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Covid-19 - Employment FAQ

25 Mar 2020

With the nation now in lock-down phase as a result of the Covid-19 crisis, many employers are considering how they can look after their businesses as well as their employees. For some, government subsidies will allow a degree of continuity in staffing whilst others will need to make changes that will adversely affect their employees. We touch upon some key topics below.

Reducing hours

Reducing employee working hours appears to be a popular choice for employers seeking to reduce overheads during a period of little to no income. Employment agreements must have any agreed hours of work specified in the agreement or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work. Check the express terms of your employment agreements in the first instance to determine whether the proposed reduction of hours is provided for under the agreement.

If your employment agreement does not specify how hours may be varied, then any proposed reduction in hours must be mutually agreed upon by both the employer and the employee following consultation.

To remain eligible for the wage subsidy (discussed in detail below), the employee's hours of work must not be reduced by more than 20%.

Payment of wages during lock down

Prior to the government mandated lockdown, employers were asking whether they had to pay wages for Covid-19 related absences. Our advice to employers remains that when absences are at the request of an employee, they should be treated the same as any other request for a leave

of absence, i.e, if leave was requested because an employee or their dependant was sick, then that employee should be paid any sick leave entitlements they have accrued. Should leave extend beyond the leave accrued, then the employer and employee could reach an agreement as to whether annual leave, or unpaid leave would apply.

When an employer has no work available for employees, the default position is that employees who are "ready, willing and able" to work, should be paid accordingly. It is for this reason that the government has stepped in with wage/leave subsidies for employers.

As at midnight Wednesday, New Zealand entered a four week lockdown. This is a mandatory directive that is at the behest of government, not employees or employers. Some employers will argue that because their employees are not "able" to come into work, they need not continue to pay them during this period. What that argument effectively says is, the contract has been "frustrated". This occurs when an extraordinary and unforeseen event makes it impossible for the parties to perform the obligations created by the contract. We note also that the remedy for contractual frustration is to bring the agreement to an end permanently, not to place the employee on unpaid leave.

Whether or not this argument will succeed remains to be seen, although it is a high threshold to cross and employers would be wise to consider the availability of wage/leave subsidies and the ability to work from home before attempting to terminate agreements on the grounds of frustration. In addition, some employment agreements will set out what will happen during such an unforeseen event (a force majeure clause).

Some employees may prefer to end an agreement so they can be eligible for other employment opportunities or unemployment benefits. Conversely, some employers will prefer to retain their current staff in order to pick up where they left off once this virus has run its course. Each employer will need to consider their individual circumstances, and the terms of their employment agreements, before deciding on the appropriate course of action.

Forced Annual and Sick Leave

Employers may require an employee to take paid annual leave at a time nominated by the employer, but only if the employer and employee have been unable to reach an agreement regarding when the employee can take annual leave. Employers must give no less than 14 days' notice of their intention to require the employee to take paid annual leave.

Employers must bear in mind that they still retain an obligation to act in good faith when requiring employees to take annual leave. It remains to be seen whether or not requiring employees to take annual leave during the shut down is in good faith and will likely depend on the individual circumstances of each case.

Sick leave can only be used if the employee or their dependant is ill or injured. It would not be appropriate to require employees to take sick leave in any other instance.

Redundancy

Employers who find themselves unable to operate either at all, or at reduced capacity, will almost certainly find themselves with a surplus of staff and will have to consider making redundancies.

If an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, they are required to provide to the employees affected-

- access to information, relevant to the continuation of the employees' employment, about the decision; and
- an opportunity to comment on the information to their employer before the decision is made.

This means employers will need to consult with their employees about the proposal and take time to receive and consider their feedback before making a final decision. If you are minded to make redundancies, we recommend that you seek our advice regarding a fair process.

Contractors

People working under a contract for services (independent contractors) will in most cases, be deemed to be contractors to whom the duty of good faith, and the personal grievance provisions of the Act, do not apply. This means that these agreements can be terminated without the procedural fairness requirements under the employment law regime. Any contract must also be terminated in accordance with the terms of the contract. Business should review the terms of any contract carefully before terminating.

However, it is important that employers consider whether the agreement is in fact, a contract for services. The Employment Relations Authority has the ability to declare a contractor to be an employee in certain circumstances. The Employment Relations Authority will consider the full factual matrix to determine the real nature of the relationship including the terms of the contract, the parties' intentions, control and integration, and industry practice. The question will however, be determined on the facts of any given situation.

New starters

Employers may wish to revoke offers of employment made immediately prior to the Covid-19 crisis however, once an individual has accepted an offer of employment, that offer cannot be withdrawn.

A person who accepts an offer of employment acquires rights (even before finalising the terms of employment or signing an agreement). The Employment Relations Act 2000 definition of employee includes a person intending to work. Accordingly, the duties of good faith, and the personal grievance provisions of the ERA apply to people who have accepted an offer of

employment, even if that employment has not yet commenced. This means that the intending employee must be treated like an ordinary employee.

Wage subsidies

As of 23 March, Cabinet agreed to remove the cap on the Government's wage subsidy scheme. Important changes to the scheme include:

- lifting of the previous \$150,000 cap;
- new businesses and high growth firms are eligible for the scheme (subject to eligibility conditions);
- self-employed people with variable monthly incomes are eligible for the scheme (subject to eligibility conditions); and
- the scheme does cover registered charities, non-governmental organisations, incorporated societies and post-settlement governance entities.

Other criteria still apply, including

- The business must be registered and operating in New Zealand;
- The employees are legally working in New Zealand;
- The business has experienced a minimum of a 30% decline in actual or predicted revenue over the period of a month when compared with the same month last year, and that decline is related to Covid-19;
- The business has taken active steps to mitigate the impact of Covid-19;
- The business must make best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period.

If the business is eligible, they may be entitled to be paid a flat rate of \$585.80 for each employee working 20 hours or more per week, or \$350 for each employee working less than 20 hours per week. The subsidy is paid as a lump sum and covers 12 weeks per employee.

Given the unprecedented action of a nationwide shut down, many of the questions that we face have never been contemplated before and our existing legislation and case law do not necessarily provide clear answers.

However, the overarching obligation of good faith remains paramount, and should be the guiding principle for both employers and employees when dealing with each other in the coming weeks.

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