



# COVID-19: Employment Law – what's new, what's not?

## Introduction

The response to COVID-19 is an unprecedented situation that requires employers and employees to deal with new and rapidly evolving situations, legal obligations, and legal permissions; while remembering that employment law obligations, including the need to act in good faith, have not changed.

This resource will help employers, employees, and their representatives to do the right thing with and by each other during this time.

### What's new?

COVID-19 initiatives are new. From an employment perspective key aspects of this relate to the:

- › classification of work as “essential” or not
- › Wage Subsidy Scheme (incorporates the Leave Payment Scheme from 4pm 27 March 2020)
- › Essential Workers Leave Scheme and from 28 April 2020, the COVID-19 Leave Support Scheme.

Employment New Zealand, which includes the Labour Inspectorate, have seen issues that show not all employers understand the following in relation to these initiatives.

- › At Alert Level 3 employees must work from home if they can. Guidance on what work is permitted, and under what conditions, is available at [COVID19.govt.nz](https://www.covid19.govt.nz), [Business.govt.nz](https://www.business.govt.nz) and [Worksafe.govt.nz](https://www.worksafe.govt.nz).
- › Employers must pass on the Wage Subsidy and COVID-19 Leave Support Scheme to employees as per those schemes' requirements (details are available from [workandincome.govt.nz/covid-19/](https://www.workandincome.govt.nz/covid-19/)).
- › Employers receiving the Wage Subsidy, must make best endeavours to pay named employees at least 80% of their pre-COVID-19 income. While many businesses will not be able to pay that much, with no income coming in, this does not automatically change the employment agreement. Employers and employees need to have good faith discussions about hours and leave arrangements, including changes to patterns of work and agree to any changes to hours or pay.
- › Employers considering redundancy as an option should first consider, in good faith, all other options such as applying for the Wage Subsidy as part of any restructuring process

- › Employers cannot require staff to come to the workplace when they are sick. If an employee is sick they must stay home.
- › Where eligible, employers should consider accessing the COVID-19 Leave Support Scheme to ensure compensation for eligible workers unable to work.

### What's not new?

Employment law has not changed. Employers and employees still have the same rights and responsibilities, including the following:

- › Employers, employees, and their representatives must engage with each other in **good faith**.
- › Employers **cannot unilaterally change** employees' terms and conditions. This does not mean that employers cannot propose changes to employees' terms and conditions, but any changes need to be genuinely agreed following a good faith process and should be recorded in writing. It should also be clear whether the change is permanent or temporary.
- › Employers **cannot** agree or contract to **pay less than the law requires** for work performed (eg at least the minimum wage for each and every hour worked), annual leave or public holidays.
- › Employers **cannot require** staff to take annual leave without agreement or 14 days' notice; or to use “accrued” or “anticipated leave” or other contractual leave entitlements (eg long service leave) without agreement.
- › Employers **cannot** unilaterally make an individual redundant without undertaking a redundancy process in a “good faith” and non-discriminatory way, which involves all of the potentially affected workforce.

## What does Employment Law look like in the COVID-19 environment?

Employers have varying business models, financial viability, and employment conditions. Some are providing “essential services”, some are not, and some are providing a mix of services. This means there is not a one size fits all way to determine a COVID-19 approach that will make sense in all circumstances.

Following is a set of guiding principles that may assist parties to engage in good faith and arrive at genuine agreement in respect of COVID-19 approaches. While it is not the only approach possible, it is an approach that is likely to be transparent, fair, acceptable, and ultimately enduring to employees and their representatives. It should keep the risk of any subsequent issues to a minimum.

### Principles

- › **Early engagement** on presenting issues and the options available to address. If your employees are represented, including by a union, you must **engage with your employees’ representatives**.
- › **Ground proposals in facts** which have been evidenced. Financial disclosure is likely to assist in the current circumstances. Employees and/or their representatives must **receive and consider their employer’s proposals** with an open mind and having regard to all of the circumstances.
- › Make it clear **employees do not have to accept any proposal**. Have a process available for those that do not agree to the proposal.
- › Provide employees and their representative’s **adequate time to respond to proposals**, and consider any responses in good faith. Noting that in the current situation, there may be circumstances where consultation on changes can be truncated if the employer genuinely needs to make rapid adjustments to cope with their circumstances under COVID-19 alert restrictions, but truncated processes must still occur in good faith, and provide opportunity for workers to seek advice.
- › **Get agreement in writing** – it’s a legal requirement and provides protection against subsequent claims.

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It is important to note that employees may take a personal grievance where an employer does not meet good faith expectations. Unions may also bring an action for breach of good faith. In such situations, the Employment Relations Authority or the Employment Court may award penalties for a breach of good faith. The Labour Inspectorate can also seek penalties where employees don’t have written employment agreements accurately reflecting working and remuneration arrangements.

From a regulatory perspective, apparent and serious breaches of good faith are more likely to attract attention to an employer’s action.

## Do the rules apply to every business?

Employers who are not sure if the rules currently apply to their business should seek professional advice to clarify their thinking. This should be done before taking any action that might later cause problems. Should an employer not do this, and the Inspectorate later investigate and find breach(es) of employment law, they will not hesitate to use the full range of enforcement tools as they would in the normal course. The Inspectorate consider this is the only fair thing to do for workers and for businesses that are meeting their obligations – especially in these tough times.

Businesses should also be aware the Inspectorate is working with the Ministry of Social Development and will pass on information in relation to any abuse of the Wage Subsidy or COVID-19 Leave Support Schemes.

## What help is available?

There are a number of useful resources available online to help keep you up-to-date in this space: [www.employment.govt.nz/coronavirus](http://www.employment.govt.nz/coronavirus). You can also contact the employment line (0800 20 90 20) for support or assistance. This may include the assistance of mediators to help employers and employees talk through issues.

