

COVID-19 Information for businesses and landlords

Introduction

The economy and life for many New Zealanders has been disrupted by the COVID-19 virus. We know this is affecting everyone. The faster our economy can get back to normal the better for us all but there are a lot of things to think about. Below is some general information about the implications for employment, commercial and residential tenancies. If you have any questions or want specific advice on these matters, please contact us.

Employment Matters

Based on recent contact from our clients, here are a selection of questions that might crop up.

After lockdown do staff just return to work as normal?

That will depend on government directions but generally, yes. There have been no changes to employment law as a result of Covid-19 so all usual obligations in employment agreements and under employment law apply. Employers cannot change the terms of employment without consent - changes must be reached by agreement after good faith consultation. If changes have been agreed these should make it clear whether they are temporary or permanent.

We have received the government wage subsidy, but we are still struggling, can we make staff redundant?

“Redundancy” is when you can no longer employ a person, so you end their employment agreement. It must be handled carefully. If you received the subsidy for an employee, you cannot make that person redundant during the twelve-week subsidy period. You can negotiate reduced hours and reduced payment, but you must use your best efforts to continue to pay at least 80% while receiving the subsidy. This should be recorded in writing without putting the person under duress, though some haste is justified given the pandemic. Some employers may need to make staff redundant after the twelve-week period if there are major disruptions to their usual customer base or supply chain and no additional support is available. Tourism is an obvious example.

The process is critical. Specific advice is needed but in summary:

1. you need a valid reason – not just “Covid-19” – why is the position no longer viable?
2. collate all relevant information about the redundancy proposal and consider any reasonable opportunities for redeployment
3. give the employee this information and a reasonable chance to respond
4. act in “good faith” – be open and honest and consult
5. pay any notice period in the employment agreement – for example, payment for two weeks after the final decision to make the position redundant. This means you need to plan and forecast now.

What about workplace health and safety?

Employers must always consider the health and safety of their staff. Staff have the right to stop work if they reasonably consider their workplace is not safe, but ongoing refusal to work can become a disciplinary matter. For Covid-19, safety precautions may include monitoring the Ministry of Health website and following the guidelines, ensuring appropriate physical spacing, allowing ongoing remote working, reducing visitors, regular hygienic cleaning of surfaces and key equipment, providing sanitiser and appropriate protective equipment. Mental health is also important so respect for the boundaries between home and work is needed.

What if staff have children and school/daycare is closed but work is open?

The government has closed education facilities. This may continue for some time. We know from personal experience that it is challenging to work and care for children. Employers need to make reasonable accommodation to support all staff. For those with children this might include ongoing remote working,

agreed periods of availability, revised communication arrangements, and limiting meetings. For some, a temporary reduction in working hours or reassignment of duties may be appropriate. All changes to an employment agreement require good faith negotiation and agreement.

If someone is diagnosed with Covid-19, can we tell other staff?

Yes, if you need to but this should be assessed based on the specific facts. Do not name the person if it is not necessary. Avoid disclosing personal information beyond what is necessary and try to get consent from the affected employee before disclosure. You can balance privacy against the risk to other staff – if someone is likely to have been exposed to Covid-19 they need to be told so they can be tested and go into isolation. Staff may need the specific details of where or when the exposure occurred for contact tracing but let the officials guide that process.

I think I was unfairly treated by my employer, but I can't afford a lawyer – what should I do?

Getting good advice can take time but is often worthwhile so you can contact us if you have questions. There is a lot of information available online but not all of it is correct. Focus on credible sources rather than social media or what your friends tell you – the MBIE website is great, especially for employees: www.mbie.govt.nz. The first place to look is your employment agreement (if you can find it!). Think carefully about what the problem is, what you know and what you don't know and what outcome you would like. If you gather the relevant information there is less work for us to do which saves you money! For some questions we may refer you to a specialist employment lawyer.

Tenancy and Lease Issues

Lease payments-Residential

The tenant is required to meet their obligations in terms of rental payments. A Landlord may consider a reduction or a deferment of rental to assist a tenant, as a long-term commitment to keeping a good tenant. They should first recommend the tenant approach WINZ for assistance. The rental must be in arrears for 60 days before a Landlord can apply for an order to remove a tenant. It is unlikely a tenant will be removed during a lockdown period.

Lease payments -Commercial

The treatment of lease payments by commercial tenants will depend on their circumstances. If the lease is the most recent Auckland District Law Society version (used from November 2012 onwards for most commercial leases) then a fair proportion of the tenant's payments will abate if they are unable to fully carry out their business from the premises. Other leases may not have the same provisions, some parties may seek relief in terms of legislation, there is a very high threshold to prove a lease is frustrated (non-access for 4 weeks is very unlikely to be a frustrating event), and the consequences of frustration may not be what the parties wanted, as the lease terminates on the happening of a frustrating event.

We are seeing some quite wide-ranging variations in negotiations between Landlords and Tenants as to what is considered a fair proportion. The New Zealand government has not put any restrictions or rules around what Landlords and Tenants do in relation to their contractual commitments. The Australian government however have set up a mandatory code of conduct requiring Landlords to waive or defer at least 50% of the rental.

Sale of property with a residential tenant to vacate.

If you have sold your property and given notice to your tenant to vacate during or after the lockdown period that notice will be of no effect. You are unable to give notice until the expiry of 90 days from 26 March 2020 (expiry 24 June 2020). Then the usual notice periods will apply. If a tenant has given notice to vacate, they can withdraw their notice. You will need to carefully negotiate with the tenant an agreement in writing to vacate or wait out the time period to give notice. You will also need to negotiate with your purchaser a satisfactory outcome such as the purchaser taking the property subject to the tenancy or delaying settlement.

Inspections and Urgent Repairs.

For both residential tenancies and commercial leases, you are unable to inspect the property. You may reach agreement with your tenant to complete a video inspection. Any urgent repairs should be carried out by a professional tradesperson, and they must ensure they meet the requirements of distancing from other persons.

Who gets relief?

The government has signalled this week it will extend the notice periods for default under (non-residential) leases, and for default under mortgages. In terms of the Property Law Act a Landlord is currently required to give 10 working days' notice to a commercial tenant that is 10 working days in arrears of payments before they can terminate the lease. Both of those periods will be extended to 30 working days.

Currently a mortgage lender under the Property Law Act must give 20 working days' notice to a borrower in default before they can call in a loan, that period is being extended to 40 working days. The extension of the periods is to allow borrowers (potentially some Landlords), and commercial tenants time to reorganise their affairs before loans are called in (mortgagee sales) or leases are terminated.

At this stage there are a lot of commercial Landlords and tenants affected by the Lockdown at Alert Level 4. It may be that this only affects them for the 4 weeks, and they can return to the standard contractual terms of their lease next week. However, some may be affected in differing ways for some time to come, and careful consideration needs to be given to the legal position of Landlords and Tenants to balance the needs of both parties going forward in these unusual times.