



COVID-19 UPDATE

FREQUENTLY ASKED QUESTIONS

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FitzherbertRowe
LAWYERS

Frequently Asked Questions

GENERAL OVERVIEW

While there are many new processes, terms and mechanisms for us to get our heads around – including bubbles, essential services, wage subsidies and more – the key tenants of employment law remain the same. That is, employers must act in **good faith**, which includes being responsive and communicative.

Importantly through the coming weeks, that means that an employee's terms and conditions of employment should not be changed without firstly trying to reach agreement and; if agreement cannot be reached; working through a consultation process which may end in a restructure of the role or, at worst, redundancy.

We always use the phrase “ask, tell, make” – and don't get the order wrong. If you need to make changes – for example, reducing wages across the board to 80% or less – talk to your employees first. We are finding that most of the time, employers and employees alike are doing all they can to keep employment relationships going – people are really trying to work together for the greater good. We are available to assist where agreements cannot be reached.

Below, we answer some key questions about the Wage Subsidy scheme, essential services, redundancies, leave and other employment law changes.

We are here to help.

If you need any further advice on your employment matter.

Please contact Alastair Hall (a.hall@fitzrowe.co.nz) or

Joelle Avery (j.avery@fitzrowe.co.nz).

COVID-19 WAGE SUBSIDY SCHEME

Question	Answer
<p>When did you apply for the scheme?</p>	<p>Applications for the previous Wage Subsidy Scheme and COVID-19 Leave Payment Scheme closed at 3pm on Friday 27 March 2020.</p> <p>Applications for the modified Wage Subsidy Scheme will be open while New Zealand is at COVID-19 Alert Level 4. Firms have been able to apply since 4pm Friday 27 March on the Work and Income website.</p> <p>Why is this important? Those who applied after 27 March 4pm - must retain those employees or you will be in breach of your obligations.</p>
<p>Who can apply?</p>	<p>The modified Wage Subsidy Scheme is available to all businesses (including the self-employed, contractors and sole traders), registered charities, incorporated societies and post settlement governance entities, that are adversely affected by COVID-19.</p> <p>It is also available to employers who recently let employees go because of COVID-19, provided they re-hire those employees before applying.</p> <p>The scheme excludes state sector organisations.</p>
<p>How much does an employer get?</p>	<p>The wage subsidy is \$585.80 a week for full-time workers (who worked 20 or more hours per week before COVID-19) and \$350 a week for part-time workers (fewer than 20 hours).</p> <p>It is paid out in a lump sum covering the 12 weeks, meaning a \$7,029.60 payment per full time worker.</p>
<p>How much does an employer have to pay staff?</p>	<p>If you are receiving the Wage Subsidy, you must try your hardest to pay the employee named in your application at least 80% of their usual wages. If that isn't possible, you need to pay at least the subsidy rate (i.e. full-time or part-time). To be clear though, any reduction in wages and/or hours of work can usually only be done by agreement – or after consultation.</p>
<p>Can I top up the wage subsidy using employee's annual leave entitlements?</p>	<p>The key here is that you cannot force an employee to use their annual leave unless you give them 14 days' notice, after failing to reach agreement. If you are struggling to pay employees 80% of their wage, you should consult with them about the option of using their annual leave entitlements as a "top up". If the employee does not wish to use annual leave, you should</p>

	consider whether you wish to direct them to take annual leave (on 14 days' notice). Other employees may request to use annual leave, which should be dealt with in the usual way.
Can I top up the wage subsidy using employee's sick leave entitlements ?	Employees should not be paid sick leave – unless they are genuinely sick.
What if my employee's usual wages are less than the subsidy amount?	If your employee's usual wages are less than the subsidy, you must pay them their usual wages. Any difference should be used for the wages of other affected staff - the Wage Subsidy is designed to keep your employees connected to you through employment.
Do I have to pay GST and tax on the wage subsidy?	You don't have to pay GST or tax on the Wage Subsidy. It is exempt from GST and classified as "excluded income" for tax purposes. Your employees will need to pay tax on their Wage Subsidy payment meaning it is subject to the usual deductions, e.g. PAYE, Student Loan, KiwiSaver, ACC, etc. The Wage Subsidy is paid to employees through the normal wage process.
What are steps to mitigate the financial impact of COVID-19 on your business?	You must take active steps to mitigate the financial impact of COVID-19 on your business before you apply for the Wage Subsidy scheme. This could include: <ul style="list-style-type: none"> • activating your business continuity plan; • drawing on your cash reserves (as appropriate); • making an insurance claim; • proactively engaging with your bank; • seeking advice from the Chamber of Commerce, a relevant industry association or the Regional Business Partner programme.
What are my obligations to employees under the Wage	You will not make any changes to your obligations under any employment agreement, including to rates of pay, hours of work and leave entitlement, without the written agreement of the relevant employee: (from the Wage Subsidy declaration for

Subsidy scheme?	<p>applications made after 4pm 27 March, if you applied prior to this check here)</p> <ul style="list-style-type: none"> • You will retain the employees named in your application as your employees for the period you receive the subsidy in respect of those employees; • You will not unlawfully compel or require any of the employees named in your application to use their leave entitlements for the period you receive the subsidy in respect of those employees; • You will only use the subsidy for the purposes of meeting your named employees' ordinary wages and salary and your obligations in relation to this subsidy; • You remain responsible for paying your employees ordinary wages and salary for the employees named in your application; • You will for the period you receive the subsidy: <ul style="list-style-type: none"> ◦ use your best endeavours to pay at least 80% of each named employee's ordinary wages or salary; and ◦ pay at least the full amount of the subsidy to the employee; but ◦ where the ordinary wages or salary of an employee named in your application was lawfully below the amount of the subsidy before the impact of COVID-19, pay the employee that amount.
Do casual employees qualify?	<p>Yes. You can apply for the Wage Subsidy for any casual employee(s) that are employed by you at the time you apply and who would have been expected to work during the time you will receive the Wage Subsidy.</p> <p>Casual employees may have variable hours, so to assess their subsidy rate, the employer should average their hours over the last year. If this average is 20 hours or more, they can apply for the full-time rate, and if it's under 20 hours they can apply for the part-time rate.</p> <p>If they have worked for less than a year, the employer should average the hours worked during their total employment period.</p>
What about employees who	Employees who are also self-employed as well as employed through an employer can apply for the Wage Subsidy scheme

<p>work two or more jobs?</p>	<p>for their self-employment role regardless of whether their employer applies for the subsidy or not.</p> <p>Employees will still need to meet the same criteria for the self-employment component.</p> <p>Technically, if an employee is working for two different employers, there would be nothing stopping both employers from applying for, and passing on, the appropriate Wage Subsidy.</p>
<p>What if I didn't include all my employees when I applied for the Wage Subsidy?</p>	<p>For any staff on the original COVID-19 Leave Payment (which was merged into the Wage Subsidy scheme), you can apply for the Wage Subsidy after 14 days so long as you meet the criteria.</p> <p>You can make another application if you did not include all your employees on your first Wage Subsidy application. For instance, when there was a wage cap on the subsidy previously.</p>
<p>Are there any privacy implications?</p>	<p>An employer must have discussed the application for the Wage Subsidy with their employees. The employee must consent to their information being provided to MSD. It is preferable to get employee consent in writing. The employee information will also be shared by MSD with other agencies or other agencies providing information about the employee to MSD.</p>

ESSENTIAL SERVICES

Question	Answer
<p>Do I need to pay Hazard Pay to my employees who are attending work during the lockdown?</p>	<p>There is no obligation on employers to pay this. The most important thing is to ensure that the workplace is operating in a safe and healthy way – check WorkSafe and the Ministry of Health websites for specific guidelines.</p>
<p>What if one of my essential service workers are high risk, or have high risk people in their bubble?</p>	<p>You may be able to apply for the Essential Workers Leave Support scheme, which pays the same as the Wage Subsidy scheme, for 4 weeks (you can reapply after 4 weeks if necessary).</p> <p>Note, that from May 1 all high-risk workers are eligible for the COVID-19 Leave Support scheme which had previously only been available for essential workers.</p> <p>However, the business will only be eligible if:</p>

	<ol style="list-style-type: none"> 1. It has experienced a 30% revenue loss because of COVID-19; or 2. Its ability to support eligible employees that need to take leave because of COVID-19 has been negatively impacted by the COVID-19 public health restrictions. <p>Before applying for the scheme, you must talk to the employee. They may choose to use sick leave, rather than get the Leave Support. If you cannot pay the full amount of this leave to your employee, you can apply for the Leave Support to top it up.</p> <p>If you successfully apply for the Leave Support, you must try your hardest to pay the employee at least 80% of their usual wages. As with the Wage Subsidy, you can consult with the employee about how this can be achieved.</p> <p>If the employer is not eligible for Leave Support or Wage Subsidy scheme, we suggest consulting with your employee about taking special paid leave, annual leave or sick leave (if they are sick). Guidelines suggest that, where possible, paid special leave should be considered.</p> <p>Just to be clear, as a PCBU, your duty to operate a safe and healthy workplace would mean that particularly vulnerable people – i.e. those with underlying health conditions or that are over 70 years old, should not come to work unless they can work in a way that appropriately manages the risk.</p>
<p>How do I know if my business has been negatively impacted (when applying for the Leave Support subsidy)?</p>	<p>This is slightly unclear – but the guidance suggests that if you cannot afford to pay the employee to stay at home and hire someone else to do their work in their absence, you will be negatively impacted.</p>
<p>Can I ask my employee for proof that they are high risk?</p>	<p>Proof is not required when you make an application for the Leave Support scheme. You may be able to ask your employee for proof for your own records (such as a medical certificate) – but it could be difficult for the employee to comply with that request.</p>
<p>What if my employee has childcare responsibilities, or children in their bubble?</p>	<p>Caring for children or dependents is not an eligible ground for the Leave Support Scheme (unless they</p>

	<p>fall into one of the categories for the scheme namely they are isolating or are high-risk).</p> <p>You should discuss options for dealing with this situation with your employee, including being flexible about hours of work or considering options for working from home. Employees should consider their own options for childcare (such as support from other members of their household). They may be eligible for in-home childcare for essential workers at Level 4.</p>
<p>What if one of my essential service workers is refusing to come to work at Level 4?</p> <p>Or, what if my business is open at Level 3 but my employee is refusing to come to work?</p>	<p>Many employees in essential services or in businesses that are re-opening at level 3 are saying that they do not want to work, but are not officially required to self-isolate. Those people are often scared about coming to work.</p> <p>The first step, as a PCBU, is to talk to the employee and understand their concerns. If they have reasonable and valid concerns about the safety/health of the workplace, address those.</p> <p>If you are satisfied that the workplace is operating in a safe and healthy way, and that all reasonable concerns have been met, you can direct the employee to attend work.</p> <p>If the employee still chooses not to come to work, you should let them take annual leave and/or leave without pay – consult with them about that. If you are eligible for the Wage Subsidy, you could also apply for it for the employee, and pass the Wage Subsidy value to them.</p> <p>Technically speaking, an employee who does not come to work, after being directed to do so, could be committing misconduct capable of disciplinary action. We caution against using aggressive mechanisms in these circumstances though – people are scared and anxious, and some humanity and understanding goes a long way. This is particularly so if the employee is refusing to come to work because, for example, they need to look after their children.</p> <p>We've also heard of employers telling employees that if they do not attend work, they will be considered to have abandoned employment. We advise not to use this approach. It likely would not be</p>

abandonment in its technical form, and again, it seems particularly aggressive in the circumstances.

REDUNDANCIES

Question	Answer
Can I make an employee redundant during this time?	<p>You need to try your best to retain your employees you are currently receiving the Wage Subsidy for. If you applied for the Wage Subsidy for any employees after 4pm on 27 March 2020, you must retain those employees for the period you received the subsidy for, or you will be in breach of your obligations.</p> <p>If you do need to make redundancies, you still need to work through a consultation process, in good faith, with the potentially affected employees before coming to any decisions. That would include exploring options that might be available that are “less than” a redundancy, including reducing hours of work/pay; placing the employee on annual or unpaid leave.</p>
I let some employees go because of the virus – can I now rehire them so I can get the Wage Subsidy to help pay them?	<p>Employers must rehire the employees before applying for the Wage Subsidy. The employees must have:</p> <ul style="list-style-type: none"> • been employed by you at 17 March 2020; and • let go because of COVID-19; and • the employer did not apply for the Wage Subsidy for the employees previously. <p>Employers should look to rehire on at least the same terms and conditions.</p>

OTHER EMPLOYMENT OBLIGATIONS – LEAVE AND WAGES

Question	Answer
What about the minimum wage increase?	<p>The minimum wage increase is occurring while New Zealand is at COVID-19 Alert Level 4.</p> <p>If employers are unable to process the change, pay can be backdated when they can.</p> <p>The Government requires businesses to retain the workers they receive the subsidy for, and if possible, to pay at least 80% of their pre-COVID-19 income. For workers on the minimum wage, this means they could</p>

	<p>receive less pay than previously did, even when the minimum wage has increased. This is because there is no requirement for employers to pay the minimum wage, if no work is being performed.</p> <p>The Government's Wage Subsidy scheme requires businesses to pay their employees at least 80% of their pre-COVID-19 income, if possible. However, many businesses will not be able to pay that much, with no income coming in. At a minimum, in most cases, businesses must pass on the full subsidy to their employees.</p>
Employees with annual leave pre-approved prior to the lockdown	Employers are encouraged to discuss in good faith pre-approved staff annual leave and to agree on appropriate action, including granting requests to reverse approved annual leave.
Public holiday entitlements during the lockdown	<p>There will be at least 3 public holidays during Alert Level 4: Good Friday, Easter Monday, and ANZAC Day.</p> <p>Employers are required to pay employees where a public holiday falls on an "otherwise working day".</p> <p>Determining what would be an "otherwise working day" should be based on the employees work pattern prior to the lockdown. If you have agreed a new permanent pattern of work with your employee then this should be used to assess if a public holiday is on an "otherwise working day".</p> <p>Employees should be paid their normal relevant daily pay (or average daily pay). If you have agreed to reduce your employees pay during this time, to an agreed lower amount or the subsidy payment, then this is what should be paid.</p> <p>Note: Easter Sunday is not a public holiday.</p>
Do I have to pay employees time and a half for working on a public holiday during lockdown?	Yes, if an employee works on a public holiday an employer will need to pay the employee at least time-and-a-half. Remember too, that if the public holiday falls on a day the employee would normally work then they will also get an alternative paid holiday or day in lieu.
Can my employee refuse to work on Easter Sunday ?	Easter Sunday is not a public holiday; however all employees have the right to refuse to work that day.

	An employee does not need to give you a reason for their refusal.
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Joelle Avery (j.avery@fitzrowe.co.nz).

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