



COVID-19 Subsidy Update 30 March 2020

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Introduction

On the afternoon of 27 March 2020, the Government announced changes to the Covid Subsidy and Covid Leave entitlements. The changes do not apply retrospectively. If a business applied for the Wage Subsidy before 5pm on 27 March 2020, the business' obligations remain the same as at the time it applied. Similarly, payments made prior to 3pm on 27 March 2020 will still be processed.

The announcement was brief, and it was stated that the Leave Payment would be folded into the Covid Wage Subsidy scheme. The reality is that the Leave entitlement has ceased. Significantly, it was announced that employers will be required to keep employees employed if they are receiving the Wage Subsidy from 5pm 27 March 2020.

Given the initial approach and quick roll out, it was expected that changes and further clarity to the subsidy and leave schemes would occur.

Subsidy

Overall, other than incorporating the Leave Subsidy into the Wages Subsidy scheme and requiring employers retain employees for the duration of the Wage Subsidy, the criteria for accessing the Wage Subsidy is relatively unchanged.

The eligibility criteria for the Wage Subsidy from 27 March 2020 is:

- 1 The applicant operates a business (being a registered business, sole trader, self-employed person, registered charity, incorporated society, non-government organisation, or post settlement governance entity) in New Zealand that employs and pays the employees named in the application; and
- 2 The employees of the business, which includes any sole trader or self-employed person, named in the application are legally employed by the business and are employed in New Zealand; and

- 3 The business has had a minimum 30% decline in actual or predicted revenue over the period of a month when compared to the same month last year, or a reasonably equivalent month for a business operating less than a year, and that revenue loss is attributable to the COVID-19 outbreak; and
- 4 Before making application for the subsidy, active steps must have been taken by the business to mitigate the impact of COVID-19 on the business activities, including but not limited to engaging with the businesses bank, drawing on cash reserves as appropriate and/or making an insurance claim; and
- 5 The business is not currently receiving the Wage Subsidy or Leave Payment in respect of any of the employees named in the application.

The new factors of significance are set out in point 4. The Government has clarified that active steps includes engaging with the bank, drawing on cash reserves as appropriate and/or making an insurance claim.

The obligation to engage with the bank on the face of it appears to be a relatively onerous one. It seems to require businesses to attempt to extend their credit in what is likely to be extremely difficult operating circumstances. However, at the very least, to ensure compliance, business will need to ask the question of their bank.

The reference to "includes" also contemplates other steps may need to be taken in addition to the active steps expressly referred to. While it is unclear what these additional active steps will be, they could include directors reducing drawings and shareholder dividends not being paid.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson, Peter Zwart, Dean Kilpatrick or Jane Taylor.**

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Requirements

The subsidy is also subject to stricter requirements in its application:

- 1 The granting of the subsidy does not override the existing obligations under the Employment Relations Act 2000.
- 2 Any changes to an employment agreement, such as rates of pay, hours of work and leave entitlement, must be by agreement and recorded in writing. Changes cannot be unilaterally made (which is consistent with 1 above).
- 3 Employees named in the application must remain employed for the period the employer receives the subsidy for those employees.
- 4 Employees receiving the subsidy cannot be compelled or required to use their leave entitlements for the period an employer receives the subsidy for those employees. Questions arise in this context of requiring employees to take annual holidays under the Holidays Act and/or the employment agreement. Our advice is to be very cautious in requiring employee to take leave.
- 5 The full amount of the subsidy must be paid to each named employee in fulfilment of, or towards the fulfilment of, the wages or salary for the period of the subsidy.
- 6 An employer will for the period it receives the subsidy:
 - (a) use their best endeavours to pay at least 80% of each named employee's ordinary remuneration; or
 - (b) pay:
 - (i) at least the full amount of the subsidy to the employee; or
 - (ii) where the ordinary wages or salary of an employee is lawfully below the amount of the subsidy before the impact of COVID-19, pay the employee that amount.
- 7 The wages or salary obligations are:
 - (a) as specified in the employee's employment agreement as at 26 March 2020; or
 - (b) where an employee who ended their employment due to Covid19 and has been re-employed on or after 17 March 2020, as recorded in the employee's employment agreement as at the date that employment relationship ended.

Points 1 and 2 are relatively straight forward. Other requirements are carried over from the previous requirements. Points 3, 6(b) and 7 are new. The most significant is that where an employer is receiving a subsidy, it must retain the employees it is receiving the subsidy for.

The subsidy applies to all workers, including casual employees. The requirement for casual employees is to average the employee's hours over the last year. If this average is 20 hours or more, apply for the full-time rate, and if it's under 20 hours then apply for the part-time rate. If the casual employee has worked for less than a year, the employer should average the hours worked during their total employment period.

The one gap is that with the Leave Subsidy being removed. Where an essential business does not qualify for the subsidy there is no Government support for employees who cannot work if they are vulnerable, have to self-isolate or are infected. There was a brief statement on Radio New Zealand on Saturday from Jacinda Ardern that the Government may need to address this gap. This was confirmed when the Prime Minister noted the Government is going to examine concerns about essential services accessing the Leave Subsidy on 30 March 2020 during the 4pm update.

Changes in Eligibility and Repayment

If there is any change in eligibility, an employer must notify the Ministry of Social Development within five working days. This includes if any of the employees named in the application end their employment.

Employers must repay the subsidy or any part of the subsidy where the employer:

- 1 Fails to meet any of the obligations for use the subsidy; or
- 2 Was not or stops being eligible for the subsidy or any part of the subsidy;
- 3 Provides false or misleading information in its application; or
- 4 Receives insurance such as business interruption insurance for any costs covered by the subsidy.

It has also been confirmed that where an employer does not comply with its obligations, they may be subject to civil proceedings or prosecution under the Crimes Act 1961.

Conclusion

These changes and clarification of the subsidy is to be expected. The new requirements ensure that the subsidy will be used for its intent from the outset, i.e. to support business to keep workers during this crisis.