

COVID-19 UPDATE

EMPLOYEE SCENARIOS

Last updated: MAY 1

FitzherbertRowe
LAWYERS



EMPLOYEE SCENARIOS

Employee 1: is working in an essential service or is able to fully work from home. Company is functioning as normal with no real loss of revenue

Yay! The employee is paid their usual wage, and life goes on.

Employee 2: is partly able to work from home or at work (either because of role or because of decrease in work), Company does not meet 30% revenue decline threshold to apply for the Wage Subsidy

If there is a decline in work, or the employee can only do part of their role from home, you should consult with them about a temporary drop in hours (and therefore associated pay) – i.e. during the lockdown; or for 4 weeks and to be reviewed. You may be able to agree that they can take accumulated annual leave to top up the difference.

If the employee agrees to this, try to get the agreement in writing – even just a text.

If the employee does not agree, and you cannot afford to keep them on their full wage, you may need to consult with them about making their role redundant.

Note, that the employee's entitlement to annual leave will continue to accrue, but will drop on a pro rata basis. You should let them know this also.

Employee 3: can work from home or at work and the company is eligible for the Wage Subsidy

If the employee can fully work from home, try to pay them the Wage Subsidy with a top up to 100%.

If that's not possible, consult with the employee about decreasing their hours (and pay), as with Employee 2 above. Get any agreements in writing. Ensure that the employee is not paid less than the minimum wage for hours worked. Note that with the Wage Subsidy, "best endeavours" have to be made to pay the employee 80% of

their usual wage: this means that to drop under 80% of the wage, you need both the employee's agreement, and to show best endeavours have been made not to drop under that threshold – make sure you have the financial evidence to back up your position, and be ready for an audit of that.

Employee 4: cannot work from home (or only in a very limited way) and the company is eligible for a Wage Subsidy

The Wage Subsidy should be paid on to the employee in full. Then, the company needs to make best endeavours to top the subsidy up to 80% of the usual wage (see the discussion under Employee 3 above). If the top up cannot be done, the employer should consult with the employee and reach agreement on:

- The employee using annual leave to be topped up to 80%; and
- The employee agreeing to a temporary wage reduction – possibly even as far down as the Wage Subsidy amount (bearing in mind the best endeavours requirement).

If no agreement is reached, the employer could direct the employee to take annual leave (on 14 days' notice) to top them up to 80%; or may have to further consult with the employee around making the role redundant (noting though that if the employer applied for the Wage Subsidy after 4pm on 27 March, they must retain those employees).

Employee 5: cannot work from home and the company is not eligible for a Wage Subsidy

The company should consult with the employee. Depending on financial circumstances, options could include any or a mix of the following:

- Agreement to continue paying the usual wage
- Agreement to take special paid leave during the shutdown (equivalent to 100% of the wage or something less)
- Agreement to take annual leave
- Agreement to take unpaid leave
- A direction to take annual leave (on 14 days' notice)

As with the other scenarios, try to reach agreement first, via consultation – and record that agreement in writing.

If agreement cannot be reached, and the employee has used up all annual leave (either by agreement or after direction), the employer may have to consider making the role redundant.

Employee 6: works in an essential service, but is required to self-isolate (or is vulnerable)

If your employee:

1. Is sick with COVID-19; or
2. Has been in close contact with someone with COVID-19; or
3. Has dependents who are either sick with COVID-19 or have been in close contact with someone with COVID-19; or
4. Has serious health conditions, or someone in their household has serious health conditions putting them at higher risk of becoming seriously ill from COVID-19 (and they agree not to work)

You may be able to apply for the COVID-19 Leave Support Scheme, which pays the same as the Wage Subsidy Scheme, for 4 weeks (you can reapply after 4-weeks if necessary). From May 1, the Leave Support scheme will cover all workers (outside of the state sector), prior to this the scheme only covered Essential workers.

However, the employer will only be eligible if:

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.

Before applying for the scheme, you must talk to the employee. They may choose to use sick leave (if available) or take annual leave, rather than get the Leave Support subsidy. Note, sick leave is only available if the employee is sick. If the employee chooses to take annual leave or sick leave then you must pay them their normal wage rate for their normal hours of work (prior to COVID-19) unless their employment agreement has been varied by agreement, reducing the wage or hours of work. If

you cannot pay the full amount of annual or sick leave to your employee, you can apply for the Leave Support to top it up.

If you successfully apply for the Leave Support, you must try your hardest to pay the employee at least 80% of their usual wages.

If the employer is not eligible for the 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.

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.

Employee 7: works in an essential service (or is able to come to work at Level 3), but does not want to work

Many employees in essential services, or in businesses that are opening at level 3, are saying that they do not want to work - but they are not officially required to self-isolate. Those people are often scared about coming to work.

The first step, as a PCBU, is to talk to the employee and understand their concerns. If they have reasonable and valid concerns about health and safety in the workplace, address those.

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.

If the employee still chooses not to come to work, you should let them take annual leave and/or leave without pay. 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.

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 – people are scared and anxious, and some humanity and understanding goes a long way.

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 abandonment in its technical form, and again – humanity can go a long way.

Employee 8: is a casual employee

You can apply for the Wage Subsidy for a casual employee if they are employed by you at the time you apply and who would have been expected to work during the time you receive the Wage Subsidy. To assess their subsidy rate, you should average their hours over the past year (or over the total employment period if it is less than one year).

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).

Disclaimer: While reasonable care has been taken to ensure the content of this document is accurate at the time of publishing, law changes and government guidance will likely occur after publication. Further, the information in the document is general only and cannot replace specialist advice. Fitzherbert Rowe accepts no responsibility or liability for reliance on this document. Please see your lawyer for specific advice tailored about your situation.