

HUMANKIND

COVID-19 – Considerations for employers

Updated 25 March

Guiding principles

We encourage all employers to keep the following in mind:

- Each employee will experience the impacts of COVID-19 in a different way. We encourage all leaders to have empathy with each employee, while still making the necessary decisions.
- Lead with humanity and act with kindness and in good faith. This includes being open, responsive, and communicative with employees at all times.
- Your duties and obligations under Health and Safety at Work Act 2015, the Privacy Act 1993; and the Employment Relations Act 2000; and
- The requirement to comply with employees' employment agreements and all relevant policies.

1 Working from home

If it is possible for your business to continue to operate remotely, consider:

- how to set up employees for productivity;
- how to maintain collaboration, connection and workplace culture;
- how you will move your regular rituals and routines to the remote environment, such as meetings, shared lunches, team coffees and even the 5 minute quiz;
- what systems and tools are needed to enable employees to work effectively and connect often (such as video conferencing and messaging services);
- your health and safety obligations; and
- having one person or a team of people who are responsible for the remote working experience.

2 Keeping employees safe in the workplace

If you are an essential service and working from home is not possible, you need to look at how you can put in place alternative ways of working to keep your employees safe including:

- Ensuring that your employees follow physical distancing practices and are working 2 metres apart where possible;
- encouraging people to spread out while in communal spaces or in meetings;
- using phone calls or video calls instead of face-to-face meetings;
- exploring the possibility of rotating people between from working from home and being in the workplace, or putting in place a roster to enable the minimum number of people to be in the workplace at one time.
- Exploring shift-based working and staggered meal breaks,

Also ensure your workplaces are regularly cleaned and sanitised, and have hand sanitiser available for every person to use when they enter or leave your workplace.

3 Reducing employees' hours

In order to stay afloat, you can consider reducing your employees' hours. It is recommended you:

- Seek advice first; and
- Consult with your employees and seek their views

You may also be eligible for the COVID-19 Wage Subsidy (see www.covid19.govt.nz). To qualify you must be able to demonstrate that:

- Your business is registered and operating in New Zealand
- Your employees are legally working in New Zealand
- Your business has experienced a minimum 30% decline in actual or predicted revenue over the period of a month when compared with the same month last year (or to a previous month for new or high growth businesses), and that decline is related to COVID-19
- Your business has taken active steps to mitigate the impact of COVID-19
- You are making best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period.

4 Paid and unpaid leave

If it's not possible for an employee to work from home, employees can take accrued leave.

Employees who are required to self-isolate or who are sick with Covid-19, or need to look after a dependant who is sick with COVID-19:

- can use their sick leave or annual leave entitlements and are entitled to the Government COVID-19 Leave Payment (see www.covid19.govt.nz).

Employees who are well:

- can use their annual leave entitlements

Employees who run out of sick leave or annual leave:

- can use other forms of leave, take leave in advance (record this in writing and let the employee know they may be required to pay it back if their employment terminates) or you can choose to grant them paid special leave. Alternatively they can be placed on leave without pay

While they are on leave, think about how to keep connected with your employees and check in with them regularly.

5 Temporary close down

If you are required to close your business temporarily:

- Review your employment agreements – they may allow suspension without pay in these circumstances otherwise you still may be required to continue paying employees;
- Consider placing employees on annual leave (either by agreement or by giving 14 days' notice) or seeking their agreement to take leave without pay;
- Be aware that unless their employment is terminated, employees continue to be employed by you even if they are not being paid, and some obligations continue (such as the accrual of leave under the Holidays Act).

6 Reduction in staff numbers or permanent close down

Review employment agreements for a '**force majeure**' or '**business interruption**' clause. We strongly recommend that employers seek advice before seeking to rely on these clauses. They:

- may release you from your contractual obligation to pay employees in the event of an extreme unforeseen event,
- have a high threshold and can only be used if the business is permanently closed (as opposed to a short break)

Preferably, you can follow a restructuring/redundancy process to terminate some or all your employees' employment. This requires a strong business case and you must still follow a fair and reasonable process including consulting with affected employees before making any final decisions.

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Employers Guide to COVID-19

Updated 25 March

We are living in uncertain times. As the COVID-19 pandemic makes its way across the globe and has been labelled as pandemic by the World Health Organisation, it is affecting communities in different ways. In New Zealand, the outbreak is raising questions for both employees and employers about their rights and obligations in Alert Level 4.

Ministry of Health Guidance

As the situation is developing daily, you will need to stay up to date with any official Ministry of Health announcements because this could impact the guidance provided below. For more information see: <https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-Covid-2019>, www.covid19.govt.nz, and www.beehive.govt.nz.

Guiding principles

We encourage all employers to keep the following in mind:

- Each employee will experience the impacts of COVID-19 in a different way. People are likely to have a variety of concerns and worries that others may not be aware of, and these may have an effect on their responses at work. These could include underlying health conditions, elderly parents, financial difficulties, or any number of other stressors. We encourage all leaders to have empathy with each employee, while still making the necessary decisions.
- The overarching obligation of good faith, which includes being open, responsive, and communicative with employees at all times – which in relation to COVID-19 means being open with employees about the impact COVID-19 is having on your business and their role and/or employment;
- Your duties and obligations under Health and Safety at Work Act 2015 (HSWA), the Privacy Act 1993, and the Employment Relations Act 2000;
- The requirement to comply with employees' employment agreements and all relevant policies.

FAQs

Below, we set out some frequently asked questions relating to the impact of COVID-19 on the workplace. These FAQs cover your legal obligations as an employer. We encourage each employer to not only meet these obligations, but consider how you may lead with 'humankindness'.

My employee is required to self-isolate in accordance with the Ministry of Health guidelines - do I have to pay them?

Employees in self isolation may be entitled to the Government COVID-19 Leave Payment which can be paid to employees who are required to self-isolate, are sick themselves with COVID-19, or they are looking after a dependent who is required to self-isolate or is sick with COVID-19. More information on the financial support available is here at www.covid19.govt.nz.

If the employee is not sick, the first thing to consider is whether they can work from home. If they can perform all their duties from home, then you should pay your employee their normal pay. In some cases, employees may only be able to perform part of their duties while working from home. It is open to you to continue to pay the employee's full pay. Alternatively, you may be able to consult with the employee about reducing their hours and therefore their pay or request the employee to use their leave entitlements to top up their hours. Reducing an employee's pay is a significant step, affecting their financial situation and potentially your relationship with them – we strongly recommend you consider your options and seek advice before you do this.

If the employee cannot work from home, then the employee is not ready, willing and able to work, and is not entitled to be paid, unless of course they take leave - the employee may be entitled to use any sick leave, annual leave, or other special leave depending on the circumstances.

If the employee, or someone dependant on them for care is unwell, they are of course entitled to use their sick leave entitlements. Once an employee's sick leave is exhausted, the employee can use annual leave, if you agree to this. You should not automatically place employees on annual leave but should discuss this with the employee and see if this is what they want to do.

Once sick and annual leave is exhausted, you have no obligation to pay the employee for any further time off work due to sickness unless the employment agreement provides otherwise (i.e. additional special paid leave). However, you may allow the employee to take sick leave or annual leave in advance. If you allow an employee to take sick leave or annual leave in advance, this should be recorded in writing (as well as the requirement to pay back any leave taken in advance if the employment relationship ends). You can always choose to grant paid special leave in such situations. However, you should ensure you treat all employees consistently.

We are not an essential service – can my organisation still operate?

Our understanding of the requirements for Alert Level 3 and 4 is that organisations can still operate, but must close their physical premises and instead work from home.

If working from home is not an option, you may be required to consider the options outlined below.

We are not an essential service and cannot operate remotely – what are our options?

Employers who are experiencing a significant downturn in revenue for a month or more, may be able to access the Government's COVID-19 wage subsidy.

To qualify you must be able to demonstrate that:

- Your organisation is registered and operating in New Zealand
- Your employees are legally working in New Zealand
- Your organisation has experienced a minimum **30%** decline in actual or predicted revenue over the period of a month when compared with the same month last year (or a recent month for new or high growth businesses), and that decline is related to COVID-19
- Your organisation has taken active steps to mitigate the impact of COVID-19
- You are making best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period.

More information including details on how to access the financial support is available at www.covid19.govt.nz.

In addition to the Wage Subsidy, you can consider the following options:

Option 1

Continue to pay your employees as per normal

Option 2

Combine pay and leave so employees continue to be paid for their normal hours

By agreement or on 14 days' notice, employees can take a 1-2 days annual leave per week and be paid their normal pay for the remainder of their hours. This doesn't reduce costs but does reduce the leave liability.

Option 3

Reduce employees' hours/pay

Reducing an employee's hours or pay is a change to their employment terms and conditions, so requires you to consult with them first. We recommend a reduction in hours as this is easier to administer and quantify. It also means that your employees continue to be paid at or above the minimum wage and are being paid for all hours worked.

Place employees on paid leave (option 3)

Under the Holidays Act 2003, employers and employees should try and agree on when annual leave can be taken, but if agreement cannot be reached, you can direct employees to take annual leave on 14 days' notice.

Option 4

Place employees on leave without pay

Employees can only be placed on leave without pay if your employment agreement allows for it (and even then you would still need to consult employees), or employees agree to it.

Option 5

Reduce staff numbers

It is a significant decision to if you are looking to reduce staff numbers, so we recommend you seek advice first about what your options are and the process to follow. Regardless of which approach you take, it is also important to lead with kindness and empathy during this process and consider the impact not only those affected but also your whole team.

Your options may be to:

- undertake a restructuring process (which requires a strong business case to justify why particular positions are being proposed to be disestablished, and a fair and reasonable process (which in these circumstances could involve shorter timeframes).
- rely on 'frustration of contract' (this applies where employees are ready, willing and able to work (i.e. they do not have COVID-19) but cannot do so because of a supervening event that is not the fault of either party). This still requires you to inform the employee you are seeking to rely on this and seek their feedback before making a decision. However, there is a high threshold for this option and we recommend seeking advice on this point as a restructure may be more appropriate.

Option 6

Ceasing all operations and closing the business

We know some businesses will have no choice but to cease their operations as a result of COVID-19. In these difficult times, the recommended approach is to still follow a redundancy process which means engaging with your employees and consulting with them on the proposed closure. In some cases, you may be able to rely on a 'force majeure' or 'business interruption' clause in the employment agreement, which may release you from your contractual obligation to pay employees in the event of an extreme unforeseen event. Ending employment this way has a high threshold and can only be used if the business is permanently closed (as opposed to a short break) and the employment agreement contains such a clause. This is a highly significant decision, and we strongly recommend that employers seek advice before seeking to rely on a force majeure clause, particularly in light of the financial support available from the Government.

We are an essential service - can an employee refuse to attend work because of COVID-19?

Under the HSWA, employees can refuse to work if they have reasonable grounds to believe that the work they are required to perform is likely to cause them serious harm, which could include having reasonable grounds to think they are likely to contract COVID-19. It's important to note that each of us will be processing information about COVID-19 differently, resulting in different concerns about the risk of exposure. Therefore we recommend that employees should first discuss any concerns with their employer see if alternative arrangements can be made (e.g. working from home). If there are no reasonable grounds to believe the employee is likely to contract COVID-19 while working, the employee is not justified in refusing to work. If they continue to do so, you are not obliged to pay them unless the employee requests to take leave over this period.

Employers must ensure, so far as is reasonably practicable, the health and safety of workers in the workplace, which includes managing the risks associated with COVID-19. This will be particularly important for employers deemed essential services who will need to take appropriate steps to protect their people who cannot work from home (e.g. maintaining physical distancing, shift and staggered working, personal protective equipment).

It is important that you continuously assess the health and safety risks in your workplace. If, for example, you allow an employee to attend the workplace when there is a reasonable chance that they may have been exposed to COVID-19 (e.g. a family member is in compulsory self-isolation), this could be in breach of the HSWA, and you may be obliged to pay any employee who then refuses to attend work.

What do I tell employees if one of their colleagues is suspected of having COVID-19?

Under the Privacy Act 1993, you need to consider the privacy of the employee who may have COVID-19 and their right to have their health information kept confidential. If you can, talk to them first about what the team can be told. If you can avoid it, let the team know without disclosing their colleague's identity. In some cases, this won't be possible, so you are required to only disclose information the team needs to know in order to lessen or prevent the risk of a serious threat to someone's safety, health and wellbeing. See the Privacy Commissioner website for more details <https://www.privacy.org.nz/blog/faqs-on-privacy-and-covid-19/>.

The above is a high-level guide only - as the situation is changing daily, we recommend seeking advice in relation to specific queries.