000. This means your employer must:

- tell you their proposed changes and provide you with all relevant information;
- give you time to consider and give feedback; and
- genuinely consider your feedback before making a decision.

You do not have to accept any proposed changes.

### **Can I work from home instead?**

Yes, if you and your employer both agree to you working from home.

### **Is COVID-19 considered a health and safety issue?**

Yes, any infectious disease is considered a health and safety issue.

#### *What does my workplace have to do to address COVID-19 as a workplace hazard?*

Your workplace is, as always, required to comply with its health and safety obligations. This means that, among other things, your workplace must take measures to minimise the risk of exposure and spread of COVID-19 in the workplace. This could include, but is not limited to:

- eliminating or minimising staff interactions;
- encouraging working from home where possible;
- making sure that the workplace is clean and hygienic; or
- providing personal protective equipment like gloves where appropriate.

For more information on workplace health and safety in the COVID-19 context, see [MBIE](#) and [WorkSafe](#).

*What if I feel that my workplace is not taking enough measures against COVID-19?*

You should discuss your concerns with your employer or your manager and try to work together to find a solution. If you are still not happy, you can contact:

- your workplace health and safety representative, if you have one;
- your union; or
- WorkSafe, by [submitting an online form](#).

If you still feel your concerns have not been addressed, under the [Health and Safety at Work Act 2015](#), you can also stop working if you believe that it will expose you or someone else to a serious risk to your/their health or safety arising from an immediate or imminent exposure to a hazard. You can only stay off work if you tell the business, try to fix the issue, and then reasonably still believe that the risk remains.