



# COVID-19 FREQUENTLY ASKED QUESTIONS

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## Requiring employees to work

### Can I compel employees to attend work during Alert Level 2?

At Alert Level 2, all businesses can open if they can do so safely. This means that in most cases an employer is able to require that employees attend the workplace, subject to some exceptions:

- If an employee is sick, they should be encouraged to stay home. As would normally be the case, employees would be entitled to sick leave where they are sick or injured or where a dependent is sick or injured.
- Where an employee has been advised that they should stay at home because they, or someone they live with, is at high risk if they get COVID-19, they would not be required to attend the workplace but could be required to work from home.

Employers must also comply with their health and safety obligations, including maintaining hygiene, physical distancing, hand washing and regularly cleaning surfaces.

As the implications for workplaces of COVID-19 continue, one of the issues that employers are grappling with is employees who refuse to undertake work.

In circumstances where an employee is unreasonably refusing to attend work, an employer may be able to commence a disciplinary process for the refusal to attend work. However, an employer should ensure they have carefully considered the reasons an employee is refusing to attend work before considering disciplinary action.

It is also important to remember that an employee can cease or refuse to carry out work pursuant to section 83 of the Health and Safety at Work Act.

For such an act to be lawful, the employee must believe that carrying out the work would expose them, or someone else, to a serious risk to their, or the other person's, health or safety arising from an immediate or imminent exposure to a hazard. Also, where the work in question inherently or usually carries an understood risk, the employee can only cease work if the risk has materially increased beyond the understood risk.

Having refused to carry out work, an employee can continue to refuse if:

- They have attempted to resolve the matter with their employer as soon as practicable after the first refusal;
- The matter is not resolved; and
- The worker believes on reasonable grounds that carrying out the work would give rise to a serious risk to them, or another person, arising from an immediate or imminent exposure to a hazard.

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A health and safety representative who has been properly trained can also direct that unsafe work must cease on the same basis as an employee can stop work (section 84). However, such a direction must follow consultation with the employer unless the risk is so serious and imminent it is not reasonable to consult (in which case consultation must happen as soon as practicable thereafter).

If an employee stops work, the employer can direct them to undertake alternative work that is within the scope of their role (or any other work they agree to undertake).

If there is a dispute regarding this issue, WorkSafe can assist to resolve it.

### **What are my obligations in respect of clients and customers coming into the office?**

The Government has announced that at Alert Level 2 businesses can have customers on their premises if they can meet public health requirements. The requirements include:

- having good contact registers, or contact tracing records, in place to record everyone who you interact with on your premises
- maintaining physical distancing of 1 metre between groups of customers, or 2 metres if not possible to keep contact tracing records
- not having groups larger than 10 people
- maintaining a 2-hour time limit for groups to be on your premises.

Failing to comply with such requirements would arguably give rise to an employee having reasonable grounds to refuse to come into work, if they believed doing so would present an imminent risk to their health and safety in accordance with the above.

### **Can I require staff to work from home?**

Whether an employer can require staff to work from home would depend on the individual employment agreement, and what is provided for in the “location” clause.

Where the location clause provides flexibility as to the employee’s place of work, the employer may be entitled to continue to require employees to work from home. This would also be consistent with the official Government advice, which encourages employers to use alternative ways of working where possible.

However, where the location clause does not provide for flexibility as to the employee’s place of work and/or the employer is proposing to permanently vary the employee’s work location, it is likely to be necessary to secure the employee’s agreement to continuing to work from home, or to undertake a consultation process regarding a proposed change to the employee’s work location.

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## Staff who are unable to work

### **Do I have to pay someone who cannot attend work because they have been advised by the Ministry of Health that they should stay at home?**

Where an employee has been directed by the Ministry of Health to stay home because they are high risk, or live with someone who is high risk, if they get COVID-19, an employer would not be required to pay them as they are not “ready, willing and able” to attend work.

In that situation, an employer should engage with the employee on alternatives to unpaid absence such as working from home and/or the application of any available paid leave entitlements.

Employers can also apply for the COVID-19 Leave Support Scheme which the Government has widened from initially being available for essential businesses only, to all businesses subject to certain criteria. Specifically, the Covid-19 Leave Support Scheme is available for businesses that have:

- experienced a minimum 30 per cent decline in actual or predicted revenue over the period of a month when compared to the same month last year, or a reasonably equivalent month for a business operating less than a year, and that revenue loss is attributable to the COVID-19 outbreak; or
- had its ability to support its employee due to the COVID-19 public health restrictions negatively impacted.

Where employers meet the eligibility criteria, they can apply for the leave support for employees who either:

- are at higher risk if they get COVID-19, and Ministry of Health guidelines recommend they stay at home while public health restrictions are in place
- have come into contact with someone who has COVID-19 and must self-isolate for 14 days (as required by Ministry of Health guidelines)
- 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 the Ministry of Health recommends the employee also remains at home to reduce the risk to them.

It must be pointed out that the declaration for receiving the Essential Workers Leave Support states that employers 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.

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- 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 the application was lawfully below the amount of the subsidy before the impact of COVID-19, pay the employee that amount.

The obligation to make best endeavours to pay at least 80 per cent of ordinary wages or salary places a higher burden on employers than would otherwise apply in the circumstances of an employee who is unable to work.

However, employers should be aware that subject to consideration of the specific circumstances of a given case, employers are not required to pay employees who are unable to work in these circumstances. Therefore, by applying for the COVID-19 Leave Support Scheme, and committing to make best endeavours to pay at least 80%, an employer is potentially taking on greater obligations than would otherwise exist.

## **Obligations to staff working from home**

### **What are my obligations around flexible working arrangements?**

The Employment Relations Act provides employees with a statutory right to request a variation to their working arrangements, which includes their hours, days and place of work.

Where an employee makes a request for a flexible working arrangement, an employer is obliged to consider the request, and within one month of the request, notify the employee of their decision. If an employer refuses the request, the employer must advise the employee the grounds for the refusal, and provide their reasoning for refusing the request on the grounds set out.

The limited grounds for refusal prescribed under the Employment Relations Act are:

- a) inability to reorganise work among existing staff:
- b) inability to recruit additional staff:
- c) detrimental impact on quality:
- d) detrimental impact on performance:
- e) insufficiency of work during the periods the employee proposes to work:
- f) planned structural changes:
- g) burden of additional costs:

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- h) detrimental effect on ability to meet customer demand.

In addition, under the Act, an employer must refuse a request for a flexible working arrangement where:

- a) the request is from an employee who is bound by a collective agreement; and
- b) the request relates to working arrangements to which the collective agreement applies; and
- c) the employee's working arrangements would be inconsistent with the collective agreement if the employer were to approve the request.

### **What are my health and safety obligations to staff who work from home?**

For staff working from home, the employee's home becomes the "workplace", and the Employer's obligations under the Health and Safety at Work Act 2015 do not change. In this regard, an employer would still be required to take reasonably practicable steps to ensure that the "workplace" did not pose a risk to the employee's health and safety.

This may include ensuring that the employee's desk is appropriately set up to prevent injury, that employees are encouraged to take regular breaks, and that hours are recorded. In this respect, practical steps should be taken, such as asking employees to send photos of their desk set up and providing ergonomic advice and support as appropriate.

### **What about other obligations?**

In addition to obligations around health and safety, other obligations arise given the implied duty on an employer to provide employees with the equipment and tools necessary for them to perform their work.

For this reason, an employer may be required to reimburse an employee for any additional costs incurred as a result of them working from home. This could include reimbursing employees for increased costs for internet, where usage (and likewise cost) has increased as a result of the employee working from home.

Some employers pay a "reimbursement allowance", which may be paid as a tax free amount so long as the amount is not greater than the expenses incurred. Guidance for such payments is available on the [IRD website](#).

We would recommend that businesses that have many employees working from home implement a "Working from Home/Working Remotely" Policy, which would include (amongst other things):

- How the employer expects the time spent working to be recorded, if required;
- How the employer will monitor output, and the quality of the work;

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- The health and safety obligations of the employee, including the requirement to take regular breaks, and ensuring that their workplace is free from hazards and risks to injury;
  - What will and won't be provided to employees;
  - How information security and confidentiality will be maintained.

**If you have any questions, or would like to talk to one of the team then please call us on 04 471 2013 or email us at [enquiries@dundasstreet.co.nz](mailto:enquiries@dundasstreet.co.nz).**

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