

Covid-19 – Employment Law Intersect
Payroll Provider Q & A
8 April 2020

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Question	Answer
<p>With 3 public holidays coming up, what is the payment for these? The original agreement or ADP, or 80% of those?</p>	<p>If Fridays and Mondays are otherwise working days based on pre-COVID-19 working patterns, employees should be paid for the upcoming public holidays. The payment should be Relevant Daily Pay, or if it meets the criteria, can be Average Daily Pay.</p> <p>Determining whether a day is an 'otherwise working day' should be based on the employee's pre-lockdown working pattern. However, if the employer and employee have agreed to a permanent change, this new arrangement can be used to assess whether the day is an 'otherwise working day'.</p> <p>Employers can use the wage subsidy to cover some or all of their employees' wages, including pay for the upcoming public holidays. More information on the wage subsidy scheme can be found on our website here: https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/coronavirus-workplace/wage-subsidy/</p> <p>Employers must pass the full subsidy amount received onto the employee, except where a person's income is normally less than the subsidy amount, in which case they can be paid their normal salary.</p>
<p>If an employee cannot work (i.e. not essential and cannot work from home) do we presume that 'otherwise working days' are determined by pre covid lockdown work patterns?</p>	<p>Yes. Determining whether a day is an 'otherwise working day' should be based on the employee's pre-lockdown working pattern. However, if the employer and employee have agreed to a permanent change, this new arrangement can be used to assess whether the day is an 'otherwise working day'.</p> <p>Employers claim the wage subsidy based on the amount of hours an employee would work in regular circumstances. Employers commit to paying 80% of wage but if this is not possible they are required to pass on the subsidy in full. If your employee's usual wages are less than the subsidy, you must pay them their usual wages. Any difference should be used for the wages of other affected staff. Any employment obligations between the employer and employee still apply. Minimum wage requirements continue to apply to any work preformed or leave used.</p>
<p>If an employee has agreed to reduced working hours due to loss of work from covid, but being paid up to 80%, is the 'Otherwise working day' determined by the new work pattern? Could that result in them being not entitled to PH if say reduced to only a day or so a week?</p>	<p>Determining whether a day is an 'otherwise working day' should be based on the employee's pre-lockdown working pattern. However, if the employer and employee have agreed to a permanent change, this new arrangement can be used to assess whether the day is an 'otherwise working day'. The likely consequences of shifting to the new arrangement (both during or following the period of the wage subsidy) should be made clear to the employee wherever possible.</p>
<p>What Reporting requirements are there in terms of tracking subsidy payments to employees</p>	<p>There are no explicit reporting requirements as this is a high-trust system. Employers will need to be able to verify subsidy payments if they are audited.</p> <p>Additionally, employers should note that their normal legal employment obligations apply. These include obligations for holiday and leave under section 81 of the Holidays Act 2003 and wages and time records under section 130(1) of the Employment Relations Act 2000. Employers need to retain all information necessary to satisfy those requirements.</p>

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<p>Where hours/days work are reduced or non existent, does this impact what a week is for an employee and reduce AWE & OWP rates? Provisioning AND Payments could drop fairly low?</p>	<p>Employers and employees must agree what a 'week' is for the purposes of annual holidays. This should be based on the regular working pattern (pre-lockdown), unless the employer and employee have agreed to a permanent change. Payment for annual holidays should be based on the greater of Ordinary Weekly Pay and the average weekly earnings over the last 12 months. Ordinary Weekly Pay should be based on 'ordinary' weekly gross earnings (ie before the lockdown), unless the employer and employee have agreed to a permanent change. For future calculations the the payments made wil lbe included in gross earnings.</p>
<p>If I haven't applied for the subsidies (or even if I have) can I enforce my employees to exhaust their existing leave entitlements (i.e. annual, sick, lsl, alt) first?</p>	<p>No. Annual holidays, alternative holidays and long-service leave should be by agreement. However, an employer can make an employee take annual holidays provided agreement can't be reached, they are given at least 14 days' notice, and the employee has worked for the employer for more than 12 months, and they have an unused entitlement to cover the period of leave. They can also choose when an employee takes alternative holidays if agreement can't be reached and they are given at least 14 days' notice. An employer cannot require an employee to take annual leave in advance of their annual entitlement. Sick leave can only be used when the employee (or their partner or dependent) is sick or injured. Long-service leave is not a legislated entitlement, and is only governed by contractual arrangements. Employers must act in good faith when making their decisions and engaging with employees.</p>
<p>Is the government imposed lockdown considered being told to self isolate under Ministry of Health Guidelines and so therefore does the Leave Payment apply during this period?</p>	<p>No. The leave subsidy scheme has been absorbed into the enhanced wage subsidy scheme, because of the alert level 4 requirements. Employers, who qualify for the wage subsidy scheme, with workers who are required to self-isolate as part of the public health response to exposure to the virus, and unable to work from home – or employers with workers caring for such people, and unable to work from home can use the wage subsidy scheme to help pay for their wages.</p>
<p>If the employee is unable to work from home during the shutdown, can the employee still be expected to receive 80% of their normal wage even though they are not working?</p>	<p>Employers who receive the subsidy must use their best endeavours to pay at least 80 per cent of each named employees' wages or salary for the period of the subsidy at the rate of income they would have been paid before the business was impacted by COVID-19. However, if the employees' wages or salary are usually under the subsidy they applied for, the employer must pay them their usual wages. If paying 80% of their pre-COVID-19 impact wages isn't possible, and the employee was usually earning over the subsidy applied, the employer must pass on the full subsidy amount (minus any PAYE etc) to the employee. If the employee usually earned under the subsidy amount, the employer must continue to pay the employee their usual wage. Should the employee perform any work, all hours worked (and leave taken) must be paid at the contracted rate.</p>

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<p>If businesses are unable to provide wages of up to 80% of the employees normal wage, are they able to pay them instead what they can (best efforts to pay 80% is not possible), with the minimum being the subsidy amount \$585.80? Would they still be eligible to receive the wage subsidy?</p>	<p>Employers who receive the subsidy must use their best endeavours to pay at least 80 per cent of each named employees' wages or salary for the period of the subsidy at the rate of income they would have been paid before the business was impacted by COVID-19. However, if the employees' wages or salary are usually under the subsidy they applied for, the employer must pay them their usual wages. If paying 80% of their pre-COVID-19 impact wages isn't possible, and the employee was usually earning over the subsidy applied, the employer must pass on the full subsidy amount (minus any PAYE etc) to the employee. If the employee usually earned under the subsidy amount, the employer must continue to pay the employee their usual wage. Should the employee perform any work, all hours worked (and leave taken) must be paid at the contracted rate.</p>
<p>Does an employer need to prove they used their "best efforts" but were unable to pay employees a minimum of 80% of their normal wage? If so, what type of evidence is required?</p>	<p>This is a high-trust system. Employers will need to be able to verify subsidy payments if they are audited. Employers also need to think about good faith and engaging with employees.</p>
<p>Is wage pooling allowed? Eg the wage subsidy has been applied for a part time employee who only works 10 hours each week @ \$20 per hour = \$200. The subsidy covers her for \$350. This means that \$150 is unpaid. Can this \$150 be used to offset another employees pay where the \$585.80 is not sufficient to cover that individual's wage?</p>	<p>Yes. Any surplus does not need to be returned by the employer, but must be used to support wage payments elsewhere in the company</p>
<p>Employer has applied for wage subsidy for all staff. Some staff are working as they are essential workers. They are being paid their normal wage and the wage subsidy is helping to pay for this.</p> <p>Some staff are working minimal hours or none from home. These staff are being offered their normal hourly rate for the hours they work, and the option of topping up with annual leave, taking leave without pay, or being paid their remaining hours at \$18.90 (minimum wage).</p> <p>Some of these employees may not receive 80% of their normal wage under this arrangement especially if they do not use annual leave for topping up. Is this a suitable approach to using the wage subsidy?</p>	<p>If firms want to use the wage subsidy, they are committing to making best efforts to pay the identified staff 80% of their wage. If paying 80% of their pre-COVID-19 impact wages isn't possible, and the employee was usually earning over the subsidy applied, the employer must pass on the full subsidy amount (minus any PAYE etc) to the employee. If the employee usually earned under the subsidy amount, the employer must continue to pay the employee their usual wage.</p> <p>The employer must ensure they are meeting minimum wage requirements for any work performed or leave used.</p>

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<p>Does this condition “You will use the full amount of the subsidy to pay each of the employees named in your application in fulfilment of, or towards the fulfilment of, the wages or salary obligations contained in each of their employment agreements for the period you receive the subsidy.” mean that a part time employee working 3 hours every week at say \$20 an hour (\$60 total + kiwisaver and holiday pay) must be paid the full \$350 subsidy? Or does it mean over all the employees of that employer the full amount of the subsidy must be used, and the part time employee only needs to be paid what they are due to be paid as per normal?</p>	<p>In this case, they would endeavour to pay the full normal salary of the part time employee. As this would be less than the wage subsidy there will be a surplus. The surplus does not need to be returned by the employer, but must be used to support wage payments elsewhere in the company</p>
<p>Following on from the question above, if they must be paid \$350, is it correct that if they also work part time (under 20 hours) for 3 other employers that they will get \$350.00 from each of those employers assuming they all apply to have that person covered by the subsidy?</p>	<p>The employer would endeavour to pay the full normal salary of the employee, rather than the full \$350. Each employer of the person could apply for a wage subsidy for their employee.</p>
<p>Again, following on from the question above, if the part time employee is the only employee and the employer is only obligated to pay what they normally pay, do they have to repay the difference? E.g. for a week they pay \$60 + \$1.80 KiwiSaver + \$4.80 Holiday pay, and receive \$350. Difference is \$283.40 to be repaid?</p>	<p>In this case, they would endeavour to pay the full normal salary of the employee. The excess could be used, for example, to top up wages beyond the 12 weeks.</p>
<p>Following on from the question above: Can the the Kiwisaver employer contribution be paid out of the subsidy? I had thought that the subsidy could be used for wage and salary payments only.</p>	<p>Payments to employees under the modified Wage Subsidy Scheme, and the previous and COVID-19 Wage Subsidy and Leave schemes are wages, and subject to standard deductions like PAYE, ACC levies, KiwiSaver contributions and student loan repayments.</p>
<p>Does the announcement today mean that two sets of rules apply. If wages subsidy was applied prior to 4pm Friday 27/3 then one set of rules apply. For the combined wage subsidy scheme, a second set of rules apply. Eg If employer 1 already received the wage subsidy, are they obliged to pay the employee up to 80% of pre covid wages even if their business while initially still open is now closed. Compared to employer 2 who applies for the wage subsidy now after lock down, who now can pay just the wage subsidy amount</p>	<p>Employers are required to continue to make best endeavours to pay the staff named in their application at least 80% of their normal income if this is possible, and if not, they must pass on the full subsidy to each named employee. Employers are encouraged to top up the subsidy amount to their employees normal income level if possible.</p>
<p>Can we please have a copy of the old declaration, so we can know the details of the two sets of rules?</p>	<p>See: https://workandincome.govt.nz/online-services/covid-19/wage-subsidy-declaration.html</p>
<p>I can no longer find what date the subsidy started from? Was it the 17 March? Is the start date the same for everybody? Or is it from when they applied? Or can they choose which 12 weeks to apply the subsidy to, depending on when their pay periods start and finish? (e.g. Monday to Sunday for 12 weeks from ?, or Thursday to Wednesday for 12 weeks from ?</p>	<p>The subsidy was announced on 17 March, but regardless of this the employer would receive subsidies for the 12 week period from when their application is approved.</p>

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<p>What sources of evidence will be acceptable to prove the decline in revenue?</p> <p>What evidence will you want as proof the subsidy has been correctly applied and paid?</p>	<p>In order to be eligible for the wage subsidy, firms are required to have had a 30% decline in actual or predicted revenue. Actual revenue is set over a period of a month when compared with a month last year, so does not include 2018. However, firms can also forecast a 30% decline in revenue. Employers will need to sign a declaration as part of the application process, confirming that they meet this eligibility criteria.</p>
<p>Can you please resolve the mixed messages within the COVID-19 Wage Subsidy information on Work and Income?</p> <p>Examples: “... you have made best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period.”</p> <p>Compare: •“... retain the employees the subsidy was paid for, and •pay those employees at least 80% of their normal wage or salary.”</p>	<p>The purpose of the wage subsidy scheme is to support employers and their staff to maintain an employment connection and ensure an income for affected employees, even if the employee is unable to actually work any hours. The intent was that the subsidy would give the employer flexibility of how to apply the wage subsidy – with the proviso that the employer would make best endeavours to pay at least 80% of wages for any named employee, unless this is not possible in which case the employer must pass on the subsidy to the employee in full.</p>
<p>If the intention is to retain employees, can you please clarify that “active steps to mitigate the impact of COVID-19” do not include making employees redundant?</p>	<p>Examples include talking to their bank, activating their business continuity plans, and accessing internal cash reserves. The purpose of the wage subsidy scheme is to support employers and their staff to maintain an employment connection and ensure an income for affected employees.</p> <p>Employers must engage with employees in good faith regarding any changes to employment.</p>
<p>What are the requirements for time and attendance record keeping?</p>	<p>Employers' normal legal obligations apply. These include obligations for holiday and leave under section 81 of the Holidays Act 2003 and wages and time records under section 130(1) of the Employment Relations Act 2000. Employers need to retain all information necessary to satisfy those requirements.</p>
<p>Will ‘enforced’ leave without pay periods (no Wage Subsidy) be considered a break in service</p>	<p>Leave without pay can only be by agreement between the employer and employee. The provisions of the Holidays Act 2003 still apply.</p> <p>Leave without pay greater than one week in duration is not included in the period of 12 months continuous service to become entitled to annual holidays.</p>

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Is it ok if paying 80% to an employee puts them below minimum wage?	Employers must still adhere to relevant employment laws when reducing an employee's wages to 80% of income or to the subsidy level provided by the Government. This relationship is between the employer and the employee. An employer cannot pay an employee less than the minimum wage for any work performed or leave used. However, the employer may agree with the employee to reduce hours or to reduce hourly rate during this period (not to a rate lower than the minimum wage). The wage subsidy is available to support the employer as long as they retain the employee and meet other requirements of the scheme will help employers to pay this wage. It can be used regardless of whether the employees is working increased hours, normal hours, reduced hours, no hours, or any type of leave.
What should be paid to an employee if they are not working over a public holiday?	Holidays Act 2003 requirements still apply as during the pre-lockdown period. If the public holidays falls on an otherwise working day, the employer must pay the Relevant Daily Pay, unless it cannot be determined or the employee's pay varies in the pay period, where Average Daily Pay can be used.
If an employee is not working over the shutdown, is this period counted as continuous service for annual leave entitlements?	Although the employee may not be working over the lockdown period, the employee is still employed. Entitlement to annual holidays is based on 12 months' continuous employment, as during the pre-lockdown period. Leave without pay greater than one week in duration is not included in the period of 12 months continuous service to become entitled to annual holidays.
When does the 12 weeks "duration" or "period" start?	The employer receives subsidies for the 12 week period from when their application is approved.
An employer has had to shut their business during the lockdown period. The employees are not working any hours. The employer is only able to pay the subsidy amount. With a public holiday coming up, how should this be recorded and at what rate of pay should this be paid?	Employers' normal legal and contractual obligations apply. Employees should be paid Relevant Daily Pay, based on their regular hours (ie before the lockdown). If Relevant Daily Pay cannot be calculated or the employee's pay varies, they should be paid Average Daily Pay. Employers are required to pass on the full subsidy to each named employee (except where the employee's regular income is less than the subsidy amount. Employers must also pay 80% of the employees regular income, if this is possible.