

Business Interruption

What is it?

Some employment contracts include a clause referring to "force majeure" or "business interruption,". These clauses stipulate, in general, that following a proper process the employer has the right to lower wages or temporarily not pay wages at all in situations where the employer is unable to run their business due to factors that are beyond their control. There are some stipulations that may also give an employer the right to terminate employment in the same kinds of situations.

An example clause (used in the RA employment template agreements) is:

Business Interruption

If the Employer's business is interrupted by unforeseen events beyond its control (for example by natural disasters, damage to the workplace premises including electrical failure or fire, governmental action or restrictions, war, terrorism or health epidemic or pandemic) the Employer may be unable to provide work for you to perform ("Business Interruption"). If this happens, the Employer will endeavour to consult with you before determining whether our employment relationship can reasonably continue. This will include consulting with you about whether your work and remuneration will continue during and/or following the event/s causing the Business Interruption.

You acknowledge that the Employer will not be required to provide you with work or pay your remuneration where your usual work is not available due to Business Interruption.

How can I use it if I have a Business Interruption clause in my employment agreements?

It really depends on how your business was impacted and to what degree your operations were affected. Businesses can be affected in many different ways by a major disaster, from closing down completely to being mostly unaffected. In some situations, a company may not be able to meet its contractual obligations to employees, or may only be able to do so partially.

When enforcing a business interruption clause consultation and a thorough employment process must be conducted and the RA Helpline team can assist with this process.

The so-called "doctrine of frustration" can be utilised in some cases when it comes to contracts and there is not a business interruption clause. If something happens after a contract is made that would make keeping the contract a "vastly different" obligation than what was agreed to, the contract can be thrown out and the parties don't have to keep it.

However, the bar is set high, and the fact that a natural disaster or some other unforeseen event has "merely" made it more expensive or time-consuming to carry out a contract can be insufficient grounds for claiming breach of contract. To put it another way, a party, in this case an employer, is not generally able to avoid liability for failing to perform a contract on the grounds that an unintended event (such as a natural disaster) made it more expensive, time-consuming, or complicated. This is because

unintended events are generally considered to be outside of a party's control.

So to use a “doctrine of frustration” clause, you will need to have been severely impacted by the floods, to a point that there was no real way for you or an employee to enter the workplace or operate the business. Please get in touch with us if you would like to use this clause to terminate/cancel a contract with an employee.

Options for leave and payment

- Annual holidays
- Anticipated annual holidays or additional annual holidays
- Using any entitled alternative holidays
- Special leave, either as provided for in employment agreements or workplace policies or by agreement between the employer and employee
- Leave without pay
- Employees can take sick leave if their partner or dependents are injured or sick and they have sick leave available or the employer agrees to extra sick leave
- Other paid or unpaid leave either as provided for in employment agreements or workplace policies or by agreement between the employer and employee
- Advance on wages

Whichever option the employer and employee agree on may depend upon the circumstances, including the nature and extent of the business interruption and how long it lasts for. Once all leave entitlements under the Holidays Act 2003 and any negotiated additional leave or any anticipated leave entitlements run out, employees and their employers will need to consider further options

in good faith (and consider the impact these options will have on business recovery later).

Cancelling a shift

There are special rules for shift workers relating to the cancellation or early ending of a shift. These will be outlined in your employment agreements as notice required for cancellation of shift. In general, an employer can't cancel one or more of an employee's shifts unless:

- the employment agreement has:
 - a reasonable period of notice for cancellation, and
 - reasonable compensation payable to the employee if the employer cancels a shift without giving reasonable notice, and
- the employer either gives the employee the above notice or pays the reasonable compensation above, and
- cancelling the shift doesn't breach the employment agreement (including agreed hours).

If the employment agreement doesn't have a valid shift cancellation provision and the employer cancels a shift anyway, the employer must pay the employee what they would have been paid if they had worked the shift.

Employers must also pay employees what they would have been paid if they had worked the shift if:

- the shift is cancelled but the employer doesn't tell the employee until the start of the cancelled shift, or
- the rest of the shift is cancelled when the employee has already started the shift.

In this situation, the remuneration the employee gets when the shift is cancelled is included in their ordinary weekly pay and relevant daily pay.

Key takeaways:

Employment law can be tricky to get right at the best of times, let alone during a natural disaster

- Employees must be consulted when decisions affecting their continued employment are made.
- All actions must be made in good faith.
- During the natural disaster, all contractual and statutory entitlements remain in effect.
- Pay employees in accordance with the terms of their employment agreement.
- Before altering any part of the agreement in place, please ensure you consult with employees first
- Before relying on the business interruption clause, be sure the proper circumstances exist.
- Seek legal counsel.

In summary, we strongly advise you to get legal advice and contact the Helpline team, if you are considering reducing employee pay, changing employees' working hours, or executing a business interruption clause.

Natural Disaster Checklist

- Ensure the health and safety of your employees, yourself, and clients/customers.
- If the workplace is unsafe, employees should not be required to work there. Ensure the safety first.

- Effective staff communication and support are crucial. Contact employees immediately after a disaster to inform them of the workplace condition and your expectations. Even if they are not needed to be at work, provide them with updates so they are aware of what is happening. Utilize text messages and social media whenever possible to reduce network congestion. Consider that employees may be experiencing increased stress and provide them support and assistance while demonstrating your concern. This could include access to EAP [employee Assistance programme] for counselling, a daily blog or email, or a team debriefing.
- If public transportation is unavailable or limited, consider encouraging carpooling among employees. Smaller businesses could organise carpooling with other neighbouring businesses. Consider any impact on employees' ability to be on time for work and your flexibility.
- Consider broader infrastructure difficulties (such as road closures, power outages, and water limitations) and their impact on employees' ability to get to work, as well as your flexibility.
- An uncommon occurrence may require a different response. This may involve temporarily modifying your leave policy, allowing workers to work flexibly, or adopting a flexible attitude to employees making personal phone calls to check on their families during the workday.
- Consider any possible negative impact on employee pay (such as payroll processing) and attempt to minimise it.

- Act in good faith and be forthright with your employees regarding the circumstance. You can reassure them by providing an explanation, demonstrating the workplace's safety. If an employee expresses worry that the workplace is unsafe, you should enquire about the specifics of their concern (e.g., have they observed cracks) so that you can conduct an investigation.

Overarching employment advice for businesses affected by an emergency situation

The key is communication. 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, they should raise their concerns with their employer.
- If employers are asking employees to do work they don't normally do (for example, clean-up work), both sides need to ensure they're comfortable with this, and safety must be a top priority.
- 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 a significant event - People react differently in these types of situations - some may need extra support. Some will want to focus on caring for their family

- 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

Frequently asked questions

Whose responsibility is it to ensure the workplace is safe?

This is the responsibility of the PCBU/employer under the Health and Safety at Work Act. You should follow the advice of the local council

My business is in the area that has been officially closed and/or my business is one of the those affected by civil emergency processes. What if it is a usual day of work for my employees and the business is closed. Do I pay employees?

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. 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. 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 making a decision on whether they will be paid or not.

Insurance

Please be aware that members can call our insurance partners the Crombie Lockwood team on 0800 252 461.

Key Crombie Lockwood broker contacts:

- The Crombie Lockwood claims number is 0800 252 461

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.

Civil Defence Payments

Civil Defence payments are available if you've been affected by flooding in Auckland, Waitomo and Tairāwhiti.

- If you're in Auckland or Waitomo, call 0800 400 100.
If you're in Tairāwhiti, call 0800 559 009.

Who can get it?

You may be able to get a Civil Defence Payment if either:

- A Civil Defence emergency has been declared, or
- The event meets the guidelines for a Civil Defence emergency.

You must be in one of these situations because of the emergency:

- You had to leave your home (e.g. you've been evacuated or you're on stand-by)
- You were away from your home at the time of the emergency and can't return

- You need help with food, bedding or clothing
- You can't go to work.

You must also:

- Not be able to cover your costs from insurance (or you haven't been paid yet)
- Not have access to any other help, e.g:
 - public donations
 - other government relief funds
 - charitable relief funds.

If you're not sure whether insurance will cover your costs, you may still qualify for a Civil Defence Payment. However if you get a Civil Defence Payment and then your insurance pays for any costs covered by this, you'll need to pay MSD back.

What you can get depends on your circumstances. You can apply for help with more than one type of cost.

Click here to apply [Civil Defence Payment - Work and Income](#)