



# COVID-19 GUIDANCE

*VARYING TERMS AND CONDITIONS OF EMPLOYMENT*

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## VARYING TERMS AND CONDITIONS OF EMPLOYMENT

### INTRODUCTION

As a general rule, contractual terms cannot be varied unilaterally without the consent of both parties.

Therefore, if an employer proposes to change the terms and conditions in an individual employment agreement (**IEA**) such as employees' hours of work, or their remuneration, to manage the impact of COVID-19 on the business, it would need to obtain consent to those proposed changes from each employee.

The practical way of doing this is by sending a letter to the employee which identifies the proposed changes, and explains the rationale for those changes, and seeks the employee's consent.

In some cases, an IEA might reserve the power to make some changes unilaterally, e.g. changes to an employee's hours of work. In this case, an employer must still act fairly and reasonably before doing so.

### PROCESS

The ability to vary an employment agreement is governed by the Employment Relations Act 2000 (**ERA**).

The ERA provides that when an employer wishes to vary an employee's IEA, they must consult with each employee about the proposed changes. As part of this process, the employer must:

- a) give the employee a copy of the intended variations in the context of the clauses in their IEA;
- b) advise the employee that they are entitled to seek independent advice about the proposed variations; and
- c) give the employee a reasonable opportunity to seek that advice, and consider any issues. They must also be given the opportunity to raise any issues with the employer.

The employer must keep a signed copy of the IEA (as varied) or the signed variation letter.

Given the context of COVID-19 and the fact that it has been very unsettling for employees, you may wish to arrange a video conference with affected employees to give further context as to why the business is proposing the variation. As much information should be given as possible. If the business is considering the possibility of restructuring if it cannot achieve cost savings through a variation, you should explain the variation is being offered as an alternative to a possible restructuring scenario.

There is no "one size fits all" process to vary terms and conditions of employment, and the timing of COVID-19 impacts and vintage 2020 increases complexity. We recommend you seek specific legal advice to commence this process.

### LEGAL OBLIGATIONS

As part of the consultation process, the business must comply with section 63A of the ERA.

Section 63A of the ERA provides employees with protection against "unfair bargaining". The provisions protect an employee where the employer is shown to either have known or ought to have known that the employee entered into the agreement in specified circumstances. These circumstances include the inability to adequately understand the provisions or implications of the agreement by reason of some diminished capacity; the reliance on the skill, care or advice of the employer; the inducement into the agreement by oppressive means or where the employee was not provided with information or given the opportunity to seek advice before entering into the agreement.

Further, section 63A of the ERA also states that an employer must consider and respond to any issues that the employee raises in respect of the variation "in good faith". This means that if employees raise additional points for negotiation, an employer must consider and respond to these issues (which could potentially extend out the negotiation period). This may also mean that a business cannot enter into negotiations with employees with a "closed mind" to the possibility of amending the proposed variation to IEAs in response to employee feedback.

## VARIATION LETTER

The letter given to employees should:

- a) Give some context to the reason for the variation. For example, explain the impact that COVID-19 has had on the business.
- b) Set out clearly what the proposed changes are. A table showing the “before” and “after” of a clause can be helpful to show this. Note that the changes should be described as a proposal, rather than a decision that has already been made.
- c) Make clear that all other terms and conditions of the employment agreement remain unchanged.
- d) Include a statement that the employee is entitled to seek legal advice regarding the proposed variation.
- e) Allow for the employee to provide their consent, for example providing a form for them to return. The consent form should contain a declaration that the employee agrees that they have been given the opportunity to seek legal advice.
- f) Set a reasonable timeframe for the form to be returned by.
- g) Provide contact details for the employee to call if they wish to discuss.

## TOP TIPS – WHAT TO DO AND WHAT NOT TO DO

✓ Give employees an opportunity to seek legal advice. Employees should be given at least 5 business days.

✓ Check in with employees who do not respond initially to see whether they have any questions

✓ Consider any feedback or requests in good faith

✓ Word the variation letter as a proposal

✓ Offer Employee Assistance Programme (EAP) services to employees if the business has these services available

✓ Seek legal advice on your process and communications to employees

✗ Process payroll changes before you have received an employee’s consent

✗ Give employees an unreasonable time frame to seek legal advice.

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