

## Understanding leave entitlements during COVID-19

### Can I make my staff take annual leave or alternative days if our business is also claiming the wage subsidy?

The guidance from the government on the interaction between the wage subsidy scheme and leave is that employees cannot be unlawfully required or compelled to take their leave. If you are giving the required 14 days' notice under the Holidays Act 2003, it's not unlawful to require employees to take their annual leave or alternative days. In our opinion this guidance doesn't prevent employers from lawfully requiring their employees to take leave while still claiming the subsidy.

Under the scheme, employers must make best endeavours to pay employees 80% of their normal income (and where that's not possible, the whole of the wage subsidy should be passed on.) In our view, employers are meeting their requirement to pay at least the subsidy where employees are on leave because the employee will be receiving their full pay. It is clear that the subsidy must be used for wages - a business's leave costs are wage costs. However, the guidance from the government is changing regularly. We will update this article if future government guidance changes our view on this.

You should also be mindful of the possible disparity created within your workplace where leave is required to be used, as some employees may have a large leave balance while others won't have any. There may be particular circumstances where an employee is especially disadvantaged by having to take their leave during this time. We suggest considering individual circumstances on a case by case basis.

The issue becomes more complicated when an employee is still working their full hours but on reduced pay. If the employer is seeking to top up their reduced pay to 80% by annual leave payments, our view is that this can only be done by way of agreement to cash up

annual leave. An employee is entitled to cash-up up to a week's annual leave in any leave entitlement period. Since the employee is working, they cannot also be taking annual leave. Therefore the top up will not be payment for annual leave but a cash payment for leave.

We also do not think that employers can renege on leave which has already been approved and booked for a period outside of the lockdown, and instead require that leave to be taken during the lockdown.

If employees no longer wish to take leave that they have been granted, they can negotiate with their employer to defer that leave. It will be up to the employer whether they agree to that request. The employer will need to consider the request however, in good faith, and have genuine business reasons for refusing to allow the employee to defer the leave request.

### Sick leave, bereavement leave and family violence leave

Employees are entitled to 5 days sick leave (after 6 months continuous employment). There is no entitlement during the lockdown to sick leave – unless the employee is truly sick (or their dependents are sick), as opposed to just self-isolating. This means there is no ability for an employee to demand sick leave, or for the employer to compel that it be taken, in circumstances where the employee is not unwell. That being said, you could reach an agreement with your employees to take sick leave during this time, but be aware that this means they may then have no sick leave down the track if they become unwell.

Last weekend New Zealand very sadly suffered the first fatality due to COVID-19. As a reminder, employees are entitled to 3 days bereavement leave (after 6 months continuous employment) on the death of their spouse or partner, parent, child, sibling, grandparent, grandchild or spouse or partner's parent. An employee is further entitled to one day of bereavement leave on the death

---

## Understanding leave entitlements during COVID-19 (Continued)

of any other person if the employer accepts the employee has suffered a bereavement.

It is also a very sad reality that family violence is likely to increase during this time with families self-isolating together. Employees are entitled to 10 days paid family violence leave (after 6 months continuous employment) where they are affected by family violence - that includes where the employee is living with a child who is being subjected to family violence.

If your employees are on annual leave and become sick, suffer a bereavement, or are subject to family violence, they must be allowed to take sick leave, bereavement leave or family violence leave, rather than using their annual leave.

Sick leave, bereavement leave and family violence leave are all calculated on the basis of relevant daily pay or average daily pay. They are payable where the day would otherwise be a working day for the employee.

Malcolm Couling from our team has written an article on the upcoming public holidays and annual leave accrual. You can read that article [here](#).