

Client Update

Shaping the future of insurance law

Lockdown – what the Wage Subsidy Scheme means for NZ employers

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AT A GLANCE

- The New Zealand economy has been severely hit by the impacts of the coronavirus, with many businesses now in lockdown.
- The Government has introduced a COVID-19 Wage Subsidy Scheme to help businesses and affected workers in the short-term, as they adjust to the initial impact of COVID-19.
- For employers, the subsidy comes with a range of new and existing obligations.
- In communicating options to employees, it has never been more important to show kindness and compassion.

Most New Zealand businesses are now in lockdown. While some may have employees, who can work from home and continue (almost) as normal, other non-essential businesses, or parts of businesses, have effectively closed down for at least four weeks. This is likely to introduce a redundancy scenario for many of these businesses.

The New Zealand Government has sought to alleviate some of the lockdown cash flow issues and to assist employers retain staff during this unprecedented situation. But how the subsidies interact with employer rights and obligations can be confusing.

This article clarifies the options available to employers and their obligations.

SUMMARY OF EMPLOYER OBLIGATIONS

Employers:

- cannot unilaterally change an employee's terms and conditions of employment, regardless of the government subsidy – changing terms and conditions requires the agreement of the employee
- may need to consider a restructure process if agreement is not possible and employees appear genuinely surplus to requirements
- continue to have good faith and fair process obligations around information and consultation
- need to consider alternatives to redundancy, such as:

- considering the subsidy, including eligibility and employee agreement
- considering reduction in pay
- reaching agreement to take annual leave
- requiring annual leave to be taken (complying with the *Holidays Act 2003* requirements)
- considering reduction in hours, and
- may have no reasonable alternative to redundancy, if there are no other viable options.

EMPLOYEE TERMS AND CONDITIONS

The government subsidy for employers comes with strings attached. Businesses have to commit to making best efforts to pay employees at least 80% of their normal pay. This has been clarified as requiring employers to try their hardest to pay 80%. If that is not possible, for example because workers are not able to work at all, then employers need to pay the full subsidy to employees regardless of their normal pay. Employers must retain staff in employment for the duration of the scheme.

Employers cannot unilaterally change an employee's terms and conditions of employment, including pay. This is regardless of the subsidy. An employer can propose this and consult the employee on the proposal, but if the employee says "no" then their pay cannot be reduced.

WHAT CAN AN EMPLOYER DO?

In circumstances where employees cannot work, or there is a significant reduction in revenue such that overheads need to be reduced, there is likely to be a potential redundancy situation. Discussions with employees around variations to their terms and conditions can occur against this backdrop, including reduction in pay and application of the subsidy.

If a potential redundancy situation applies, the employer must provide information and consult (under section 4 *Employment Relations Act 2000*). In the circumstances, the process can be swift, but there is a requirement to engage in genuine consultation in good faith. This will include a consideration of alternatives to redundancy.

Employers cannot exploit the shutdown as a pretext to get rid of difficult or underperforming employees, where the commercial rationale for redundancy is not the dominant motive.

To demonstrate best efforts to pay 80% of wages or salary, employers will likely have to show they considered paying 80% or more before embarking on any action (i.e. variation of terms or restructure). If an employer does no real analysis and claims the subsidy, it may be required to repay the subsidy at a later date.

ALTERNATIVES TO REDUNDANCY

Alternatives that businesses should consider will include:

- creative thinking on whether any work can be done from home
- whether the business can pay employees at 80% of normal wage or salary
- whether obtaining the subsidy will avoid the need for redundancy
- reducing hours
- reducing pay
- reaching agreement by the employee to take annual leave
- requiring employees to take annual leave under the *Holidays Act 2003*, or
- a combination of the above.

If, after considering these options, employers still need to reduce staff then redundancies will likely follow unless there are redeployment opportunities available.

ADVICE AND ASSISTANCE WITH COMMUNICATIONS

Employers and employees alike are trying to understand the impact of lockdown and come to terms with the new norm.

It has never been more important to show kindness and compassion through effective communication. If you or your business need to change employee terms and conditions, we are available to help you navigate through these turbulent and unprecedented times by assisting with communications and advising on the process.

NEED TO KNOW MORE?

For more information please contact us.



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