



# COVID-19 FREQUENTLY ASKED QUESTIONS

## UPDATE 1

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## 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, and the answer is not clear from the guidance issued by the Government. Our view is that the most likely legal position is that you must continue to pay staff during the (current) four-week lockdown, even if they are not working from home.

However, it may be that an employer could claim frustration of contract if they were unable to pay employees because of the lockdown and had exhausted all other options. This has not been tested in New Zealand employment law and would be a high risk option.

There may also be an exception for employers who have a “force majeure” or “business interruption” clause in their employment agreements. If such a clause exists, the requirement to pay employees would depend on the wording of that clause and if it covers this situation. **Please note that the threshold for invoking such a clause is high.**

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

In the event an employer cannot afford to pay employees during the lockdown period, there are several options available. In this respect, an employer could propose that:

- There is a reduction in the number of hours for which employees are paid;
- Employees are paid their annual holiday entitlements for some or all of the period;
- Employees take a period of leave without pay during the lockdown period.

Keep in mind that each of these options requires the agreement of the employee(s).

We have addressed the wage subsidy below.

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

In the event an employee or employees do not agree to their hours and pay being reduced, and an employer needs to reduce the wage bill in order to stay afloat, an employer could undertake a restructure to make these changes.

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Such a proposal may be framed on the basis that some or all current roles must be disestablished and replaced with, for example, fewer roles and/or part-time roles. Employees affected by the proposal would have the option of being redeployed into the new roles and, in the event they chose not to be redeployed, their employment would come to an end by reason of redundancy. In that case, the terms of their employment agreement in respect of notice and redundancy compensation would apply.

The usual requirements to consult with employees and fairly consider feedback received would continue to apply. However, the process may be able to be truncated given the unique circumstances. We suggest that if an employer is considering such changes, they get in touch.

### **Can an employer unilaterally reduce an employee's pay to 80%?**

This is a unique situation because the Government has made a wage subsidy available to employers who make best efforts to pay their employees at least 80% of their normal income.

However, the default position remains that an employer cannot unilaterally reduce any employee's pay – their agreement is required.

Employers should, therefore, consult with employees in good faith and try to reach agreement on this issue in the first instance.

However, if they cannot agree and have exhausted all reasonable alternative options, it is arguable that an employer could rely on the "frustration of contract" principle to enforce the reduction. The law remains unclear on this point and it is a high risk option, but if the employer would otherwise go under, it may be a better option than the alternative.

## **Making structural changes**

### **What happens if I need to consider redundancies?**

Even with the wage subsidies, many companies will struggle to stay viable and, in some cases, will need to consider making changes to their business.

In the first instance, employers should explore all reasonable alternatives, such as seeking an employee's agreement to reduce their pay to no more than the value of the wage subsidy (bearing in mind that the wage subsidy will not be available unless the employer can demonstrate that they have

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made “best efforts” to pay employees at least 80% of their normal income), to take leave without pay, reducing employees’ hours or requesting that employees take annual holidays.

However, in the event that employees do not agree to any such changes, or, even with employee agreement to changes, an employer is required to make structural changes in order to stay viable, a business could commence a restructuring process.

As described above, even though the circumstances are very difficult, employers will still be expected, in almost all cases, to consult fairly with staff regarding what is proposed. If you are in the position where you need to consider such changes, we would suggest that you get in touch to discuss what such a process would look like.

We note that, where you have received the wage subsidy, that is likely to undermine the justification for making employees redundant if the justification is based on an inability to pay employees. That is because, if employees are prepared to agree to reduce their salary or wage to the value of the subsidy, the employer’s wage cost should be zero. The justification for changes would, in that case, need to be something other than the ongoing cost of wages.

## **Wage subsidies**

The Government has announced the expansion of the wage subsidy scheme, so that there is no longer any \$150,000 cap. This means larger employers can access the scheme.

The same criteria continue to apply to wage subsidies:

- 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 COVID-19 Wage Subsidy will be paid at a flat rate of:

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

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The subsidy is paid as a lump sum to the employer and covers 12 weeks per employee. This subsidy is for wages only. It is to help you keep your staff employed while you consider changes that may be needed while the disruption continues, and to ensure the future viability of your business. Businesses can only get this subsidy once.

### **Can you use wage subsidies for notice/redundancy?**

In order to be eligible for wage subsidies, employers must make best efforts to retain staff and, as we have described above, redundancies based on wage cost where an employer is receiving the wage subsidy may not be justified.

However, leaving that aside, we consider that you could use the wage subsidy to pay an employee's notice period, but not to pay redundancy compensation, as it is not wages.

### **Can you use wage subsidies for annual holidays?**

Yes, as annual holidays are wages. However, you would need to seek the employee's agreement, or give 14 days' notice of the requirement to take annual holidays.

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

While the wage subsidy is applied for and granted on a "per employee" basis (\$585.80 or \$350 for 12 weeks), it is paid as a single lump sum and not as an employee-specific entitlement.

The expectation is that an employer will make best efforts to pay employees at least 80% of what they would normally earn during the 12-week period that the subsidy is provided for using the wage subsidy lump sum together, wherever possible, with the employer's own money.

This means that 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.

On the other hand, 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 does it mean to "make best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period"?**

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When employers apply for the wage subsidy, they must agree to make best efforts to *both* retain employees the subsidy **was paid for** and pay those employees a minimum of 80% of their normal income.

The “best efforts” requirement does not preclude redundancies during the period for which the wage subsidy is granted (although you will not be entitled to wage subsidies for employees that were made redundant). However, please note our comments on issues of justification above.

The “best efforts” requirement also does not preclude paying employees less than 80% of their normal income where that is not possible. As described above, this means that you may ultimately be in a position where you can pay no more than the wage subsidy to your employees.

### **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?**

Employers are entitled to the subsidy if they make best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period. It is not intended that employers receive the subsidy if employees are not being retained. In other words, employers who have made employees redundant will not be entitled to the subsidy for any period after the employment terminates. Although this is unclear currently, we would anticipate employers being required to repay a portion of the lump sum in that event.

It is also expected that employers will make best efforts to pay employees a minimum of 80% of their normal pay. Even if they cannot do this, it would be expected that they would at least pass on the amount of the wage subsidy to employees.

If an employee believes that their employer has accepted the wage subsidy but is not passing it on, they should contact Work and Income or an employment lawyer/union for assistance.

## **Leave payment**

### **Where an employee is receiving the COVID-19 leave payment, do I need to pay them sick leave?**

Where an employee is receiving the COVID-19 leave payment because either they are sick, or are looking after someone who is sick, the employer would be required to pay them any sick leave they are entitled to.

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However, the COVID-19 leave payment does not require employers to pay employees more than they would otherwise earn had they worked. Therefore, the amount of sick leave payable to an employee would only be the shortfall between the COVID-19 leave payment, and what that employee would otherwise have earned had they worked.

## **Working during the lockdown**

### **What can I do if I think my employee working at home isn't doing their work?**

An employer would be justified in asking an employee to complete timesheets setting out the hours they have worked and what they have been working on, if they have reasonable grounds for concern about whether the employee is working from home.

### **What if my employees aren't taking part in online meetings or other virtual meetings?**

If employees are being paid to work from home, an employer could issue a lawful and reasonable instruction requiring them to participate in online and virtual meetings, and potentially take disciplinary action if they do not.

### **What should I do if an employee reports harassment (e.g. cyber-bullying) by a colleague while we're all working at home? How can I investigate?**

Regardless of the fact that employees are working from home, they continue to be bound by the normal expectations as to their conduct and behaviour. Therefore, any complaints of bullying should be dealt with in the usual way, including the commencement of an investigation if appropriate. Interviews would need to be done by skype/audio etc, but otherwise the process could still occur as previously.

### **What can I do if my employer isn't giving us a safe environment to operate in (e.g. a supermarket worker who doesn't have enough distance from customers)?**

Firstly, the employee should raise the issue with their employer, through their health and safety representative if they have one. If the employer fails to adequately address the problem, the employee may be entitled under the Health and Safety at Work Act to refuse to undertake further work until the situation is addressed.

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## **Can I be forced to do deliveries if I'm a delivery driver but feel unsafe?**

Employers are required, under the Health and Safety at Work Act, to take all reasonable steps to provide a safe working environment for employees. In this situation, this would include putting in place appropriate safety protocols, including personal protective equipment and social distancing.

If an employee considers that they face a serious risk from an immediate or imminent exposure to a hazard, they may refuse to carry out work. In these circumstances the employee must notify their employer and try to resolve the matter with them.

## **Can I be forced to work if I'm in an essential service and I live with vulnerable people at home?**

The Health and Safety at Work Act also covers risk created by the activities of an employee to the health and safety of another person. If an employee considers that they are at particular risk of catching the virus and passing it on to a vulnerable person at home, they could potentially refuse to undertake the work whilst they attempt to resolve the matter with their employer. Whether it is reasonable for an employee to do so will depend on the degree of risk – it must be a serious risk arising out of immediate or imminent exposure to a hazard. This is a high threshold.