



# COVID-19 FREQUENTLY ASKED QUESTIONS

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## Leave payment for essential workers

### What is the COVID-19 Essential Workers Leave Support payment?

On 6 April 2020, the Government announced the details of the COVID-19 Essential Workers Leave Support payment. This payment is available only for [essential businesses](#), but excludes the State Sector and Local Government.

The Leave Support payment is available to essential service workers who either:

- are at higher risk if they get COVID-19, and [Ministry of Health guidelines](#) recommend they stay at home while we're in lockdown (and potentially longer); OR
- come into contact with someone who has COVID-19 and must self-isolate for 14 days (as required by [Ministry of Health guidelines](#)); OR
- have tested positive for COVID-19 and are required to remain off work until they've been cleared by a health professional to be released from self-isolation; OR
- have household members who are at higher risk if they get COVID-19 and Ministry of Health recommend the worker also remains at home to reduce the risk to them.

Importantly, an employer must meet the following conditions before applying for the Essential Workers Leave Support payment:

- The employer must have had a conversation with their employee about how the employer can best support them at this time. For example, they may choose to use any sick or discretionary leave they have, instead of getting the Leave Support. If you can't pay the full amount of this leave to your employee, you can apply for the Leave Support to top it up.
- The employer is not be able to financially support their employee due to the COVID-19 public health restrictions. For example, the cost of paying for the employee's leave and paying for replacement staff is significant.

Under the Essential Workers Leave Support, employers will receive as a lump sum paid for four weeks per employee:

- \$585.80 for people who were working 20 hours or more per week (full-time rate)
- \$350.00 for people who were working less than 20 hours per week (part-time rate).

While an employer can apply for both the COVID-19 Wage Subsidy, and the COVID-19 Essential Workers Leave Support, an employer cannot receive both payments for the same employee at the same time.

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## What are my obligations as an employer if I access the Essential Workers Leave Support?

The declaration for receiving the Essential Workers Leave Support suggests that employers accessing it are under the same obligations as when they receive the Wage Subsidy.

In this respect, the declaration provides that:

- employers must retain the employees named in their application for the period that they will receive the subsidy.
- Employers must use their best endeavours to pay at least 80 per cent of each named employee's ordinary wages or salary; and
- pay at least the full amount of the subsidy to the employee; but
- where the ordinary wages or salary of an employee named in their application was lawfully below the amount of the subsidy before the impact of COVID-19, pay the employee that amount.

Ordinary wages or salary are defined as being:

- as specified in the employee's employment agreement as at 5 April 2020; or
- if you ended your employment relationship with any employee named in your application as a result of your business being adversely affected by the COVID-19 outbreak and have re-employed that employee on or after 17 March 2020, as specified in the employee's employment agreement as at the date that employment relationship ended.

## What are the extra obligations on employers who use the Essential Workers Leave Scheme?

The Essential Workers Leave Scheme requires the employer to make best endeavours to pay the employee 80% of their ordinary wages or salary. Employers should be aware that this may be imposing a higher obligation than may otherwise exist. This is because where an employee is not able to work, but is not sick, they are unlikely to be entitled to be paid or to use sick leave.

For example:

**Employee is sick with Covid-19, or their Partner/Spouse, or someone who depends on them for care is sick with Covid-19.**

Employee is entitled to any sick leave they have owing. After that, they would be on unpaid sick leave.

**Employee has high risk factors according to the Ministry of Health.**

If the employer can nevertheless provide a safe workplace (taking into account the high risk factors),

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the employee would not be entitled to be paid, as the employee is not “ready, willing and able” to work.

If the employer is not able to meet its obligations under the Health and Safety at Work Act 2015 to the employee (taking into account their risk factors), and therefore the employer requires them to remain away from work, the employee should be paid.

**Employee has someone in their household with high risk factors, so the employee decides not to attend work.**

If the employer is fulfilling their obligations to the employee under the Health and Safety at Work Act 2015, and the employee chooses not to work because of the risk to others in their household, they are not entitled to be paid as they are not “ready, willing and able” to work.

**Employee may be a risk of infection to others, so employer wants them to remain away from work.**

The employee is remaining away from work at the direction of the employer, because their presence creates an unacceptable health and safety risk in the workplace, therefore the employee would be entitled to be paid by the employer.

Where the Essential Workers Leave Scheme would cover 80% of the employee’s ordinary wages, the employer may not be too concerned about whether or not they would be required to pay wages in the absence of the scheme. However, in all other cases, the employer may need to seek advice about whether the employee is entitled to be paid while they remain away from work, before deciding whether to access the subsidy, as the employer may be committing themselves to an additional burden by applying for it.

The Essential Workers Leave Scheme also requires the employer to maintain the employment of the worker for the four week period being covered. Where an employer is otherwise considering reductions in its workforce over the four week period, they should take into account this obligation before deciding whether to access the Scheme.

### **What proof can an employer require that the employee is unwell, or is required to self-isolate?**

Work and Income has advised that they will not be seeking any health-related information as part of an employer’s application for the COVID-19 Leave Support payment. All an employer is required to declare is that they have confirmed with an employee that they meet the Ministry of Health guidelines.

However, if an employee is unwell and is receiving sick leave, the standard position under the Holidays Act regarding the production of medical certificates would apply.

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In this regard, an employer can require an employee who is taking statutory sick leave to provide a medical certificate at the employee's expense, after three consecutive days of absence, or earlier than that if there is good reason and the employer pays.

Also, where an employee has been absent from work as a result of having been diagnosed with COVID-19, an employer would be justified in seeking from the employee a medical certificate confirming their fitness for work.

In cases where the employee is required to remain at home for reasons other than their own health, an employer would be justified in seeking reasonable information, where necessary, to support the reason provided by the employee for their absence. The exchange of information in this regard would be consistent with the mutual duty of good faith.

If an employer has some uncertainty about an employee's eligibility for the Essential Workers Leave Scheme, they should talk to the employee about this to satisfy themselves. If the employer has good reason to remain unsatisfied, the employer could ask the employee to confirm in writing that the Ministry of Health criteria apply to them.

### **What if an employee insists on remaining away from work despite not meeting the Ministry of Health guidelines?**

An employer has an obligation to take all reasonably practicable steps to provide a safe workplace and should respond responsibly to this situation, including listening to the concerns raised and providing the employee with information about the basis upon which the employer is satisfied that the workplace is safe.

If an employee considers that there is a serious and imminent risk to health and safety they could potentially strike. However, there is a very high threshold that must be met before these actions are justified.

If an employee refused to come to work because they considered the workplace to be a risk, the question would be whether that concern was reasonable. If it was not, the employee would not be entitled to be paid for their absence from the workplace, and where there was an ongoing, unreasonable refusal to work, that could ultimately give rise to a disciplinary issue.

However, in the current situation employers would need to be sensitive to employee's genuine fears and concerns and taking disciplinary action would be unlikely to be justified in the absence of evidence that the employee was not acting in good faith.

In terms of how to treat the period of the employee's absence, in these circumstances the employee would not be ready, willing, and able to work and the employer would not, therefore, be obliged to

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pay the employee for the period of their absence unless some alternative arrangement, such as discretionary leave, was agreed. Where the employee does not meet the Ministry of Health guidelines, they would not be eligible for the Essential Workers Leave Support.

### **Can an employer ask an employee to take sick leave?**

An employer cannot require an employee to take sick leave. However, if the employer reasonably believes the employee should not be in the workplace, due to a serious and imminent risk to the health and safety of the employee or their colleagues, an employer can direct them to leave work after following a fair process.

If there is no evidence that the employee is in fact sick, the employer would be required to pay special leave for the period of the employee's absence.

### **Is the nature of the work performed or the work environment relevant?**

Yes. Only essential business, excluding local and central Government can access the Essential Workers Leave Scheme.

In terms of the employer's health and safety obligations, the work environment is relevant. Some work environments will be higher risk to people than others. For instance, the Ministry of Health guidelines advise that residents of aged care facilities are at higher risk, given aged care facilities are susceptible to the rapid transmission of viruses.

However, regardless of the degree of risk created by the workplace itself, it is the particular employee's (or those within their bubble) risk factors which are the key to their eligibility under the scheme

### **Can an employee who works in high risk essential services elect to use the Essential Workers Leave Scheme?**

Under the COVID-19 Essential Workers Leave Support scheme, it is employers who must apply for the scheme, not employees. Further, only essential workers who fit the criteria listed above are entitled to the payment. Therefore, if an employee does not meet the criteria, an employer would not be entitled to claim the Essential Workers Leave Support payment for that employee.

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## Paying employees over the Easter Break

### **Am I required to pay my staff who are not working during the Easter break?**

Entitlement to payment for a public holiday depends on whether the public holiday would have otherwise been a working day for the employee. If it would have been, the employee is entitled to be paid. If it would not have been, the employee is not entitled to be paid. Where it is unclear whether a public holiday would otherwise have been a working day, the Holidays Act requires the parties to try and reach agreement taking into account factors listed in the Act.

If the employee is not working because of the lockdown, arguably, the public holiday would not otherwise have been a working day for the employee because, irrespective of the public holiday, they would not have worked. On that basis, assuming the employee does not work on the public holiday, they would have no entitlement to be paid for the public holiday. However, where the employee is continuing to be paid during the lockdown even though they are not working, that arrangement should apply equally to the public holidays.

### **What do you pay staff who are working during the Easter break?**

Where an employee is required to work on Good Friday or Easter Monday, the Holidays Act 2003 requires an employer to pay that employee the portion of their relevant daily pay or average daily pay for the actual time worked on the day, plus half that amount again.

If it would otherwise be a working day for them, they also receive an alternative day's holiday, to be taken at a later date.

### **Can I require staff to work on Easter Sunday?**

Easter Sunday is not a public holiday under the Holidays Act 2003. Therefore, if an employee works on Easter Sunday, there is no entitlement to time and a half, and no entitlement to an alternative holiday. For most employees Easter Sunday is no different from any other Sunday, and the employee's employment agreement determines whether they can be required to work that day, and what they get paid for it.

However, an employer cannot require a **'Shop Employee'** to work on Easter Sunday. A Shop Employee is an employee who works in or from a shop. If an employer wants a Shop Employee to work on Easter Sunday they must advise the employee 4 to 8 weeks before Easter Sunday that the employee is entitled to refuse to work on that day. The Shop Employee then has 14 days to give the employer notice that they refuse to work on Easter Sunday.

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An employee does not have to give a reason, nor can an employer treat an employee any differently for refusing to work on Easter Sunday, otherwise an employee would be entitled to raise a personal grievance.

## Increase in minimum wage

### **Do I need to increase the wages of employees for whom I am currently paying the minimum wage?**

The minimum wage has increased to \$18.90 from 1 April 2020.

An employer is required to increase the wages for any staff member who is currently working and is being paid below \$18.90 (gross) per hour.

However, for employers with staff who are not currently working at all due to Alert Level 4, there is no obligation to increase the wages, as the requirement under the minimum wage act is for *work actually performed*.

Therefore, where the employee is unable to work due to the lockdown, the employer is under no obligation to pay at least the minimum wage, but can, instead, continue paying them their usual pay (which may, as a result of the increase in the minimum wage, be less than the minimum wage), or agree with that employee to pay them any amount, or if they have applied for the wage subsidy, at least that amount. Once these employees return to work, their wage will need to be increased to ensure they are paid at least \$18.90 for every hour of work performed.

## Further questions in respect of the Wage Subsidy

### **Does an employer have to top up a casual employee's wages to 80 per cent?**

A truly casual employee is employed on a per assignment basis. They would be entitled to be paid in full for any existing assignment that they have been offered, but not beyond that. An employer could only reduce the employee's pay to 80% for the duration of the assignment with the employee's consent – otherwise they must be paid in full.

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**Some of my employees earn less than \$585 a week and some earn more - should I pay 80 per cent of their normal rate regardless?**

No. Employees who earn less than the subsidy rate per week, should receive their full pay, but not more than that.

For employee who earn more than the subsidy amount per week, employers must make best efforts to pay their employees at least 80% of their usual earnings in order to claim the wage subsidy and must pass the full subsidy on – but this does not mean that they can unilaterally reduce employees' pay to this level without agreement. The Government has made it clear that normal employment laws continue to apply.

**As an employer, am I expected to pay back part of the wage subsidy if the lockdown lasts 4 weeks, not the 12 weeks covered?**

The wage subsidy is not just for the period of the lockdown, rather it applies if the employer expects there to be a reduction in revenue of at least 30% for up to 12 weeks. The WINZ website provides that an employer will be liable to repay the subsidy or part of it if they “stop being eligible”. We would therefore expect that if the employer’s business had a change in circumstances which meant a 30% reduction in revenue was no longer expected, or if any employee leaves the business during this time, it may be liable to pay some of the subsidy back.