

UNDERSTANDING EMPLOYMENT LAW DURING COVID-19

The COVID-19 pandemic is causing widespread economic pain and the Government has urged employers to avoid redundancies at all costs by implementing the wage subsidy.

Understanding your obligations towards staff while receiving the wage subsidy might be enough to put your head in a spin; but you're not alone. We've set out answers to some of the most common COVID-19 employment related questions below.

Redundancy and Restructure

For many businesses, reducing staff numbers may look like a sensible option at this time. Plenty of employers who applied for the wage subsidy for all their staff in March and April now face a significantly different outlook and need to initiate changes to their business for survival. The question on many employers' minds at the moment is:

Can I make staff redundant while receiving the wage subsidy?

At the heart of things are two distinct sets of obligations - obligations to your employees under employment law, and obligations to the Government as a result of receiving the wage subsidy.

Employers who accepted the wage subsidy take on legal obligations to the Government, including to keep staff employed and pay at least 80% of normal wages for the whole subsidy period.

While employers may conceivably make employees redundant during the wage subsidy period, their legal obligations to the Government under the wage subsidy scheme count against this, as a sensible course.

If an employer applied for the wage subsidy scheme:

Before 4pm on 27 March 2020

...then they are legally obliged to use best endeavours to retain employees for the period of the wage subsidy, and to use best endeavours to pay employees at least 80% of their regular income for the 12-week subsidy period.

After 4pm on 27 March 2020

...then they are legally obliged to retain employees for the period of the wage subsidy, and to use best endeavours to pay employees at least 80% of their regular income for the 12-week subsidy period.

The effect of this is that if an employer makes an employee redundant during the wage subsidy period, there is risk of breaching either declaration; particularly if the employer applied after 4pm on 27 March 2020 as this declaration expressly requires you to retain staff for the period of the subsidy.

Making employees redundant during the subsidy period also increases risk that the redundancy might be viewed as not legally genuine or bona fide. Employees may raise personal grievances on this basis.

Employers may still undertake consultation for redundancy during the 12-week subsidy period, which must be carried out for good reason and follow a fair process under employment law as this stood prior to the pandemic.

Annual Leave

Can I ask staff to use annual leave during the wage subsidy period?

You are generally entitled to ask any employees to use their annual leave at any time, including during the wage subsidy period. Annual leave may also be used as a way of ‘topping up’ any shortfall in normal wages by agreement with employees.

If agreement cannot be reached then you can require staff to take entitled annual leave by giving them 14 days’ notice, including during the wage subsidy period. The key here is that you must first attempt to reach agreement about when to use annual leave before requiring staff to take annual leave.

There is also an important difference between ‘entitled’ leave and ‘accrued’ leave. Entitled leave is unused annual leave since an employee’s last anniversary. It is not what is ‘accruing’ since their last anniversary. However, some employers are allowing employees to take annual leave in advance if they do not have sufficient entitlement.

Changes in Work Hours and Pay

What’s the right process to change staff work hours or pay?

Under employment law, you generally cannot unilaterally vary an employee’s remuneration or hours of work. Any variation must be by agreement and in conformity with any provision in the employment agreement about how that is to be varied.

The wage subsidy declaration (post 27 March 2020) also includes a requirement to not make any changes to obligations under any employment agreement (including rates of pay, hours of work and leave entitlements) without an employee’s written agreement.

Employers looking to vary employees’ work hours and pay are also required to:

- a. provide an intended copy of the agreement under discussion to the employee;
- b. advise the employee of their entitlement to seek independent advice;
- c. give the employee reasonable opportunity to seek advice; and
- d. consider and respond to any issues the employee raises.

Employers should also observe their obligations of good faith by providing appropriate background information to the employee about the proposal with an opportunity to comment on that information.

If agreement can be reached, the new agreement should be recorded in writing and the employee asked to sign the agreement. Make sure you keep clear records of any changes.

Can a pay reduction proposal be coupled with “threat” of possible redundancy if not accepted?

Parties are required to act in good faith in an employment relationship. This also applies to bargaining for any variation to employment agreements. In this context, ‘good faith’ means that you cannot be misleading or deceptive, and if an employee could possibly face redundancy, you must provide them with access to all relevant information and an opportunity to comment on that information.

Keep in mind that bargaining may be deemed unfair if an employee is induced to vary an agreement by oppressive means. It is certainly arguable that telling staff they must accept pay reductions or face redundancy is oppressive and amounts to undue influence. However, the legal threshold for establishing this is relatively high.

On the other hand, it is not necessarily unreasonable to advise employees that if they do not agree to pay reductions redundancies could result, but this must be done in a genuine and reasonable way. You need to ask yourself whether you are realistically facing a financial situation such that employees may genuinely be made redundant if you cannot reduce labour costs.

For advice on your specific obligations as an Employer, or your rights as an Employee, please contact our Employment Law Team at Mactodd Lawyers, or visit our website at www.mactodd.co.nz.



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