

COVID-19: Post-lockdown employment considerations, 23 April 2020

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By Meilun Chen, Solicitor, Kiely Thompson Caisley, a specialist employment law firm



The impact of the COVID-19 pandemic continues to seriously affect New Zealand and the world. To combat the outbreak, the government has taken a series of measures to halt the spread of the virus. From 11:59 pm on Wednesday 25 March 2020, New Zealand moved to Alert Level 4. This means that, at the time of writing, New Zealand is under a strict lockdown where everyone must stay at home unless they are working in an “essential business”.

Since the lockdown has been in place, there has been a significant impact on businesses across all industries in New Zealand. The lockdown has created a unique set of challenges for employers in terms of managing their workforces during these difficult and uncertain times.

This article provides an update on the key employment issues and developments arising from the Alert Level 4 lockdown and the impact of the virus.

Health and safety obligations during lockdown

Both employers and employees have continuing duties to ensure that employees have a safe and healthy workplace. This includes the duty to eliminate risks to health and safety so far as reasonably practicable; and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

When an employee works from home, that becomes their “workplace” and employees need to work with their employer to identify and eliminate (as far as possible) any potential hazards and risks. It will not be practical for employers to carry out an inspection of every employees’ workplace but there are other sensible measures employers and employees can take together. For example, employees can carry out their own workplace assessments and confirm to their employers that they have done so. Employers may also consider ensuring employees complete checklists and/or review materials on safe working practices.

Employers should ensure that there are processes in place to maintain contact with and support for employees. This could include regular catch-up sessions with employees via telephone or videoconference to check in on their well-being while in isolation. Employers can also check to ensure employees have the necessary equipment, tools and IT support to be able to work from home.

Essential services

Under Alert Level 4, essential businesses can remain open and continue to operate during the lockdown as these businesses provide the necessities of life for everyone in New Zealand. A list of businesses that are essential services can be found here: covid19.govt.nz/businesses-and-employees/essential-businesses/.

If an employer is operating an essential business during the lockdown, it has an obligation to eliminate and/or minimise risks posed by COVID-19. This involves taking steps such as:

- providing clear guidance on when workers need to stay away from work
- introducing requirements to maintain physical distancing and minimise face-to-face meetings
- promoting good hygiene practices at work such as hand washing, using hand sanitiser and appropriate coughing and sneezing techniques
- carrying out frequent surface cleaning around the workplace
- prominently displaying relevant information on hygiene and safety to people working in or visiting the workplace
- providing employees with personal protective equipment if necessary due to the nature of the work, and
- checking-in regularly with employees' health status and any concerns they may have regarding health and safety at work.

If an employee does not feel safe coming to work (or wishes to reduce the risk of spreading COVID-19) but is not required to self-isolate, the employee should notify the employer immediately and provide reasons.

Employers should consult with the concerned employee to understand the reason for not wanting to come to work. If the employer considers there is a reasonable belief or concern about contracting and/or spreading COVID-19, it must do what is reasonably practicable to reduce the risk. This includes consulting with affected employees in good faith to arrange alternative working arrangements where possible.

If an employee is unable to carry out their work due to having contracted COVID-19, the employee must notify their employer as soon as possible. An employer should not allow the employee to come to work as this will likely be a breach of the Health and Safety at Work Act 2015 and will also be in breach of the government's directive.

In these circumstances, an employee can take sick leave. The employee may also be eligible for payments under the Essential Workers Leave Scheme.

If an employee needs to take leave because they are vulnerable due to their age or immunity, need to self-isolate due to close contact with someone who has COVID-19 or are caring for someone with COVID-19, they may also be eligible for payments under the Essential Workers Leave Scheme.

Wage Subsidy Scheme

The government initially announced two financial packages to support employers and employees affected by COVID-19. These were the Wage Subsidy and the leave payment schemes.

There have been changes to both schemes following the article published last month.

Firstly, there is no longer a cap on the amount of assistance a business can receive and no limit on the number of staff an employer can support. Before 24 March 2020, the Wage Subsidy was subject to a maximum cap of \$150,000. If a business applied before that date and only claimed an amount up to the cap but would now be entitled to more, the employer can re-apply for further cover once the employer receives its initial entitlement.

If a business has applied for and was granted the subsidy but the Ministry of Social Development (MSD) capped the amount paid, the business does not have to re-apply and MSD will top up the difference between the previous \$150,000 cap and the original amount claimed.

Secondly, MSD has now issued a declaration in relation to the Wage Subsidy which sets out the obligations on an employer using the Wage Subsidy to retain and pay its employees.

If an employer applied for the Wage Subsidy on or after 4 pm on 27 March 2020, the obligations that employers agree to by signing the declaration include (but are not limited to) the following:

- The employer will not make any changes to its obligations under any employment agreement, including to pay rates, hours of work and leave entitlements without the written consent of the relevant employee.
- The Wage Subsidy received must only be used by the employer for the purposes of meeting employees' wages and/or salary and the employer's obligations in relation to this subsidy.
- For the 12-week period of the subsidy, the employer will:
 - retain its employees named in the application in employment
 - use best endeavours to pay at least 80% of each named employee's wages or salary, and
 - pay at least the full amount of the subsidy to the employee; but
 - pay the employee the amount of their wages or salary before the impact of COVID-19 if that amount is below the subsidy.

The notable change which took effect from 4 pm on 27 March is that the employer must now retain the employee for the 12-week subsidy period. This replaces the previous obligation to use best efforts to retain the employee.

Essential Workers Leave Payment

As of 3 pm on 27 March 2020, the Leave Payment Scheme is no longer available to receive applications. The government has now replaced this scheme with the Essential Workers Leave Scheme.

Businesses may be eligible for the Essential Workers Leave Scheme if the employer is an essential business and its employee needs to take leave because he or she is vulnerable, sick or otherwise unable to work.

There are three groups of essential business workers who are eligible for the scheme:

- Employees that need to self-isolate in accordance with public health guidance because they have contracted the virus, or have come into contact with someone who has contracted the virus.
- Employees who are deemed at higher risk if they contract COVID-19, in accordance with public health guidance and therefore should self-isolate for the duration of the lockdown (and potentially longer). This includes those with pre-existing medical conditions which increase their vulnerability and susceptibility to contracting COVID-19. This includes:
 - individuals who have respiratory conditions, chronic lung disease, cardiovascular disease, diabetes and chronic kidney disease and cancer
 - those aged 70 years and over
 - pregnant women, and
 - people experiencing homelessness or difficulty accessing medical care
- Employees who have household members who are deemed at higher risk if they contract COVID-19, in accordance with public health guidance and as such should self-isolate for the duration of the lockdown (and potentially longer) to reduce the risk of transmitting the virus to that household member.

The scheme provides employers with the same amount as the Wage Subsidy Scheme of \$585.80 per week for full-time workers and \$350.00 for part-time workers.

Payments are provided four weeks at a time, after which employers can apply again for employees who are eligible.

Leave entitlements

During the lockdown, employers and employees can agree that an employee will take annual leave during this period if the employee is unable to work. Pursuant to the duty of good faith, the employer must try to reach an agreement with the employees as to when the employee takes leave.

If an employer and employee cannot agree on the employee taking annual leave during this period, then the employer can require the employee to take annual leave at a specified time by giving the employee 14 days' notice of the requirement to take annual leave.

Employees can take sick leave during the lockdown period if the employee is sick and/or the employee is caring for a dependent who is sick. However, employers cannot require the employee to take sick leave in the same way as annual leave.

Employers in receipt of the Wage Subsidy are not obliged to pay employees an amount that is above what they would have ordinarily received under their employment agreement.

Minimum wage

On 1 April 2020, the minimum wage increased from \$17.70 to \$18.90 per hour.

An employer must pay its employees at least the new minimum wage for the work they perform whether employees are working from home or are in the workplace conducting essential work. If the business cannot process the increase during the lockdown period, it is recommended that employers openly communicate this with their employees. An employer should process the new payment rate as soon as it is able to do so safely in accordance with lockdown restrictions and provide employees with backpay as soon as practicable.

Conclusion

While the COVID-19 situation is rapidly changing from week to week, employers need to remember their existing contractual and statutory obligations continue to apply during the lockdown and beyond. This includes the obligation of good faith and the requirement to be responsive and communicative with employees.

The upcoming weeks promise uncertainty for many businesses, but it remains important for employers to understand their legal obligations during these difficult times. This will help employers respond effectively and lawfully to the challenging employment environment.