

Proposed temporary variation to Employment Agreement and consultation

27 July 2020

[PLEASE NOTE. Restaurant Association members are strongly advised to seek guidance from the employment team on 0800 737 827 if you have any questions. *The Restaurant Association has taken all reasonable care to ensure that the information materials contained on our website are true and correct at the time of publication. The information provided is general information only, and is not intended to constitute legal advice. Therefore, the Restaurant Association accepts no responsibility for any loss, errors or omissions which may arise pertaining to such reliance.*]

Please read this Guide and refer to the **templates** included in the second half of this document.

A. Guide:

In moving between Alert levels, for many employers looking to maintain the viability of their businesses, the current terms and conditions for employees may not be feasible based on changes to operating requirements and current or expected reduced levels of customer demand.

In general, most employees are likely to be 'ready, willing, and able' to work. That means that an employer's obligation will be to provide the agreed hours of work, and the agreed wage or salary set out in the employment agreements. However, due to the continuing economic impacts of COVID-19 and any restrictions or impacts of any applicable Alert levels, many employers may be unable to provide sufficient work. This does not allow Employers to avoid their obligations to pay normal wages or salary and provide agreed minimum hours.

However, factors to consider are the immediate impact to your business, what work will be available within the current Alert level, and what an employer should do with regard to its employees in relation to each level.

This might include negotiating some agreed temporary changes about how employees go about their work, how much work there is, and how much your employees will be paid for it.

A process of a **proposed temporary variation** requires review of each potentially affected employee's employment agreement before this is commenced.

A variation process with agreement reached through **careful consultation is key**. *This means that you need to specifically gain your employee's agreement to any proposed temporary variation by way of a robust consultation process.*

In addition, the temporary change you are agreeing to, needs to be as certain as possible under the circumstances with a clear start and end point such as a change of Level or a financial performance indicator.

Consideration also needs to be given to a variation being for a short-term or a longer-term, and what flexibility it can and should contain. These require careful consideration of the employment agreements, and how an employer should go about varying agreements, so that it has flexibility where possible, but both parties can also rely on and enforce the agreement.

Finally, there is no one size fits all, each variation needs to be tailored to the particular employment agreement and circumstances to be enforceable.

In general, if it is a material change to the employee's employment, a full **restructure** may be an alternative, or further option for you to consider if you are proposing potential disestablishment of roles, or redeployment into a completely different role. However, you will also need to take into account the overlay of any Wage Subsidy where the focus is on retention of employees. More information on restructures is on our website [HERE](#) and members are encouraged to contact the Helpline on 0800 737 827 if you are unsure which approach is best for your business under the circumstances.

In summary:

- These unprecedented, highly challenging times do not give an employer a unilateral right to ignore employment laws, including the agreement it has with its employees. Although the economic impact of COVID-19 may seem a compelling reason for an employer to act now without employee agreement, the principles of **good faith** still apply.
- In this current environment and in the interests of retention and as an alternative to a full restructure, it may be possible for variations to an employee's Employment Agreement to be made **if a correct and robust process is still followed and with the agreement of both you and the employee.**
- A robust consultation process may permit temporary variations as the resulting outcome.
- **Any process needs to be in good faith, with very open communication.**
- *Overall, the two pronged ERA test is: is what the employer did in good faith and what a fair and reasonable employer would have done in all of the circumstances.*

Any resulting variation from the consultation process must be in writing and the variation templates on the following pages may be adapted for use in these situations.

B. Overview of the Templates:

Letter Template 1:

INVITATION TO MEETING – Temporary Proposed Variation to your Individual Employment Agreement

- Minimum of two working days' notice required for the meeting.
- A minimum of two working days is recommended to consider all feedback after the meeting. Further time may be needed to consider specific feedback.

Letter Template 2:

PROPOSED OUTCOME – Temporary Proposed Variation to your Individual Employment Agreement

- Minimum of two working days required for consideration of the feedback to the proposed outcome and before confirming the outcome.

Template 3:

CONFIRMED OUTCOME Confirmation of Temporary Variation to Individual Employment Agreement (When agreement on the variation has been reached)

- Minimum of 48 hours recommended for return of signed letter

Template 4:

CONFIRMED OUTCOME Confirmation of Temporary Variation to individual Employment Agreement (When agreement on the variation has *not* been reached)

Letter Template 1: INVITATION TO MEETING – Temporary Proposed Variation to your Individual Employment Agreement

Employee name

Employee address

Date

Dear name,

Proposed Temporary Variation to your Employment Agreement - Invitation to Consultation

[Edit the below as it relates to your specific business and financial situation].

As you will be aware, New Zealand is currently in Alert level [insert which level] due to Covid-19 and this as well as the ongoing economic impact has significantly impacted the way we can operate our business.

Based on this, we have been considering several potential options to temporarily reduce operating costs for the business, and utilising our best efforts to ensure its commercial viability, and moving forward through the different Alert levels. It is important for us to make our best endeavours to retain, as well as support, our staff through this time.

Unfortunately, even with the Government Wage Subsidy package including other types of assistance, we do not anticipate that the business will be sustainable under the current Company structure. Combined with lost and limited revenue, including all best efforts to date we have undertaken to reduce operating costs, this will potentially mean extreme further financial hardship for the Company.

Even now that we are in Alert Level [insert which] we have not returned to pre-Covid-19 trading levels. We are therefore trying to think of ways to survive this pandemic, so we stay trading, adapt to the situation and keep

everyone retained and employed, as well as still in business until the situation improves.

In the interests of being ready in whatever way we can as well as being viable moving forward, we are inviting your feedback on this following temporary proposed change to your Individual Employment Agreement.

In summary, the purpose of this letter is to outline the proposal of [Company name] Limited, trading as [insert trading name] (the Company) to the proposed changes to your individual employment agreement dated [insert date] and subsequent variations [insert date(s) where applicable].

[Choose which option best applies to your situation and edit as needed. Delete reference to any options that are not required. Should you wish to make any other significant amendments, please contact the Restaurant Association Helpline first].

Option 1: Proposal to temporarily vary duties

Use this if you are proposing a change to duties. Check that this clause is included in your Employment Agreement. We have outlined the wording of the clause from the Restaurant Association employment agreement template.

We are proposing to do this in accordance with clause 1 of your current Individual Employment Agreement with [The Company] dated [date] (**Employment Agreement**). That clause states that your Position Description may be amended by us and that you may also be required to perform additional or alternative duties to those set out in your Position Description.

We have attached an amended proposed job description for your review.

This proposed temporary variation as below to the terms of your Employment Agreement would commence after consultation, and when you countersign any

later letter of confirmation and would come to an end when [Name of employer] requires you to return to your normal duties.

If this proposal was implemented, you would agree that you would undertake the new duties as per the suggested job description attached to this proposal including the details of any other proposed variations to your employment agreement.

Example 1: Delivery duties AMEND AS REQUIRED

1. Your temporary new duties would include delivering food and meals to customers in the [INSERT] region.
2. You would use your own vehicle to deliver our food **OR**
3. You would use our provided vehicle to deliver our food
4. You would confirm that you have a full Drivers Licence.
5. [Name of employer] would reimburse you \$0.79 for each kilometre you travel in your own vehicle while carrying out your duties.
6. You would accurately record your kilometres travelled for delivering our food during your work hours and be able to verify the details if asked (such as photos of your odometer and screen shots of your travel locations and path on google maps or similar).
7. You would agree to know and comply with the vehicle policy [\[LINK IS HERE\]](#) attached to this letter.

Example 2: Your temporary new duties would include: [LIST DETAILS]

1. [DETAIL]
2. [DETAIL]

Option 2 Proposal to temporarily vary your terms of your Employment Agreement. Use this if you are proposing a change to other terms such as hours and/or remuneration. Check that you have this clause in your Employment Agreement - Clause 33 of the standard Restaurant

Association Employment Agreement which states “The terms of this Agreement may be varied by agreement of both parties in writing.”

We are proposing this temporary variation to your Employment Agreement in accordance with **Clause 33 [check this matches the clause]** of your current Individual Employment Agreement with **[The Company]** dated **[date]** (**Employment Agreement**). That clause states that **“The terms of this Agreement may be varied by agreement of both parties in writing.”**

This proposed temporary variation to your Employment Agreement would commence only after full consultation with you and after we both reach agreement.

In good faith, the below terms propose temporarily varying the terms of the Employment Agreement as follows.

Insert specific detail of what you are proposing to vary e.g:

- **Hours of work:**
 - Include what the current/usual work hours are and what you are proposing to change these to. e.g.
 - Your usual hours are [insert hours] per week and your new proposed temporary work hours are [insert hours] per week.
 - **Remuneration:**
 - Include what the current/usual remuneration is and what you are proposing to change this to. E.g.
 - Your current salary is \$**INSERT** (gross) remuneration per annum.
 - Your proposed temporary new salary is \$**INSERT** (gross) remuneration per annum.
- OR**
- Your hourly rate is \$**INSERT** (gross) per hour.

- Your proposed new temporary hourly rate is \$INSERT (gross) per hour.

At a minimum we will ensure that you receive any applicable Wage Subsidy that the Company is in receipt of for you dependent on your individual entitlement.

- **Any other areas:**

- Include details and what you are proposing to change this to.

Option 3 Proposal to temporarily vary terms with no variation clause in the Employment Agreement. Use this as a last option if you are proposing a change to other terms and do not have a variation clause in your Employment Agreement.

In good faith and in line with our best efforts to retain our employees, we are temporarily proposing this variation to the terms of your Employment Agreement. Insert specific detail of what you are proposing to vary e.g:

- **Hours of work:**

- Include what the current/usual work hours are and what you are proposing to change these to. E.g.
- Your usual hours are [insert hours] per week and your new proposed temporary work hours are [insert hours] per week.

- **Remuneration:**

- Include what the current/usual remuneration is and what you are proposing to change this to. E.g.
- Your current salary is \$INSERT (gross) remuneration per annum.
- Your proposed temporary new salary is \$INSERT (gross) remuneration per annum.

OR

- Your hourly rate is \$INSERT (gross) per hour.
- Your proposed new temporary hourly rate is \$INSERT (gross) per hour.

At a minimum we will ensure that you receive any applicable Wage Subsidy that the Company is in receipt of for you dependent on your individual entitlement.

- Any other areas:

- Include details and what you are proposing to change this to.

Delete the above options that do not apply and ensure that you have amended the options you are using.

This proposed temporary variation to your Employment Agreement as outlined would commence only after full consultation with you and after we both reach agreement. We want to make it clear that we have not made any decisions about this proposal, and will not do so, until you have had the opportunity to provide your feedback.

Any such variation to your Individual Employment Agreement is proposed to be subject to regular review given that this is a proposed temporary measure.

With the exception of the above proposed changes, all other terms and conditions in your Employment Agreement would remain unchanged and in force.

You are invited to attend a meeting at [00:00am/pm] on [day][date][month] 2020, to be held via [insert alternative means to hold the meeting – e.g. Facetime, Skype, Zoom, video conference or some other form of alternative communication]. [Allow two working days for this meeting date from the presentation of this letter.]

You are entitled to bring a support person and/or representative to the meeting. If you intend to do so, please provide us with the details any individual(s) prior to our meeting. Following the meeting, we will take your feedback and comments into account, prior to any potential proposed final decision being made.

The purpose of the meeting is to discuss the proposed changes to your role, in detail, including receiving your feedback regarding the proposal and any ideas you may have about how to sustain the business in these unprecedented times.

We can appreciate this might be a difficult situation and would like you to know we are here to provide support to you if needed.

In the meantime, if you have any questions, or require further clarification, please do not hesitate to get in touch with me on my mobile phone [insert number] and/or via email at [insert email address].

If you have any questions, please let me know. I look forward to discussing your thoughts, feedback and comments.

Yours sincerely,

[insert [Employer Name]]

[insert [Position]]

[insert [Company name]] trading as [Trading name]

Letter Template 2:

PROPOSED OUTCOME – Temporary Proposed Variation to your Individual Employment Agreement

Employee name

Employee address

Date

Dear Name,

Temporary Variation to your Employment Agreement – Proposed Outcome of Consultation

As we outlined in our letter of [insert date] we are trying to work and continue to conduct business in this very difficult environment. As part of this and trying to adapt to the situation and keep everyone employed, we proposed the following changes to your Employment Agreement on [insert date]:

[insert the proposed changes/variation from the previous letter]

We received your feedback as follows on [insert date]:

[insert the specific feedback from the Employee and any other relevant feedback]

We have taken into account all your feedback and we very much appreciate your support at this difficult time, and we thank you for your input on this.

We therefore propose that the above temporary changes/variation are implemented with your agreement.

We propose that the temporary variation outlined above would remain in force until [insert specific event, circumstances, or time (6 months maximum is reasonable)]. However, this is subject to regular review and further consulting with you if this changes and as the viability of the trading environment evolves.

If you have any questions, please let me know. Please provide further feedback on the above proposed temporary variation to your Employment Agreement by email to [insert email] by [insert time] [insert day] [insert month] 2020. Please let me know your further feedback by [insert two working days from the date of this letter]

Yours sincerely,

[insert [Employer Name]]

[insert [Position]]

[insert [Company name] trading as [Trading name]]

Letter Template 3:

Confirmation of Temporary Variation to your Employment Agreement (When agreement on the variation has been reached)

Employee name

Employee address

Date

Dear Name,

Confirmed Temporary Variation to your Employment Agreement

As we outlined in our letter of [insert date of first letter sent to employee] we are trying to work and continue to conduct business in this environment. As part of this and trying to adapt to the situation and keep everyone employed, we invited your feedback on the proposed following changes to your Employment Agreement:

[insert the proposed changes from the previous letter]

We received your feedback on [insert date] as follows:

[insert the specific feedback from the employee]

We have therefore reached agreement and we very much appreciate your flexibility at this difficult time, and we thank you for your input on this.

With the exception of the above changes, all other terms and conditions in your Employment Agreement remain unchanged and in force.

We propose that the temporary variation outlined above would commence on [insert date] remain in force until [insert specific event, circumstances, or time (6 months maximum is reasonable)]. However, this is subject to regular review as the viability of the trading environment changes.

If you have any questions, please let me know. If you are happy with the above proposed variation to your Employment Agreement, please confirm your acceptance by signing where indicated below and returning a signed copy of this letter to me by [insert 48 hours in working days from date of letter]. You are entitled to seek independent advice about this proposed change, and we encourage you to do so.

Yours sincerely,

[insert [Employer Name]

[insert [Position]

[insert [Company name] trading as [Trading name]

I, **Name of Employee**, following consultation, agree to the temporary variation to my Employment Agreement as outlined above.

Signed:

Date:

.....

Letter Template 4:

Confirmation of Temporary Variation to your Employment Agreement (When agreement on the variation has not been reached)

Employee name

Employee address

Date

Dear Name,

Temporary Variation to your Employment Agreement - Outcome of Consultation

As we outlined in our letter of [insert date] we are trying to work and continue to conduct business in this environment. As part of this and trying to adapt to the situation and keep everyone employed, we proposed the following changes to your Employment Agreement on [insert date]:

[insert the proposed changes from the previous letter]

We received your feedback as follows on [insert date]

[insert the specific feedback from the employee]

We have been unable to reach agreement however we very much appreciate your feedback at this difficult time, and we thank you for your input on this.

We are considering all other options to make sure the business remains viable at this time and will come back to you with further thoughts and any areas for further consultation.

If you have any questions, please let me know, we very much value your ideas and input at this time.

Yours sincerely,

Insert [Employer Name]

Insert [Position]

Insert [Company name] trading as [Trading name]