

## *Covid-19: Do employers have to keep paying staff?*

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New Zealand is again facing the possibility a lockdown of uncertain duration. One thing we do know for certain is that employment law doesn't have a "pandemic exception." In the last couple of months we have seen a number of legal claims coming out of the previous lockdown, including at least two which have resulted in employees receiving financial awards.

Providing general advice to employers about their obligations is extremely difficult, because the right answer in each situation often depends on a range of details. For example, is your business essential? Can the employee work from home and, if so, to what extent? What does the employment agreement say? Do the terms of any wage subsidy scheme restrict what you can do?

There are also several areas where the law doesn't yet give clear guidance.

However, here are brief answers to some of the key questions employers will have about paying their staff:

- *Do I have to pay staff at Levels 2 or 3 if the business has no work, or can't open, or isn't viable?* Yes. At Level 3 you don't have any right to stop paying, or to reduce pay (say to 80%), or to require staff to take immediately take leave. If staff are "ready, willing and able" to work then the law says you have to pay them in full. If that's not viable, see the options below.
- *Does Level 4 make a difference?* Yes, it can. If we go to Level 4 and you are not an essential business then staff can't leave their home to come to you. If they can't work from home then they aren't "able" to work, so you don't have to pay them. If you are an essential business, then you probably have to pay them, even if you don't have work for them (although there is some uncertainty here).
- *So we have to pay, but we have no (or greatly reduced) income - what do we do?* The law gives you options, and exactly what you should do will depend on your individual situation. In brief:
  - Communicate with staff – be thoughtful and calm, but tell them (as quickly as you reasonably can) what the situation is, and what the options are, from your perspective (although don't go so far as telling them that they are going to lose their jobs, even if that's what you think – see below).

- You can make staff redundant, or decide to reduce their hours (and possibly even their pay), but before doing that you have to have a genuine business case, and you have to consult properly before making a decision. In many situations that consultation will take around least a week and half, although in some cases it will take longer. You can't decide to make staff redundant (or reduce pay or hours) until you have been through that process. Don't view the process as something that needs to be done to implement the decision you have already reached - if you do, you will inevitably say something that will get you into trouble. Instead use the process as a way of testing whether your proposed decision is the right one for the business. That testing process involves giving staff all the information and genuinely listening to what they have to say, before you decide what to do.
- Redundancy processes become more complex (and therefore normally a little longer, and riskier) when you need to choose between similar staff who are going to be made redundant and others who are going to stay. You need to choose in a way that's fair, reasonable and transparent, and you need to talk to staff about how you're planning to choose / evaluate them, and consider their views, before you make final selection decisions.
- You can also agree with staff that they will take annual leave, unpaid leave, or reduce their hours and/or pay. Often those agreements are only going to be forthcoming if you're in a redundancy process, with the redundancy option on the table. However that's not necessarily the case – smaller employers in particular will often be able to have straight forward discussions with staff, and reach agreements. However, these agreements need to be carefully and clearly recorded, and they need to be obtained fairly – i.e. make sure staff don't feel rushed or pressured. Give them time (say at least three or four working day), a copy of the proposed changes in draft and tell them they can take independent advice before signing.
- You can direct staff to take annual leave but:
  1. You can only direct staff to take their "entitled" leave balance – they can't be directed to take their "accrued" leave balance. (Leave is added to the employee's "entitled" leave balance at the end of each full year of service, because the employee is now entitled to take it. "Accrued" leave is the leave that has been earned since the employee's last 12 month anniversary).

2. You must first try to reach agreement on when the leave is to be taken. Again, if staff agree to take annual leave, make sure you can show that this agreement was obtained fairly – mainly, that involves giving staff time to agree (or not).
  3. If you can't agree, then you can direct the leave to be taken by giving 14 days' notice, remembering employees have a right to at least two week's leave in one unbroken period.
- Consider government options – at the moment we don't know if the wage subsidy scheme will be extended. If it is, be aware of the conditions that attach to that subsidy – the key point is that you probably won't be able to make staff redundant during the period in which you are receiving the payment.

Again, this is just brief and general advice – it is not a substitute for specific legal advice about your situation. If you do need help, please contact us (and you should definitely get specific advice if you are looking at making staff redundant, or otherwise imposing changes to hours or pay). We can also provide government funded tailored advice, support and coaching to eligible employers through the Regional Business Partner Network.

### *Further Advice*

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