

Guidance on Requirement to Work

22 APRIL 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.]

Your employees may feel reluctant to come back to work or in some cases refuse to return to the workplace. It is important to remind your employees that the purpose of the Wage Subsidy Scheme is continuity of employment requiring the employee to attend work, unless the employee provides you with a reasonable explanation for not wanting to do so.

This is intended as a broad Guide to assist you in these situations and to help arrive at an outcome for both parties.

Good faith and Consultation

The overarching obligations in any employment relationship is good faith and consultation, even in this unusual and evolving situation.

It is therefore very important that Employees and Employers are talking to each other and consulting with one another.

Any agreements reached with your employees should be recorded in writing.

What to do if your Employee refuses to work?

Considering the above obligations, where an employee refuses to work, the reasons for doing so need to be taken into account, then the following should be considered;

- **Vulnerable People:** If because of the nature of the position, it is not possible for the Employee to work from home, there are various leave options available to consider for an Employer. Considering the reasons for why the Employee has refused to work (for example, where an Employee would be considered to be a vulnerable person and/or lives with a vulnerable person), it may be reasonable to request in writing that a doctor's note/certificate is provided by the vulnerable person's doctor and/or a medical note from the Employee's doctor where the Employee is the vulnerable person.
- **Health and Safety Concerns:** If in general an Employee refuses to come to work due to health and safety concerns in the workplace, you must first discuss these concerns with them in good faith. Following such discussion, you can determine whether the employee's concerns are reasonable, including any further steps you may need to take within your workplace regarding the current health and safety procedures, and communicate this to the employee. Another consideration is whether you need to make any reasonable accommodations to your workplace health and safety procedures for the individual employee and their circumstances. Any accommodation should be recorded in writing.

Requiring an Employee to work

Following the above, if it is determined that the Employee's health and safety concerns are not reasonable, and where the Employee does not have a valid reason (for example, is not a vulnerable person and/or living with a vulnerable person), and it is not an approved period of leave, then the following should be considered:

- If they cannot work from home and are not on an approved period of leave, then the Employer can require the Employee to come to work – in writing.
- To do so, invite the employee to an informal meeting outlining concerns about the Employee's reasons for not wanting to come to work followed by issuing the employee with a "Letter of Expectation" (please contact us should you require a template for this purpose). This is informal correspondence recording what was discussed, including the employer's expectations of the employee moving

forward. A copy of the letter should be issued to the employee following the meeting, and a copy retained on their employee file, which you may be able to refer to later for any potential disciplinary process commenced for unauthorised absence.

- Where there is an ongoing unreasonable refusal to work, this may give rise to a disciplinary issue.
- Working from home: although this may not be an option for your business, given the Government's directive, that working from home is the primary option, where work can be done from home it should be. Therefore, where an Employee is not sick but able and willing to work, then you should consider any possibility for them to work from home in the first instance.
- Essential Workers Leave Scheme: Currently, the Governments Essential Workers Leave Scheme is not applicable to non-essential workers; however, this is subject to potential review, and we will update our members immediately following any amendments to it.

Disciplinary Process

If the employee refuses to work, and there are no reasonable grounds for their refusal of work, as a very last resort, Employers may commence disciplinary action for unauthorised absence.

Please note that unauthorised absence amounts to general misconduct, it does not give rise to grounds for termination and/or dismissal of an Employee.

Prior to commencing any form of contemplated disciplinary action, please contact our Helpline team on 0800 737 827 to discuss this further.

Employee Payment

In General

- Where an employee works, they must be paid their contractually agreed hours and pay, and it is not advisable to pay the wage subsidy only. On this note, the Wage Subsidy Scheme Declaration requires that you must pay and provide the employee's normal

hours of work in accordance with their employment agreement, unless the employee has agreed to and signed a contractual variation. Therefore, to offer less than the original contractual agreement that you have with the employee, requires a robust consultation process resulting in a valid variation signed by the employee.

- If the employee is unable to attend work because of other commitments and/or due to living with a vulnerable person and/or the employee's own vulnerabilities, as previously mentioned, you should have a discussion with the employee directly. In doing so, you could consider options for flexible work arrangements, working from home, or if the employee can do no work at all then discuss leave arrangement options (special leave or annual leave options). Please note that if you are receiving the Wage Subsidy, then you must at least pass the full amount received on to that employee, even if they are unable to work and following a discussion with the employee exploring all options.

Minimum Wage Increase Considerations: 1 April 2020

The adult minimum wage rate has increased \$1.20 from \$17.70 to \$18.90 per hour from 1 April 2020.

The starting-out and training minimum wage rates will increase 96 cents from \$14.16 to \$15.12 per hour and will remain at 80% of the adult rate.

The minimum wage increase has occurred while New Zealand is at COVID-19 Alert Level 4. Further advisory on this is on our website.

People who work must be paid at least the minimum wage for the work they do

During the various alert levels and where the business is permitted to operate, businesses must still pay workers for the work that they do. This means employees—regardless of whether they are working from home, or from premises to do work—must be paid at least the new minimum wage for each hour they work.

If no work is being performed, the Government's wage subsidy is there to support workers

Many businesses will be accessing the Government's Wage Subsidy Scheme, which supports employers and their staff to maintain employment arrangements and guarantee some income for affected employees, even if the employee is unable to work during this period.

Concluding remarks

Given the unprecedented times that Employers currently find themselves in, there is a no one-size-fits-all approach to requiring an Employee to work.

Each situation must be considered carefully and in consultation with each individual Employee in order to meet your overarching employment obligations.