

Meeting your legal obligations as employers

The primary objective of the COVID-19 Wage Subsidy Scheme is to preserve employment relationships by assisting employers to meet their wage costs at a time when businesses have significantly reduced or, in some cases, zero income.

In applying for the wage subsidy, employers undertake to *–

- Use “best endeavours” to pay employees at least 80% of their ordinary pay;
- As a minimum, ensure that the entire subsidy is passed on to the employee in the form of wages, but no employee is entitled to more than 100% of their ordinary pay (any surplus can be retained and applied for the purpose preserving other employment relationships);
- Keep those on whose behalf the subsidy has been received, employed for the 12-week subsidy period.

Employers are also required to acknowledge and declare (amongst other matters) that –

- The granting of your application and your receipt of the subsidy does not override your existing obligations under the Employment Relations Act 2000;
- You will not make any changes to your obligations under any employment agreement, including to rates of pay, hours of work and leave entitlement, without the written agreement of the relevant employee;
- It is unlawful for you to unilaterally vary an employment agreement to reduce an employee’s wages or salary in order to receive the subsidy. You must continue to comply with your obligations under the Employment Relations Act 2000.

This means that the obligation to pay ordinary wages and observe other terms and conditions of employment remains unless and until the employer and employee agree to vary those terms.

These are extraordinary times but so far there has been no indication from Government that it is prepared to consider changes to law which would modify in any way the obligations which exist for example, under the Employment Relations Act and Holidays Act.

All parties to an employment relationship must act in good faith. This essentially means that the parties must not act in a misleading or deceptive way and remain responsive and communicative.

What does this mean for employers who are unable to sustain wages, with or without the wage subsidy, at pre-lockdown levels?

Our advice is that employers need to be proactive, honest and transparent.

Despite the significant challenges now confronting most organisations, employers should use their best efforts to engage with their employees by whatever means possible (such as video conferencing, email, text and phone). You must consult around any **proposal** to change any significant term or condition of employment including proposals to reduce the hours of work, reduce remuneration or disestablish positions (redundancy). (Note – this advice assumes that the terms of the relevant individual or collective employment agreement do not expressly permit unilateral change.)

What does ‘consult’ mean?

It means being open and honest, providing all information relevant to the proposal, the rationale for it with supporting evidence if available, the objective and impact of the changes proposed. It means allowing a

reasonable time for employees to receive and digest the proposal with time to consider and respond (and obtain independent advice if required).

What is a reasonable time?

The answer will depend on the circumstances in each case – having regard to the urgency with which the organisation needs to act. We would recommend at least 36 hours – or longer if possible.

If agreement is reached, it is important to record the terms in writing. This can be achieved by an exchange of emails or texts if necessary. **See Variation of Work Hours template [here](#).**

What happens if an agreement to vary existing terms and conditions cannot be reached?

Most employers will wish to do all they reasonably can do to keep people in jobs. To do that they will need a viable business. Provided employers are open, up-front and fair it is our experience so far that employees are also acknowledging the extreme challenges faced by struggling employers and are willing to accept that keeping their job, albeit on reduced terms, is preferable to not having employment. The effectiveness of this will largely be determined by employers being transparent and communicative in consulting their employees.

Having consulted in good faith but not having been able to secure agreement with employees means that an employer may have few choices. One option for employers in this situation is to advise employees of their intention to proceed with the proposal having explained why they are not in a position to either continue with the present terms and conditions or accept any counter-proposals they may have received.

Any counter proposals or feedback do require a considered approach prior to proceeding and will again need to meet your good faith obligations. The employer should respond accordingly, answering questions that are reasonably put to them, explaining their position to the relevant individual or group of individuals. Employers should ensure that they are in the best possible position to defend any future claims of unfair disadvantage by keeping a complete record of the process adopted and the rationale for decisions taken. Notice of the change will be required equivalent to that required for termination of employment.

It may become necessary, as a last resort, to initiate consultation in advance of making positions redundant. Note that in applying for the wage subsidy on behalf of named employees, an employer has undertaken to retain those employees for the subsidy period and at the very least pay the wage subsidy. Terminating employment during this period potentially raises issues around 'reasonableness' of the employer's actions which ultimately may only be determined by the Employment Relations Authority/Employment Court. Where employment is terminated, the wage subsidy for the unexpired period will need to be refunded.

We encourage all parties to do their best in these very difficult times.

Further advice on these matters can be obtained by contacting The Chamber COVID-19 Response Team on 0800 50 50 96 or info@cecc.org.nz or visit www.thechamber.co.nz

* as at 1 April 2020