

# COVID-19 UPDATE

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## RESTRUCTURING DURING COVID-19

ARTICLE

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LAWYERS

# Restructuring during COVID-19

As we work through Alert Level 3 and (hopefully) towards Level 2, we see more and more businesses opening and adjusting to a “new normal”. Unfortunately though, for many, the “new normal” requires businesses to down size or even close entirely, such has been the significant economic impact of the lockdown and the projected ongoing economic impact for a number of industries.

If you are having to contemplate a restructure of your business, including redundancies, there are two key points to consider:

## 1. EMPLOYMENT OBLIGATIONS

Firstly, normal employment law obligations continue – both those set out in the Employment Relations Act 2000, and those found in employment agreements and policies. These will include, importantly, acting in good faith and consulting with employees on any potential changes to their roles.

### Process

Such consultation must include providing the employee with access to all information relevant to the decision-making process (for example, projections about cash flow) and providing an opportunity for the employee to comment on the information before the decision is made. Those comments must be genuinely considered before any decisions are made. Consultation may have to include consultation on a proposed selection criteria, if the proposal is for a reduction in the number of same/similar roles.

In the current situation, there may be circumstances where consultation on changes can be truncated if the employer genuinely needs to make rapid adjustments to cope with their circumstances under COVID-19 alert restrictions, but truncated processes must still occur in good faith, and provide opportunity for employees to seek advice.

### Genuine Reasons

Not only do redundancies need to be procedurally justified, they also need to be substantively justified – i.e. there must be a genuine reason for the redundancies. A significant downturn in sales/revenue, a loss of customers/suppliers, an inability to pay, imminent closure, and/or a shift in market requirements, could amount to a genuine reason for restructuring or redundancies. However, it is important to ensure that the reasons are documented, with supporting evidence, and supplied to the employees as part of consultation. Using the current pandemic as a thinly veiled excuse to ‘be rid of’ employees that are not performing well will not be a genuine reason.

If redundancies are being considered, then employers should consider and explore with their employees all alternatives short of redundancy – for example, would the employee agree to reducing hours or wage? Or even taking unpaid leave until Alert Level 2? Are there any redeployment options? When we do reach Alert Level 1 or 2,

will you need these employees? Many businesses are expecting demand to ramp back up again (think of the hairdressers and beauticians!), which may mean redundancies are not the best idea, despite current hardship. Be careful about taking extreme employment actions now, if they may sink the business later down the track.

## 2. Wage Subsidy – Declaration Obligations

Employers that receive the wage subsidy essentially have two sets of obligations when considering redundancies: one to each employee, as set out above; and one to the Government, as part of the declaration that was signed when the wage subsidy was applied for.

The date the wage subsidy was applied for becomes really important in this consideration. If the employer applied for the wage subsidy before 4pm 27 March 2020, the employer declared that they would make **best endeavours** to maintain the employment relationship. If the wage subsidy was applied for after 4pm 27 March 2020, the employer **must retain** those employees, for the 12 weeks of the wage subsidy (starting on the date of application).

### Application after 4pm 27 March 2020: Must Retain Staff

In other words, for those that applied for the wage subsidy after 4pm 27 March 2020, you have agreed to retain all your employees for 12 weeks. In our view, that would not stop those employers from consulting on a proposed restructure/redundancy – or even making a decision – provided that the contractual notice period did not end prior to the end of the 12 weeks.

### Application before 4pm 27 March 2020: Best Endeavours to Maintain Staff

For those that applied for the wage subsidy before 4pm 27 March 2020, you have agreed to make best endeavours to maintain employees for the 12 weeks from date of application. “Best endeavours” is not defined, so while it is not an absolute requirement to retain employees, it is still likely a high bar to reach – and should mean that redundancies are the very last option. To illustrate that best endeavours have been made as part of any proposed restructure, the employer should set out what steps have been taken to maintain employment. These may include bank loans, rent relief, and debt hibernation. Be extra vigilant here: the advice that has been received from MSD includes that making staff redundant is very likely to be in breach of the obligation to “using best endeavours, retain the employees named in your application in employment on at least 80 percent of their regular income”.

If best endeavours have been made, and redundancies are still required, then these can occur during the 12 weeks of the wage subsidy – however, the fact that redundancies have been made must be reported to MSD as soon as possible (because the obligation to retain employees is no longer being met).

Further, the wage subsidy should be used to pay any notice period arising from the redundancy and the employer must then repay the balance remaining, using an online form found on the Work and Income NZ website

(<https://workandincome.govt.nz/covid-19/wage-subsidy/obligations-and->

[repayments.html#null](#)). Employers cannot use the wage subsidy to make any contractual redundancy compensation payments to employees.

We recommend reaching out to our employment law team for expert tailored advice to your situation if you are considering making any redundancies. Getting advice as early in the process as possible can ensure that your legal obligations are met and that the financial benefit of a restructure is not outweighed by a costly personal grievance claim down the line.

**We are here to help.**

If you need any further advice on your employment matter.

Please contact Alastair Hall ([a.hall@fitzrowe.co.nz](mailto:a.hall@fitzrowe.co.nz)) or

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