



BRIEFING

Advice on options to support the response of employers and workers to COVID-19

Date:	6 March 2020	Priority:	High
Security classification:	In Confidence	Tracking number:	2626 19-20

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway Minister for Workplace Relations and Safety	<p>Note that minimum leave entitlements are unlikely to be sufficient for many workers</p> <p>Note special paid leave can be used, but cannot be required</p> <p>Note the key gap is cost for some employers, and there are options you can consider for state sector employers to absorb the costs or financial assistance for targeted workers or firms</p> <p>Discuss with your Cabinet colleagues whether to progress further work on any of these options</p>	N/A

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Katherine MacNeill	Acting General Manager, Labour and Immigration Policy	04 896 5810	Privacy of natural persons	✓
Simon Cooke	Senior Advisor, Employment Standards Policy	04 901 8173		

The following departments/agencies were consulted:
N/A

Minister's office to complete:

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

Comments



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Purpose

Initial advice on issues and options on pay for leave associated with COVID-19.

Recommended actions

The Ministry of Business, Innovation and Employment (MBIE) recommends that you:

- a **Note** that in the context of extended absences from work stemming from COVID-19, minimum leave entitlements are not likely to be sufficient for many workers outside the public sector
Noted
- b **Note** that special paid leave can be used if employers can afford it, but there is no clear legal mechanism to require employers to use this mechanism (over other leave balances or unpaid leave)
Noted
- c **Note** the key gap is probably cost for some employers and to address this you should consider:
- a. Government setting expectations that state sector employers to absorb the cost of providing special paid leave to employees, and/or
 - b. A limited subsidy for targeted firms or 'special paid leave' worker financial assistance for targeted workers in the private sector.
- Noted*
- d **Direct** officials to report back to Ministers with further advice on whether to progress the options in recommendation (c) and on financial implications, by Friday 20 March 2020.

Yes / No


Katherine MacNeill
Acting General Manager, Labour and
Immigration Policy
Labour, Science and Enterprise, MBIE

6 / 3 / 20

Hon Iain Lees-Galloway
Minister for Workplace Relations and
Safety

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Key messages

- There are two key objectives for consideration of leave and pay for leave for time away from work in the COVID-19 context:
 - Workers stay at home when required (whether for self-isolation or because they are sick or caring for dependents who are self-isolating or sick). This is for public health reasons, worker wellbeing, and workplace health and safety.
 - Workers and firms should not be disproportionately penalised financially by complying with public health measures which are in place for the public good.
- Existing health and safety settings support the public health response to COVID-19, by allowing employers to require workers not to come to work if they are sick or diagnosed with COVID-19, or if they have been advised to self-isolate.
- Some employees will be willing and able to work from home, and this approach will allow for both public health and income security objectives to be met for some workers.
- However, many workers will not be able to work from home, and will not have sufficient sick leave or annual holiday leave accumulated to fund the length of absence that is likely to be required if an employee is directly or indirectly impacted by COVID-19.
- Employers can, at their discretion, offer various forms of 'special paid leave' to cover lengthier absences from work that are beyond the employee's control, but many will struggle to afford this and some may not choose to do so.
- Ministers may also consider it is undesirable for employees to use their sick or annual leave to address this gap. This is the view of the Council of Trade Unions. MBIE considers that workers should not bear all of the costs of complying with this public health directive, but this is currently likely for some workers, particularly vulnerable and low paid workers.
- To ensure the right outcomes, you may wish to consider:
 - For state sector employees: Set Government expectations for state sector employers to provide special paid leave to employees who are forced to take an extended period away from work (and not working) because of COVID-19.
 - In the wider labour market: provide financial assistance for firms and/or workers to allow workers to be paid for some/all of the duration of a COVID-19-related absence, without unduly drawing down on other leave balances.
- If you wish to progress any of these options, a range of design choices need to be considered, e.g. how targeted or broad any scheme should be, and the appropriate delivery mechanism for any financial assistance for firms or workers. You will want to ensure any scheme is defined for COVID-19 and not for wider work disruption from other causes (droughts etc), is time limited, does not incur significant deadweight cost (replacing employer efforts), and mitigates any moral hazard risks.
- Other options are available to address marginal issues relating to our statutory leave settings, but in general these options are complex, would require legislative change, and would not address the fundamental financial gap that is likely to prevent workers from being paid through COVID-19 disruptions. Changes to legislative entitlements would be slow and the key issue is pay for such leave. You are not likely to legislate for special paid leave fully funded by employers in these circumstances.

Context

1. Our advice on 4 March gave an overview of how workers affected by COVID-19 are covered by employment and health and safety law, including paid leave entitlements. In the current context of a relatively confined impact of COVID-19 in New Zealand, our workplace laws generally provide for:
 - Health and safety risk assessments by businesses and workers that are grounded in legal duties under the Health and Safety at Work Act.
 - A range of options for employers and employees to consider, for categorising and remunerating time away from work.
2. However, in the context where there is a real possibility of many staff being required to self-isolate for at least 14 days, it is inevitable that many staff will exhaust all their available leave balances (whether sick leave or annual leave). This increases the likelihood of employees having a financial incentive to return to work, even if this contravenes public health directives. If this was to happen at a large scale, it would raise the possibility of labour market settings undermining (or at least not supporting) the public health objectives that underpin the government's COVID-19 response.
3. While employers can, at their discretion, offer various forms of special paid leave to cover lengthier absences from work that are beyond the employee's control, many will struggle to afford this. The key gap in this scenario is financial, rather than any regulatory barrier.
4. We therefore consider that developing financial support options to assist businesses to do right by their employees, through a period of significant disruption, should be the first priority for further work. There are additional options to address possible gaps in our leave settings (e.g. marginal changes to our sick leave settings), but these are complex and involve broader risks and legislative change. We do not recommend pursuing these options as a priority at this stage.

Developing options to assist businesses to pay workers through COVID-19-related absences

5. Work to develop options for an economic support package for businesses severely affected by COVID-19 is already underway. This will include looking at a variety of economic support levers, including wage subsidies and other forms of business support. We consider that worker-focused options should be developed in conjunction with this work, to ensure workers continue to get paid when sick, self-isolating, or caring for dependants who fall into these categories.
6. SSC's advice to the public service is that special paid leave should be used where people are not sick or have no further sick leave available. This could be considered best practice.
7. Broadly, we think the priority for further policy development should be on options that support firms to follow best practice for paying workers who are forced to be absent from work due to COVID-19. The two main (complementary) options are to:
 - set Government expectations that state sector employers absorb the cost of providing special paid leave to employees; and/or

- provide a limited subsidy for firms or 'special COVID-19 paid leave' financial assistance for targeted groups of workers in the private sector.¹
8. With respect to any financial assistance to the private sector, there will be a number of design choices to work through to ensure that workers and their employers are appropriately supported and to avoid unnecessary deadweight cost or moral hazard issues, including:
- How broad or targeted any subsidy scheme should be. For example, you could target this by firm circumstances, firm size, income level, or type of worker.
 - Payment mechanism (this would need to be an already-established mechanism, eg MSD, ACC or IR, to expedite delivery of support payments).
 - The quantum of financial support that should be provided to workers who are sick or self-isolating or unable to work because of workplace closures, and whether this should be differentiated according to the worker's income.
 - Choices around how the support should be delivered, e.g. directly to workers or through their employers.
 - How workers that are not employees can be included in any support package (particularly if the support is in any way tied to entitlements that pertain only to employees).
 - Contribution expectations for employers.
 - Conditions that should attach to receipt of any worker support package (if this is provided to businesses), while not discouraging take up.
9. We recommend that you direct officials to complete work on the design of possible worker support options, in conjunction with the wider economic support/stimulus work that is currently underway.

Other potential issues relating to leave and leave pay settings

10. In general, unless an employer elects to pay over and above the minimum legal requirements, payment for time spent away from work and not working will depend on the employee both:
- Being eligible for a category of leave that can lawfully be applied to the absence in question
 - Having a current entitlement to the type of leave in question (ie "time in the bank", or an ability to take leave in advance). This becomes relevant only if, in the first instance, eligibility is not an issue.
11. Potential issues we have identified with our leave settings are:
- **The minimum entitlement to sick leave is only five days per year** (entitlement issue). Where sick leave is available, the length of absences required by COVID-19 is likely to be such that the entitlement is exhausted. This is problematic without a financial assistance scheme.

¹ If you are concerned about the 'funded sector', ie those who are not employees of the state, options for the private sector would address these workers.

- **Eligibility to paid sick leave only kicks in after 6 months working for a particular employer** (eligibility and entitlement issue). Employees who have recently changed jobs will likely have no sick leave entitlement, and employees in “vulnerable” categories (e.g. casual employees) are unlikely to have an entitlement. This issue has been identified by the Holidays Act Taskforce for improvement.
 - **Sick leave is restrictively defined in the Holidays Act** (entitlement issue). Its use is confined to situations where the employee (or their dependant) is sick or injured. The Act does not clearly allow sick leave to be used in situations where an employee is self-isolating, but not actually sick. (This limitation does not, however, apply to any ‘sick leave’ provided over and above the minimum entitlement, which is purely a matter of contractual agreement between the parties.)
 - **There may be equity considerations** for employees who use their annual holiday entitlements in order to be paid through a time when they were unable to work through circumstances beyond their control, versus those who are paid out of discretionary benefits (‘special leave’) or contingent benefits (i.e. benefits that are only available in some circumstances, such as sick leave).
12. There are options that may address, or partially address, these issues. These include:
- Issue non-legislative guidance that sick leave should be used in circumstances that are not strictly captured by Act (e.g. self-isolation).
 - Amend the Holidays Act to extend the sick leave entitlement to more than 5 days (e.g. to 10 days as favoured by union movement). This could be targeted.
 - Amend the Holidays Act to allow sick leave to be used in circumstances where the employee (or dependant) is isolating or quarantined per public health guidance.
 - Amend the Holidays Act to create an additional, standalone category of leave entitlement for circumstances where employee (or dependant) is isolating or quarantined per public health guidance
13. However, these options involve legislative change, could be slow to implement, and would only address the funding issue if you legislated for employers to pay the full costs, which appears inappropriate in the current circumstances given your objectives.
14. We can provide further advice on these options if you wish, but we do not recommend pursuing these options as a priority at this stage. Direct financial assistance is likely to be the fastest, simplest, and most effective measure to deal with the presenting concerns. It can also be scaled up or down very rapidly as the situation develops.

Next steps

15. We suggest that you discuss with your Cabinet colleagues whether further work on the financial assistance options presented should be progressed.
16. Note that MBIE has not yet discussed this paper with officials from other agencies, but further work would require input from The Treasury, SSC, and the Ministry of Social Development at a minimum.