Employment law considerations in the COVID-19 context

Last reviewed: 23 Feb 2021

Authored by the LexisNexis team, with excerpted Practical Guidance commentary from Bronwyn Heenan, Senior Associate and Mike Mercer, Senior Solicitor, Simpson Grierson.

Various employment issues arise for businesses when there are risks of widespread disease affecting the workplace, such as in a pandemic. This Guidance Note explains how to manage those issues.

The overarching requirement for a business is to meet its health and safety duties, which requires it to ensure the health and safety of workers and other persons in the workplace.

In doing so, the business will need to:

- direct and consult with staff;
- consider discrimination and privacy issues (eg health information);
- implement appropriate hygiene and infection control measures;
- correctly accrue and pay employee leave entitlements;
- manage workplace stress; and
- implement staff travel and isolation measures (including remote working).

Depending on the duration of the spread of disease, business continuity requirements may require:

- the scaling down of operations; and
- potentially considering the implementation of redundancy programs.

Once the crisis has abated, there may be various issues to work through, including:

- workers' compensation claims;
- potential underpayment of entitlements (eg through inadequate auditing of hours worked or misclassification of staff); and
- ongoing management of employees who face post-pandemic physical or mental hurdles in resuming their pre-pandemic working arrangements.

The alert level system and impacts on employers and the workplace

A four-level COVID-19 alert system has been established by the New Zealand Government. This system specifies the public health and social measures that must be taken at each level. Alert levels may be applied at a town, city, territorial local authority, regional or national level.

Information outlining restrictions under the different alert levels is available on the Government COVID-19 website.

For current New Zealand alert levels, see covid19.govt.nz.

See also:
Unite against COVID-19: Current COVID-19 Alert Level
Unite against COVID-19: COVID-19 Alert System
NZ Business: Workplace operations at Alert Level 2

Health and Safety at Work duties

Any infectious disease encountered in the workplace is considered a workplace hazard.

The *Health and Safety at Work Act 2015* (HSW Act) requires that employers take all reasonably practicable steps to:

- mitigate risk; and
- protect workers at all times from workplace hazards.

The business (ie the person conducting the business or undertaking (PCBU)) has the primary duty of care under the *Health and Safety at Work Act 2015* to take reasonable care of the health and safety of its staff and other persons in the workplace (ie clients, supply chain).

In the context of widespread disease such as a pandemic (eg SARS, COVID-19, H1N1), the business must take steps to minimise the risk of exposure and spread of the disease to staff and other persons in the workplace.

Reasonable measures could include to:

- ensure that the workplace is clean and hygienic – conduct a deep-clean, regularly cleaning high-touch surfaces and provide additional hand sanitisers and wipes;
- closely monitor ongoing government sources for current information and advice (see the Government's dedicated *COVID-19* website);
- clearly communicate government imposed self-isolation/quarantine periods;
- provide clear guidance on when staff should not attend work (ie which may include when unwell, showing disease symptoms and/or if a staff member is very concerned about the risk of being in the workplace) (see various government health links below);
- eliminate or minimise domestic and international travel (see the *Safe Travel* website);
- review and communicate company policies (eg work health and safety policy, flexible working policy, leave policies, infection control/hygiene policy, remote working, no face-to-face meetings);
- consult with other providers of labour (ie labour hire providers, independent contractors and supply chain services) regarding their management of their own workers;
- conduct contingency planning in relation to staff absences (eg casual worker coverage, alternating teams); and
- provide staff with access to support services such as employee assistance advice lines or counsellors (eg "Need to Talk?" service on 1737).

Businesses must communicate with staff about their duties to take reasonable care of their own health and safety and to not adversely affect the health and safety of other staff or persons in the workplace. For example, staff should be informed that they should:

- use hand sanitisers and thoroughly wash hands with soap and water at regular intervals;

- avoid physical contact with others;
- cough or sneeze safely – using a tissue or crook of elbow but not hands;
- immediately contact a doctor via phone or *Healthline* if unwell; and
- immediately inform the business if they have been isolated and/or they or any member of their household have the disease.

If an employer requires or knowingly allows workers to come to a workplace when they are sick with COVID-19 or required to self-isolate under public health guidelines for COVID-19, they are likely to be in breach of their duties under the *Health and Safety at Work Act 2015*.

Businesses should also specifically address workplace health and safety risks related to working remotely, including in the staff member's home.

See below Managing issues around remote/flexible working.

Businesses must have a COVID-19 safety plan. This should be created in consultation with workers and/or their health and safety representatives to ensure new processes are effective.

WorkSafe have created a safety plan template for operating at alert level 2, which can be downloaded from their website.

The questions that *WorkSafe* advise businesses to consider in putting together their safety plan include:

- Are there any risks arising from restarting business or a business activity that has been shut down during alert level 4, and how will these be managed?
- How will all workers know how to keep themselves safe from exposure to COVID-19?
- How will information on the wellness of your workers be gathered, to ensure that they are safe and well to work?
- How will business operate in a way that keeps workers and others safe from exposure to COVID-19?
- How will an exposure or suspected exposure to COVID-19 be managed?
- How will work processes or risk controls be checked to ensure these are effective?
- How do any changes impact on the risks of business operations?

References:
Health and Safety at Work Act 2015, s 22
Health and Safety at Work Act 2015, s 36
Health and Safety at Work Act 2015, s 45

See also:
Worksafe: COVID-19: Operating safely – what you need to think about
Ministry of Health: COVID-19: Personal protective equipment for workers

Guidance from authorities and regulators

Businesses must keep informed of the latest information from authorities and regulators and where relevant, communicate that information to staff.

Information can be obtained from the following sources:

- NZ Government COVID-19 information site
- Ministry of Health: Workplace Infectious Disease Prevention
- Employment New Zealand: Coronavirus (COVID-19) and the workplace
- Worksafe: Managing Health and Safety Novel coronavirus (COVID-19)
- World Health Organisation

Directions to employees during periods of widespread disease

Contracts of employment contain implied terms (and often express terms) which provide employers with the right to direct employees about:

- what they do in the course of their employment;
- how to perform work under the contract;
- when they are required to perform work under the contract; and
- where work is performed under the contract.

Any direction must be lawful and reasonable.

Directions are likely to be lawful and reasonable if made to ensure compliance with laws (including workplace health and safety laws) and where the direction goes only so far as reasonably necessary. In determining the lawfulness or reasonableness of a direction, employers must also have regard to the terms of any applicable workplace instruments.

If an employee fails to comply with a lawful and reasonable direction, an employer may have a valid reason to discipline the employee, up to and including dismissal. However, to avoid unfair dismissal claims, employers must ensure that they have clearly and consistently communicated to employees that failures to comply may result in dismissal and that procedural fairness is afforded at all times. Employers should also seek legal advice on their particular circumstances. See *Dismissal.*

The ability of employers to lawfully regulate employees' conduct outside work is more limited. However, where the direction is to ensure health and safety in the workplace or to promote the effective conduct of the business, then employers are likely to have more latitude, particularly in situations of pandemic or widespread disease within the community.

Leave entitlements and payments to employees during authorised absences from work

Employees may be entitled to payments when on an authorised absence from work during periods of widespread disease.

Employee leave entitlements are set out in the relevant legislation and/or contracts of employment.

Employees must satisfy certain criteria, including notice and evidence requirements.

Statutory leave entitlements under the Holidays Act 2003 include:

- sick leave;
- annual leave;
- domestic violence leave;
- bereavement leave.

The applicability of leave entitlements during periods of widespread disease is set out below.

Certain staff may also be entitled to support and welfare payments through government initiatives.

Sick leave

An employee's entitlement to paid sick leave of five days annually:

- arises once an employee has worked for the employer for a continuous period of six months (in the absence of any agreement between employer and employee to take sick leave during this period);
- arises for full time employees and those who work for an average of 10 hours or more per week (at least one hour in every week or more than 40 hours per month) during the first six months of employment;
- must be provided for each 12-month period following the end of the first six months of employment (for employees who continue to work fulltime or an average of at least 10 hours per week);
- may be taken when the employee, their spouse/partner or a person who depends on the employee for care is sick or injured;
- may be carried over from one 12-month period to the next (if not fully utilised) to a maximum of 20-day entitlement in any year (or more if there are enhanced entitlements contained in the parties' employment agreement);
- cannot be capitalised or paid out unless the employee is sick (or the employment agreement allows for a pay out of sick leave upon termination of employment);
- may be the subject of proof of sickness or injury (usually a medical certificate) that may be required by the employer if:
    - three or more consecutive calendar days are taken (whether or not the days were working days); and
    - at any time the employer informs the employee that proof is required and agrees to meet the reasonable cost of obtaining the proof;
- does not prevent parties from agreeing to enhanced entitlements to sick leave on conditions they may agree — eg. a requirement to produce proof of sickness for each leave day taken in excess of the statutory minimum; and
- is subject to a requirement of notification to the employer as early as possible before the employee is due to begin work.

Notice must be given as soon as reasonably practicable and satisfactory evidence must be provided if required by an employer. During situations such as pandemics, it may be more difficult for employees to comply with onerous evidence requirements due to limited access to medical staff, advice provided by telephone health lines or requirements to self-isolate/quarantine. Employers should take this into account.

Employers are required to pay any employee who is sick (or caring for a sick dependent) until their paid sick leave is used up. If paid sick leave is not available, paid special leave should be considered. Other forms of paid leave can be used by agreement between the employer and the employee. See *Sick leave*.

Annual leave

After 12 months of continuous employment, an employee is entitled to four weeks of annual leave. An employer must allow an employee to take at least two weeks of their entitled leave in a continuous period, if the employee elects to do so. But the time at which annual leave can be taken is subject to agreement between employee and employer (who cannot unreasonably withhold consent). An employer may allow an employee to take an agreed portion of their annual holidays' entitlement in advance.

An employer can require employees to take annual leave in certain circumstances, including where work is seasonal; or if the employer and employee are unable to agree on the times at which it can be taken. If an employer requires an employee to take annual leave, the employee must be given not less than 14-day notice of the requirement to take leave.

If an employee requires sick leave or bereavement leave beyond the employee's sick leave entitlements under the Holidays Act 2003, the employer must not require, but may agree if requested by the employee, that the leave be taken as annual holidays. See *Annual leave*.

Bereavement Leave

Entitlement to paid bereavement leave:

- arises once an employee has worked for the employer for a continuous period of six months (in the absence of any agreement between employer and employee to take bereavement leave during this period);

- arises for full time employees and those who work for an average of 10 hours or more per week (at least one hour in every week or more than 40 hours per month) during the first six months of employment;

- must be provided (if required) for each 12-month period following the end of the first six months of employment (for employees who continue to work full time or an average of at least 10 hours per week);

- of three days must be provided for employees who suffer the death of:
    - spouse/partner;
    - parent, parent-in-law or grandparent;
    - child or partner's child;
    - sibling; or
    - grandchild; and
- may be provided (one day) if an employee suffers a death accepted by the employer as a bereavement, after considering the kind of relationship between the employee and the deceased and any cultural or other significant responsibilities the employee is required to undertake for the ceremonies relating to the death. See *Bereavement leave*.

Parental leave

The *COVID-19 Response (Further Management Measures) Legislation Act 2020*, which came into force on 16 May 2020, introduces temporary changes to the parental leave scheme.

Under the changes, "COVID-19 response workers" who are currently on parental leave will be able to temporarily return to work for a maximum period of 12 weeks (a Labour Inspector may deem a longer period reasonable), without losing their entitlements under the *Parental Leave and Employment Protection Act 1987*.

A "*COVID-19 response worker*" is defined as a person who:

- is entitled to parental leave;
- has agreed with their employer to return to work temporarily to respond to circumstances related to the outbreak of COVID-19 (or is a self-employed person who wants to return to work temporarily as a result of the outbreak of COVID-19); and
- in the circumstances of COVID-19, that person's role cannot reasonably be filled by another person (because of that person's skill, qualifications, or experience), or there is a higher than usual demand for workers doing that role.

COVID-19 response workers will not receive any parental leave payments or pre-term baby payments during the period they return to work. Any parental payments received during the temporary return to work are deemed to be an "overpayment" and must be returned.

Other leave

In circumstances of disease outbreak, there may be the potential for employees to be exposed to increased risks of domestic violence, particularly when required to self-isolate with their families. The Holidays Act 2003 provides for 10 days' paid family violence leave per year, which does not accumulate but is instead available from the first day an employee starts work and renews in full at the start of each 12 months' period of employment.

Notification of intention to take family violence leave is required, however, during situations such as pandemics, it may be more difficult for employees to comply with evidence requirements. Employers should take this into account.

An employee who is a voluntary member of the New Zealand Armed Forces may be entitled to unpaid leave if they are part of a response to a pandemic emergency. Under the Volunteers Employment Protection Act 1973, employers must hold an employee's job open and protect their entitlements but are not required under the Act to pay employees for this leave.

References:
Holidays Act 2003, s 16
Holidays Act 2003, s 63
Holidays Act 2003, s 65
Holidays Act 2003, s 69
Holidays Act 2003, s 72C
Volunteers Employment Protection Act 1973, s 14B

Government payments

Various schemes have been implemented by the Government to address the effect of COVID-19 on businesses. These include:

- the Wage Subsidy Schemes;
- the Leave Support Scheme;
- the Short-term Absence Payment;
- the Resurgence Support Payment;
- Cash Flow and Tax Measures;
- the Business Finance Guarantee Scheme; and
- the Small Business Cashflow Loan Scheme.

Wage Subsidy Schemes

The Wage Subsidy Schemes can no longer be applied for by employers. Previously the following schemes were available to support workers who were financially impacted by Covid-19:

- Wage Subsidy Scheme;
- Wage Subsidy Extension; and
- Resurgence Wage Subsidy.

More information on these now-ended subsidies can be found at Covid-19: Wage subsidy schemes.

Leave Support Scheme

The COVID-19 Leave Support Scheme (previously called “COVID-19 Essential Workers Leave Support”) is available for employers, including sole traders, to pay their employees who can't work.

Support is available for employers to pay their employees in situations where employees need to stay away from work and cannot work from home. Employers can apply for support to pay employees. Those who are self-employed, or contractors, can apply directly.

To be eligible for the Leave Support Scheme, employees must meet these criteria.

At 9am on 9 February 2021, the criteria for getting the COVID-19 Leave Support Scheme changed. Those who applied before this time are required to meet the old criteria.

Employers could not apply for the COVID-19 Leave Support scheme and the COVID-19 Wage Subsidy scheme for the same employee at the same time.

This payment was previously called “COVID-19 Essential Workers Leave Support” because it was only available to essential businesses. It is now available for all employers returning to work who meet the criteria.

Where workers need to miss work due to staying home while awaiting COVID-19 test results, the COVID-19 Short-Term Absence Payment covers eligible workers.

The scheme is administered by the Ministry of Social Development. Employers can apply on the Work and Income website.

See also:
Employment New Zealand: COVID-19 Leave Support Scheme.

Short-term absence payment

From 9 February 2021, the COVID-19 Short-Term Absence Payment is available for businesses to help pay their workers who cannot work from home while they wait for a COVID-19 test result. Self-employed people are eligible for this payment.

This one-off payment of $350.00 for each eligible worker is available for workers who:

- are unable to work for home; and
- must stay home while waiting for a COVID-19 test result (in line with public health guidance), meaning that they miss work.

For more information on eligibility and how to apply, see Work and Income COVID-19 Short-Term Absence Payment.

Resurgence support payment

From 23 February 2021 businesses can apply for the COVID-19 Resurgence Support Payment when there has been an increase from alert level 1 for seven days or more. The payment can be used to help cover wages and other business expenses.

To be eligible a business must have experienced a 30 per cent or more drop in revenue over a seven-day period after the increase alert level, in addition to other criteria.

Eligible businesses can receive the lesser of:

- $1,500 plus $400 per fulltime-equivalent employee (up to a maximum of 50 full time-equivalent employees); or
- four times the actual drop in revenue.

For more information and how to apply, see Inland Revenue – COVID-10 Resurgence Support Payment (RSP).

Other financial support for businesses

The Government have introduced a number of financial support measures to assist in the COVID-19 pandemic circumstances, including:

- Small Business Cashflow scheme
- Business Finance Guarantee scheme
- Business cash flow and tax measures
- Insolvency relief for businesses

See also:
Unite Against COVID-19: Financial Support for businesses
Inland Revenue: COVID-19: Business and organisations
Companies Office: COVID-19 Business Debt Hibernation
Companies Office: safe harbour for company directors

Managing issues around remote/flexible working

Under the Employment Relations Act 2000, employees have the right to request, and employers have a duty to consider a request for, flexible working arrangements.

Also relevant is discrimination legislation, as a "disease" may be considered a "disability" for the purposes of discrimination legislation. See *Overview – Discrimination*.

Employers should review flexible working policies to ensure that they are clear about expectations of employees working remotely, including health and safety obligations such as safe work practices (including the home office setup and continuing hygiene and infection control measures), confidentiality of information and protecting intellectual property. It is important to maintain communication and consultation with remote working employees to ensure their wellbeing and ongoing commitment to the business.

Businesses could assess workplace health and safety risks at the remote/home location by requesting staff (both employees and contractors) to email photos of their work areas. Staff could also be required to complete a checklist which confirms electrical safety, fire safety (ie smoke detector, fire equipment) and general access to medical assistance (ie basic first aid supplies). Team briefings around workplace health and safety issues may also be helpful in identifying risk issues that have not been captured by the more checklist exercise.

Where required to perform work, businesses should ensure that employees have an adequate internet connection that enables them to properly perform their duties and responsibilities in the online environment. If they do not, employers should consider providing allowances to increase the speed of the home connection for a limited period or could provide company-funded wireless access.

Once the disease crisis has abated, it may be difficult for an employer to refuse to continue with a flexible working

arrangement if the employee has demonstrated that he or she has remained productive and maintained commitment to the business. Employers should take that into consideration if any employee makes a request to continue remote working post-crisis.

References:
Employment Relations Act 2000, s 69AA

Communication and consultation

Employers have a duty under the Health and Safety at Work Act 2015 to provide information about health and safety in the workplace. At a minimum, information should relate to hygiene practices and infection control and on current developments relating to the spread of the virus and its effects on the community. Employers should review and, where appropriate, implement the recommendations from the Ministry of Health.

Inappropriate behaviour

In circumstances of heightened anxiety that inevitably follow any disease outbreak, it is possible that there may be inappropriate behaviours in the workplace which target “protected attributes”.

These might include:

- discrimination against or harassment of members of a race, ethnic group or religion, particularly where it may be perceived that the disease originates from a particular country; or
- discrimination against, or bullying or harassment of, people with the disease (where the disease is likened to “disability”).

Employers need to take all reasonable steps to educate the workforce on respectful treatment of their colleagues and clients to ensure that staff do not behave unlawfully. Steps could include the reissuing of workplace discrimination/harassment/bullying policies, specific communications providing examples of “appropriate” and “inappropriate” behaviours, providing avenues for staff to seek help including employee assistance lines and HR contacts and conducting investigations into complaints.

Businesses have obligations under the Health and Safety at Work Act 2015 to prevent harm, including psychological harm, to employees in the workplace.

Under the Employment Relations Act 2000, employees and employers are required to actively maintain their relationship in good faith. Repeated verbal or emotional attacks on an employee may breach the duty of good faith owed by employers to employees.

All employment agreements contain an implied obligation on employers to provide a safe workplace. Employees may have grounds to raise a personal grievance if an employer creates an unsafe workplace by failing to manage bullying.

References:
Health and Safety at Work Act 2015, s 211

Issues around business continuity flow-on staffing effects

Significant disease outbreaks are likely to adversely impact business, which may lead to staff redundancies.

Prior to implementing redundancies, businesses could consider preliminary measures, including:

- management leading by example by foregoing salary and/or bonuses;
- freezing recruitment;
- cutting back or eliminating the use of contractors or labour hire workers (subject to the terms of the service agreements);
- roster changes (eg. overtime prohibitions, reducing hours of work); or
- redeploying employees who do not have work into areas of the business that have increased labour requirements.

Some of these steps will require employee consent, particularly measures that reduce hours/income. Where employees are on unpaid parental leave, employers must ensure that they consult with employees.

Where it is necessary to implement redundancies, employers must comply with justification, consultation and selection requirements under the Employment Relations Act 2000 and contained in any employment agreement. Any decision to disestablish a position, or terminate an employee's employment for redundancy, must be ”justified” as per s 103A of the Employment Relations Act 2000 – that is, whether the employer's decision was one that a fair and reasonable employer could have made in all the circumstances at the time. Such a decision must be founded on genuine business reasons.

References:
Employment Relations Act 2000, s 103A

Requirement to consult with employees

In the event of redundancies, an employer must follow a full and fair consultation process with potentially affected employees. The consultation process must comply with the minimum steps in s 103A(3) of the Employment Relations Act 2000 and the good faith requirements for notice, consultation and disclosure under s 4 of the Act.

Typically, a fair and reasonable consultation process will require the following minimum steps:

- the business proposal for change is circulated to all employees who are likely to be affected by the change, before any final decisions are made;
- the employees are given a reasonable time to comment, respond, suggest alternative ways to achieve the change objectives; and
- the employee responses are considered in the final decisions made about the business.

This process is known as a consultation process and it must be undertaken if an employer is to avoid claims of:

- breaches of the duty of good faith; or
- unjustifiable dismissal.

References:
Employment Relations Act 2000, s 103A(3)
Employment Relations Act 2000, s 4

See also: *Restructuring: consultation*

Selection for redundancy

If an employer wishes to reduce the number of employees that perform the same kind of work, it must adopt a transparent way of selecting those for redundancy. In these circumstances, the employers may call for volunteers before a selection process begins. This has the advantage of reducing the risk of contested choices, particularly if the number of volunteers equals or exceeds the required number of redundancies. It is generally most effective where there are incentives to volunteer, for instance where employment agreements provide for redundancy entitlements (lumps sum payments payable on redundancy).

Redundancy entitlements

There is no statutory requirement for employers to pay redundancy compensation. Whether employees receive redundancy entitlements is entirely dependent on their employment agreement and is a matter for negotiation between the parties.

If the employment agreement provides for redundancy entitlements, then so long as the employee meets any conditions of receipt, they will be entitled to these payments. If not, they will be entitled only to what they can negotiate (if anything) at the time of the redundancy. It is more common for collective agreements than individual agreements to contain entitlements to redundancy payments. Entitlements will often depend (and be calculated) on the basis of length of service. See *Redundancy*.

If employers fail to comply with laws relating to termination of employment, this may give rise to claims for unfair dismissal, underpayments, unlawful termination and discrimination. See *Discrimination* and *Dismissal*.