

Job security and redundancy during a pandemic: COVID-19 considerations

A nationwide lockdown is a new challenge for New Zealand, and the consequences for businesses and employees are yet to be determined. Many employers may be wondering how they will manage this period, and whether, going forward, they can retain full employment.

The New Zealand government has introduced a wage subsidy in an attempt to help protect businesses and employees, and to reduce redundancies across the country. However, in order to qualify for the subsidy, employers are required to make their best efforts to retain staff, and pay employees 80% of their normal income.

Employers who made application for the subsidy before 27 March are able to restructure and make staff redundant. However, we do not consider they will be entitled to retain the balance of any monies received from the subsidy (i.e. to the extent the subsidy has not been paid to the employee, it will need to be repaid to the government). For employers who applied for the subsidy after 27 March, they have signed a declaration preventing them from making staff redundant during the 12 week subsidy period.

Accordingly, this is an opportunity for employers and employees to think creatively and agree to alternative pragmatic solutions to retain employment and ride out the lockdown and the on-going effects of COVID-19.

Alternatives to redundancy

The following are a few examples of options that employers may want to consider and agree with their employees to save costs during the lockdown period, as alternatives to redundancy:

- Reduced days and/or hours of work for a period of time: i.e., working three days a week or at 60% of normal hours for the next twelve weeks.
- Reduced pay during the lockdown period (i.e. 40% reduction) and/or a reduction of pay for four weeks following the lockdown.
- Utilising a combination of reduced hours and/or pay in addition to the government wage subsidy (please see our Wage Subsidy article for more information).
- Employees may agree to reduce their pay to minimum wage during this time, however it is important that any agreement maintains at least minimum wage payments to employees.
- Annual leave: employers may give notice to their employees that they must take annual leave under the Holidays Act 2003, however this requires consultation and an attempt to reach an agreement, as well as 14 days' notice. If the employee agrees to take annual leave then annual leave could begin immediately. Otherwise, the 14 day notice period is required before an employee can be required to take annual leave.
- Employers may also agree to their staff taking annual leave in advance.
- An employee may agree to use any outstanding alternative leave days, time owed in leave, or unpaid leave.
- Employees may wish to consider taking voluntary redundancy, or those considering retirement may also wish to discuss whether that is an option at this time.

If an employer and employee can agree to any of the above alternatives, it is important that any variation to a staff member's employment is recorded in writing. While we would usually recommend a variation should be

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signed by both parties, given the need for social distancing and isolation, agreement via email by both parties should suffice.

No other option but to restructure?

We understand that, for some employers, an urgent reduction in costs through a restructure may be the only way for the business to survive a minimum four-week lockdown. In those circumstances, it is likely that the restructure will need to be carried out urgently and efficiently.

The restructure process must still be followed, where a proposal is put to employees for consideration and a consultation period between employers and employees follows. In usual circumstances we would recommend that a restructure take at least two to three weeks from start to finish. However, given the current unprecedented circumstances that New Zealand is facing, we consider that restructures can be carried out in significantly reduced timeframes.

The minimum timeframe we recommend is:

Restructure proposal provided to all affected staff	9am on Day 1
Virtual consultation with individual employees and their support persons	From 9am on Day 3 (Day 2 is to enable employees to properly consider the proposal and take advice if they wish. Any less than this time would be unlikely to allow sufficient time to take advice)
Consideration of employee feedback	From 5pm on Day 3 (so long as all consultations have been carried out)

Decision on amended proposal announced and restructure effective	From 9am on Day 4 (so long as all consultations have been carried out)
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If the restructure proposal is amended as a result of employee feedback, we recommend the following minimum timetable:

Restructure proposal provided to all affected staff	9am on Day 1
Virtual consultation with individual employees and their support persons	From 9am on Day 3 (Day 2 is to enable employees to properly consider the proposal and take advice if they wish. Any less than this time would be unlikely to allow sufficient time to take advice)
Consideration of employee feedback and, if necessary, amendments to proposal made	From 5pm on Day 3 (so long as all consultations have been carried out)
Amended proposal sent to employees and further virtual consultation with staff	From 9am on Day 4
Consideration of employee feedback on amended proposal	From 5pm on Day 5 (so long as all consultations have been carried out)

Employees should still be offered the opportunity to bring a support person to their consultation meeting, however this will need to be arranged either over the phone or through video conferencing facilities.

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We note that if a business has some employees who are still at work on site (because it is an essential service) and other employees who are working from home or on sick leave, there will likely be an enhanced obligation on the employer to ensure that those employees who are not in the workplace receive sufficient consultation. This is to ensure that those employees not in the workplace are not disadvantaged as they will not be privy to any discussion or sharing of information in relation to the proposed restructure that is occurring in the workplace.

It is likely that in the circumstances employers will be able to justify providing only basic financial information or other evidence to support the necessity of the proposed restructure. However, access should be provided to relevant information wherever possible.

As far as possible employers need to ensure they are complying with employment law, which includes the following:

- The need for redundancy must be genuine. An employer should not presume it can rely on COVID-19 considerations to implement a restructure for ulterior motives.
- A fair and reasonable process must be used to determine selection criteria, which must be clearly communicated to employees.
- Employers must undertake legitimate consultation with employees. Employees' feedback must be taken into account, and employers should consider any suggested alternatives to redundancy.
- If your employees are vulnerable employees under the Employment Relations Act 2000 further considerations are required; please contact us for further advice on this point.

The upfront costs of redundancy to keep in mind

While disestablishing positions and making staff redundant may reduce costs in the long term, this comes at a cost to the business in the immediate short term.

Employees are entitled to be paid the notice period set out in their individual employment agreement, which is usually between two and four weeks' notice. Senior staff members may have longer notice periods (i.e. three months). Employers would be obliged to pay their employees their full pay for the notice period, or to pay an equivalent amount as a lump sum payment in lieu of notice. Employees who are made redundant are also entitled to be paid any annual leave balances owing. When determining whether a restructure is necessary, employers should consider whether their business can afford these payments.

Another cost that employers may face is redundancy pay. Employers should refer to their employees' individual agreements to consider whether an entitlement to redundancy pay exists, and how much pay each employee may be entitled to receive.

Key points to keep in mind

Obligation of good faith

It is important that every employer continues to uphold their obligations of good faith, and to act as a fair and reasonable employer in all of the circumstances.

While it may seem unsurmountable at this stage, once the lockdown ends and there is more economic certainty, employers will need their key staff to build their businesses back up. Further, any breaches of employment law that occur during this time are still liable to personal grievances and/or penalties.

Accordingly, breaches of employment law now may lead to significant penalties down the road which will

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further jeopardise the viability of the business moving forward.

Employers taking the time to thoroughly consider their course of action now are putting themselves in the best position to not only get through this crisis but to come out the other side with a business that is ready to rebuild.

Want to know more?

If you have any questions about job security and redundancy during the impact of COVID-19, please contact our specialist [Employment](#) Team.