

Business Interruptions

MARCH 2020

[PLEASE NOTE. Restaurant Association members are strongly advised to seek guidance from the employment team on 0800 737 827 if you have any questions. *The Restaurant Association has taken all reasonable care to ensure that the information materials contained on our website are true and correct at the time of publication. The information provided is general information only and is not intended to constitute legal advice. Therefore, the Restaurant Association accepts no responsibility for any loss, errors or omissions which may arise pertaining to such reliance.*]

INTRODUCTION

The advice here is designed to help our members make good, safe, sensible and practical decisions in the event of an emergency (such as widespread road closures, water supply issues, earthquakes or fire), which includes a business's response to COVID-19, the necessary steps to take, and reliance on any business interruption clause, or force majeure clause, contained in your employment agreements.

If life or property is threatened always dial 111 for Police, Fire or Ambulance.

EMPLOYMENT RELATIONS

You may need to close your business if you are in an affected area, such as in the instance that the Government, Ministry of Health and/or other Government body issue a closure notice and/or you may no longer be able to operate in the short-term, or long-term.

Potentially, you may have employees who are unable to get to work due to public transport interruptions being affected because of self-isolation requirements, or any other measures the Government takes. Please bear these things in mind when dealing with your staff. Business interruption considerations are dealt with in more depth further on in this guide, but first initial considerations need to be borne in mind.

OVERARCHING EMPLOYMENT ADVICE FOR BUSINESSES AFFECTED BY AN EMERGENCY SITUATION SUCH AS COVID-19

The key is communication and good faith. Like all emergency situations, you are faced with an unusual situation, and some of it is probably not covered by employment agreements. It is very important that employers and employees are talking to each other.

- Be flexible - This is a time for employers and employees to be understanding and to take a common-sense approach to getting the business up and running.
- If employees are concerned about their safety in getting to, or going back to work, in the workplace, or for any other reasons concerning their employment, they should raise their concerns with their employer.
- If employers are asking employees to do work, they do not normally do, both sides need to ensure they are comfortable with this, and safety must be a top priority.
- The responsibility for Health and Safety in your workplace rests with the PCBU/employer under the Health and Safety at Work Act 2015. You should follow the advice of the Ministry of Health, the Government, and any other Government Body. Although this may not be applicable for many of our members, a further consideration includes, that such responsibility extends to the situation where employees are required to work from home, as this has effectively become their workplace. Please ensure that they take a photograph of their workstation set-up at home, send it to you, and you can provide this as proof to Worksafe. **We have also created numerous resources to assist our members to meet their Health and Safety obligations. These can be found on our website by using your member log-in.**
- If it's applicable, working with staff health and safety representatives and union representatives will be of assistance in some workplaces.
- Work together to find practical solutions.
- Recognise that this is an unprecedented event
 - People react differently in these types of situations - some may need extra support
 - Some will want to focus on caring for their family
 - Others will be best supported by assisting to keep things running
- An individual employee has the right to raise concerns and refuse to do work they consider unsafe. Discuss the work and the concerns before it gets to this point.

ADDITIONAL EMPLOYMENT INFORMATION – BUSINESS INTERRUPTION AND FORCE MAJEURE CLAUSES IN EMPLOYMENT AGREEMENTS AND COVID-19

Initial Considerations

Wage Subsidy Scheme

As at 17 March 2020, where a business is quiet due to a virus outbreak, employers may be able to access the Government's **wage subsidy scheme** which is for businesses that are significantly impacted by COVID-19 and are struggling to retain employees as a result. Employers must have suffered, or are projected to suffer, at least a 30% decline in revenue compared to last year for any month between January 2020 and the end of the scheme in June 2020. Applications can also be made based on forecast revenue loss within the period of the scheme.

Some of the key undertakings are:

- Employers will need to declare that, on their best endeavours, *they will continue to employ the affected employees at a minimum of 80% of their income for the duration of the subsidy period. This is the equivalent of keeping people working 4 out of 5 days of the week.*
- Employers must also have taken active steps to mitigate the impact of COVID-19 (e.g. engaged with their bank/financial advisor) and must sign a declaration form to that effect.

Applications can be made through an online portal on the Work and Income website www.workandincome.govt.nz. The Ministry of Social Development will aim to make first payments no later than five working days from when applications are received.

Leave Payment Scheme

As at 17 March 2020, where an employee self isolates for 14 days after returning to New Zealand, or has potentially come into contact with the virus, or has the virus, the Government has now introduced the **COVID-19 leave payment scheme** which will provide support for those people unable to work who are in self-isolation, are sick with COVID-19, or caring for others with COVID-19. The payments will be \$585.80 per week for full time and \$350 per week for part time workers. The payment does not affect any paid

leave entitlements that are owed and is available even if an employee is on paid leave for part of the period. It is not available to those who can work from home during the period of self-isolation, and who can be paid normally by their employer.

The entitlement is for:

- Those who self-isolate in accordance with public health guidance and who register with Healthline;
- Those who are ill with COVID-19;
- Those who cannot work because they are caring for a dependent in either of these circumstances.

Those who leave New Zealand to travel overseas from 16 March 2020 will not be eligible for this payment for self-isolation on their return.

More information on the sick leave scheme, including how to apply, and other support for businesses can be found at www.govt.nz/coronavirus.

It is advisable to have a discussion with any employees in self-isolation and reach a reasonable arrangement. This may include the employee/s taking a combination of leave types (this may include the COVID-19 leave payment scheme). If practicable, an alternative arrangement may be to facilitate the employee working from home during this period, however, this is likely to be impractical for most of our Members. Please note there is no provision in the Holidays Act 2003 allowing an employer to force an employee to take their sick leave entitlement.

Where an employee is compulsorily quarantined, the COVID-19 Leave Payment Scheme should apply.

In accordance with the above, the employer may be able to access the Government's **COVID-19 leave payment scheme** which will provide support for those people unable to work due to COVID-19, and which the employer must apply for. It is not available to those who can work from home during the period of self-isolation, and who can be paid normally by their employer. More information on the sick leave scheme can be found above, including how to apply, and other support for businesses can be found at www.govt.nz/coronavirus.

This is an important consideration in light of what is to follow, as any potential restructure to an employee's role (whether this be a partial restructure, for instance, a reduction in hours, or a full scale redundancy situation completely disestablishing the employee's role) requires that the Employer has taken all reasonable steps to avoid having to undertake such measures, and that the employer has a genuine business reason including that it has followed a fair and reasonable process throughout the restructure. The Wage Subsidy and Leave Entitlement Schemes are attempts to minimise impacts and maintain continuity of employment.

Business Interruption

Many of our members are asking, in the event that you are no longer able to operate temporarily, or for the foreseeable future, and/or your business is in an affected area that has been officially closed by the Government, Ministry of Health and/or any other Governing Body, what do we do?

The answer to these (and similar) questions will depend on the employment agreement in place. If the employment agreement is clear about what to do, you should be guided by your agreement.

In this regard, the Restaurant Association's Permanent Employment Agreement has a business interruption clause which can be enforceable where business operations are interrupted by **unforeseen events beyond your control** (Business Interruption). For instance, mandatory closure required by the Government and/or Government Body, or where an employer, due to a health epidemic or pandemic, is unable to provide work for their employees to perform in the short-term due to say an enforced closure. If this happens, the employer will need to make all best endeavours to consult with employees prior to determining whether the employment relationship can reasonably continue. This will include consulting with employees about whether the employees work, and remuneration will continue during and/or following the event/s causing the Business Interruption.

In a nutshell, this Clause is triggered in **extreme circumstances that are beyond the employer's control**. Therefore, it requires that an employer has taken all measures to ensure the employee's ongoing employment: wage subsidies, Government funded leave entitlements, IRD relief, consultation with your Landlord about temporary rent relief, consultation with your bank, and any other actions that a fair and reasonable employer would have taken in all of the circumstances in order to avoid any significant ramifications for the Employee's ongoing employment with your business.

Short Term Measures

Therefore, where a business is closed due to circumstances beyond the control of the employer (even for a couple of days) it is a Business Interruption. The clause in the agreements states that an employer will consult with an employee about any decision regarding payment for the day(s) the business is closed. Therefore, we advise business owners to speak with their employees before deciding on whether they will be paid or not, and where an employer is entitled to the wage subsidy/leave entitlements scheme previously mentioned, these should be used to pay the employee.

If the decision is made not to pay the employee, it may be open for the employee to challenge it.

NOTE: Under current employment legislation your employment agreements should have a shift cancellation clause in your employment agreement and this clause may also be used in a sudden closure situation to deal with the currently rostered shift. You'll need to be sure that any shift cancellation does not affect any agreed hours of work with an employee. In other words, a shift cancellation clause, cannot be used to avoid your obligation to pay the employee what is their guaranteed minimum contained in their employment agreement.

INSURANCE

We recommend that you also contact your insurer for clarification of what your policy covers in this situation.

MENTAL HEALTH

Issues like these can affect us, our teams and communities in different ways. Please be aware that we can help with these matters through our partnership with [EAP](#). We also have a number of wellness and mental health resources made in collaboration with the Mental Health Foundation on our [website](#).

REMEMBER...

Further extensive information regarding the COVID-19 situation is available on the Restaurant Association website, www.restaurantnz.co.nz.