

# COVID-19 and the Workplace

*A guide for employers and employees*

*April 2020*

COVID-19 has brought ongoing disruption to the workplace. All employers and employees should work together in good faith. The Ministry of Internal Affairs is issuing the following guidelines to assist employers and employees through this time.

## GENERAL INFORMATION

The Employment Relations Act 2012 (ERA) still applies to the employer/employee relationship and an employer is still required to meet the minimum terms and obligations set out under the ERA.

The Government has provided payroll support through the Economic Response Package (ERP) by enabling employers to apply for a wage subsidy to assist in paying the wages of their employees. The main highlights of the wage subsidy are:

- a) A wage subsidy can be sought by a registered employer for each current employee;
- b) A wage subsidy is not a replacement of the wage of an employee:  
The employer is still required to top up the wage subsidy to meet the employee's usual rate of pay or a new agreed rate of pay;
- c) The employer who has received the wage subsidy is obligated to use it to pay an employee's wage.

Further information and details relating to the wage subsidy is available at [www.mfem.gov.ck](http://www.mfem.gov.ck).

### ***Enforcement***

The employee can take employment grievance against an employer for breaches to their employment rights. These should be handled in accordance with the dispute resolution process set out below.

The Ministry of Internal Affairs is committed to working with both employees and employers to ensure that fair and decent working conditions are maintained during this difficult time. Prosecution under the ERA or Crimes Act 1969 remains available to the Ministry but will be considered only as a last resort.

## **SPECIFIC INFORMATION**

### ***Changes to the employer/employee relationship***

Employers and employees must deal with each other in good faith and have transparent discussions on the impacts of COVID-19 on their work arrangements. Changes to the work arrangement can occur in many different ways, such as:

- i) Changing normal hours of work
- ii) Changing an employee's job description
- iii) Reducing the rate of pay (in cases where employers can no longer sustain the top up of the wage subsidy)
- iv) Redundancy.

Any changes to the work arrangements must be as a result of a legitimate need on behalf of the employer and must be done in consultation with the employee.

When the employer has a legitimate need to change the work arrangements, the employer should:

- i) consult with affected employees:
- ii) advise employees of the effect of COVID-19 on the workplace and why changes are necessary:
- iii) give consideration to the wage subsidy that is available in terms of how they deal with the employee:
- iv) not be harsh or oppressive during any discussions about changing the work arrangements:
- v) recognise that the minimum terms and conditions under the ERA cannot be contracted out of.

Employees should:

- i) be realistic about the current environment and the position of the employer:
- ii) bear in mind that redundancy or termination may be valid options for the employer if changes to the work arrangements are not made.

### ***Redundancy / termination***

#### ***Redundancy***

Any redundancy must be as a result of a genuine restructuring of an employer's business that means the employee's position is no longer available. Before engaging in the redundancy process the employer should give consideration to discussing with the employee changes to their work arrangement and the ability to access the wage subsidy.

Any redundancy must be carried out in accordance with proper redundancy processes under the ERA which includes consultation with the employee through all stages of the process.

The employee is entitled to the benefits and entitlements otherwise applicable on them being made redundant.

### *Termination*

An employer can only terminate an employee's employment if:

- i) it is in accordance with the redundancy process:
- ii) the employee no longer has capacity to carry out the duties required by the employment agreement:
- iii) the employee's conduct warrants termination (either due to misconduct or serious misconduct):
- iv) other grounds that may be specified in a person's employment agreement or at common law.

Before terminating an employee's employment, the employer is advised to seek legal advice as wrongful termination or repudiation of employment could make them liable for damages. Employers are also required to notify the employee of the intention to terminate and the reasons for it. This process also includes the opportunity for the employee to be heard in relation to the termination before any final decision is made.

In the event of termination, an employee is entitled to be paid out their accrued annual leave, any outstanding pay and any other entitlements as set out under their employment agreement or under the ERA. An employer should also provide to the employee a written letter setting out the termination and the reasons for it.

### ***Workplace health and safety***

All employers must:

- i) implement and maintain health and safety practices to prevent the spread of COVID-19 and ensure employees are aware of these:
- ii) If there is agreement for the employee to work from home the employer must ensure that the employee is able to work from home safely and have the necessary equipment to do so:
- iii) If an employer is aware that the employee is unwell the employer should encourage the taking of sick leave.

All employees should:

- i) Take responsibility for not spreading COVID-19 in the workplace by complying with the employer's requirements.
- ii) Take sick leave (if available) or other leave (if sick leave entitlements have all been used or not yet available to the employee) when feeling unwell/ or having to take care of a dependent who is unwell.

## Leave

All leave entitlements under the ERA continue to apply.

The ERP provides a new leave entitlement namely “self-isolation” which will cover a 14-day period of quarantine or up to 14 days of isolation if the employee is directed by Te Marae Ora to go into quarantine or isolation. This new leave entitlement is paid at the wage subsidy rate. For employees who are on the wage subsidy this payment is covered by using 2 weeks of the wage subsidy. For employees who are not on the wage subsidy, an employer is required to make an application to access the self-isolation subsidy which is then required to be passed on to the employee.

The wage subsidy also provides an employer with a COVID 19 leave with pay option. This allows an employer to access the wage subsidy and pass it on their employees in appropriate circumstances (see further information below).

Annual Leave: The employer cannot unilaterally require an employee to take leave. Any annual leave must be taken in agreement between the employer and employee. Annual leave entitlements accrue for the employee as normal.

Sick Leave: An employee can only take sick leave if they are sick or have suffered an injury, unless an employment agreement permits sick leave when caring for someone who is dependent on them. Sick leave entitlements accrue for the employee as normal.

Maternity/Paternity Leave: this continues as per the ERA.

Quarantine/Isolation: Te Marae Ora may direct an employee to be quarantined for 14 days. Te Marae Ora may also direct someone to go into isolation.

The wage subsidy or self-isolation subsidy is available for the employee for a period of 14 days. This payment is accessed by the employer either from the wage subsidy or via an application for the self-isolation subsidy.

During this leave the subsidy is not required to be topped up by the employer but the employer can do so if they so choose.

In the event there is an agreement between the employer and employee to work from home during any period of quarantine/isolation it is appropriate for the employer to top up the subsidy to the employee’s normal rate of pay for those hours that are worked whilst under quarantine/isolation.

COVID 19 Leave with pay:

The wage subsidy can also be used for the continued payment of the wages to the employee on minimum rate if there is no new work program available for the employee. The employee can go

on leave and continue to receive the wage subsidy in order to maintain the employment relationship. If the COVID 19 leave with pay option is applied, the employer shall not be required to top up and can treat it as leave without pay for the purpose of assessing the accrual of other leave entitlements.

This COVID 19 leave with pay option is primarily available in circumstances where no work is presently available for the employee but the employer believes that it is likely work for the employee will be available in the future. Should the situation not improve and work is still unavailable, redundancy or leave without pay may then become appropriate considerations for the employer to have in these cases.

This option is unlikely to be appropriate where the business can otherwise provide some other form of employment to the employee but the employee has chosen to reject this. Redundancy or leave without pay may then become appropriate considerations for the employer to have in these cases.

In cases where the business is closing down and unlikely to reopen, redundancy/termination are appropriate options to be considered and discussed between employers and their employees.

If the employee has agreed to the COVID 19 leave with pay, then they are still officially employed by the employer and should continue to notify their employer of any change in their circumstances (i.e. a new job, resignation etc).

Leave without pay: An employer and employee can still agree that an employee can have leave without pay.

Ideally, this should only be used if there is agreed work available for the employee to do but the employee is otherwise taking leave (in the normal course of their employment) and does not have sufficient paid leave entitlements to cover the leave period.

Bereavement and other leave: any other leave entitlements that are set out in the existing or newly agreed employment agreement.

### ***Minimum wage requirements and overtime***

The maximum wage subsidy only covers a 35 hour working week.

If an employee is working more than 35 hours per week, the wage subsidy is insufficient to meet the minimum wage requirements. Employers are required to pay for the additional hours of work.

Overtime rate of 1.5 should be applied for every hour worked over 40 hours in a week. The wage subsidy will not cover overtime and the employer is required to pay this at the appropriate rate of pay.

***Public holidays***

The ERA continues to apply in respect to public holidays.

If an employee is required to work on a public holiday, they are entitled to one of the following:

- i) Double their current hourly rate; or
- ii) Time off in lieu; or
- iii) Extra annual leave.

***Rest and meal breaks***

The ERA continues to apply in respect of rest and meal breaks (10-minute rest break at least once every three hours and a 30-minute meal break at least once every 5 hours).

***Wage deduction and payslips***

All payments of wages should be accompanied by a payslip.

The only deductions from a wage (even through a wage subsidy), are PAYE, CINSF, or as otherwise ordered by Court. No other deductions can be made without the prior authorisation of the employee. If an employer has altered the work arrangements of the employee as a result of COVID-19, then new authorisations from the employee is required.

***Migrant workers***

All ERA requirements also apply to migrant workers.

The ERP also covers migrant workers and employers can apply for the wage subsidy in respect of a migrant worker.

All employers should keep immigration informed of any changes to the employment status of a migrant worker (including changes in work arrangements and redundancy/termination).

Any enquiries regarding immigration matters in respect of migrant workers can be sent through to [immigration2@cookisalnds.gov.ck](mailto:immigration2@cookisalnds.gov.ck).

### ***Dispute resolution***

In the event of an employment grievance, the parties should refer to their employment agreement for the dispute resolution process. Ideally, the resolution process should be set out in a simple 3 step process as suggested below:

- 1. The first step is for the employee and employer to talk about the dispute (problem) and try to resolve it at an internal level.*
- 2. If this fails, either party may refer the dispute (problem) to mediation. This is where a neutral 3rd party is appointed to mediate to assist the employer and employee to reach a resolution.*
- 3. If there is no resolution from mediation, either party may refer the dispute (problem) to arbitration and the Court will appoint an arbitrator to determine a resolution for the employer and employee.*

The Ministry of Internal Affairs, Labour and Consumer Services also offers informal dispute resolution support and also registers complaints for investigation and issuing of advice and recommendation.

Before registering a complaint on general employment conditions, an employee must read the guidelines, their respective contracts and staff policy and discuss with their employer.

Before registering a complaint on the wage subsidy process, an employee must first check with their employer whether an application for wage subsidy has been made in their name and at what level. If the employee still believes that the employer is not meeting with their obligations, they can then make a complaint.