

## Employer's Guide to Dealing with Covid-2019 (March 2020)

Recent weeks have been challenging. As COVID-19 makes its way across the globe and has now been labelled as pandemic by the World Health Organisation, it's affecting our communities in different ways. With confirmed cases now in New Zealand, the outbreak is raising questions for both employees and employers about what they should and shouldn't be doing, and how to deal with employees who may have travelled overseas or may have had exposure to Covid-2019.

### Ministry of Health Guidance

The Ministry of Health is providing up to date information including details on temporary travel restrictions which deny entry to people arriving from certain countries, and guidance about who should self-isolate.

As the situation is developing daily, you will need to stay up to date with any official Ministry of Health announcements because this could impact the information provided below. For more information see: <https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-Covid-2019>

### Fundamental principles

When dealing with any epidemic or health issue, employers need to keep in mind:

- each employee will experience this in a different way. For example, people with underlying health conditions, who have elderly parents, or have upcoming travel plans may experience additional stress or anxiety;
- the overarching obligation of good faith, which includes being open, responsive, and communicative with employees at all times – which in relation to Covid-2019 means telling employees what you will do in the event Covid-2019 becomes more widespread, and providing regular updates as the situation unfolds;
- duties and obligations under Health and Safety at Work Act 2015 (HSWA); and
- the requirement to comply with employees' employment agreements and all relevant policies.

On a practical level, minimising the spread of Covid-2019 is important to keep your employees safe. Have you got hand sanitiser and are you making sure your employees and visitors are using it, and that employees stay at home if they feel unwell? The Ministry also has useful information about disease prevention in the workplace here: <https://www.health.govt.nz/your-health/healthy-living/environmental-health/infectious-disease-prevention-and-control/workplace-infectious-disease-prevention>

### We set out below some frequently asked questions relating to the impact of Covid-2019 on the workplace:

#### Can I require an employee to stay away from work if they have been in contact with Covid-2019?

Generally, if an employee is **ready, willing, and able to work**, you are obliged to provide the employee with work. However, if you have reasonable grounds to suspect that an employee may have come into contact with Covid-2019, you are entitled (and may be required under the HSWA) to direct the employee not to come to work to reduce the risk of infection to others in the workplace.

If multiple employees are affected, or the workplace is unable to function effectively due to employee absences, you may also be justified in closing down the workplace altogether under the HSWA. This depends on the situation, so we'd encourage you to seek advice before doing so.

#### Do I have to pay an employee if I require them to stay away from work?

Some employment agreements have clauses that allow an employer to not pay an employee in situations where you require the employee to stay away so check the employment agreement first. But, if:

- the employment agreement is silent; and
- the employee **is ready, willing and able to work**; and
- it is the **employer** who decides that the employee must stay away

then the employee is entitled to be paid in accordance with their employment agreement.

In extreme cases, you may be able to rely on a 'force majeure' or 'business interruption' clause in the employment agreement, which may release you from your contractual obligation to pay employees in the event of an extreme unforeseen event. Ending employment this way has a high threshold and can only be used if the business is permanently shut (as opposed to a short break) and the employment agreement contains such a clause. We strongly recommend that employers seek advice before seeking to rely on a force majeure clause.

#### **What if my employee is compulsorily quarantined?**

If an employee is compulsorily quarantined, then the employee *is not ready, willing and able to work*, and is not entitled to be paid, unless of course they take leave - the employee may be entitled to use any sick leave, annual leave, or other special leave depending on the circumstances. If the employee is not sick, you should explore whether the employee can work from home. If there are no reasonable alternatives, then you can agree to the employee using their sick leave, annual leave, or any other special leave entitlement. If the employee has no leave entitlements, you could grant the employee special paid leave for the duration of the quarantine even though there is no legal obligation to do so.

#### **What if my employee "self-isolates"?**

If an employee self-isolates in accordance with the Ministry of Health guidelines, you should also explore whether that employee can work from home during the 14 day period. If this is not possible, then you do not have an obligation to pay the employee unless the employment agreement provides otherwise. Employees are generally not entitled to sick leave if there is no identifiable illness/injury. However, there is nothing to prevent you from agreeing to recognise this leave as 'sick leave' in the circumstances. Any agreement should be recorded in writing.

#### **What if an employee in self-isolation decides to return to work within 14 days?**

If an employee in self-isolation suddenly decides to return to the workplace (e.g. for financial reasons), you will need to consider health and safety obligations to the other people in the workplace who could be impacted by the employee's return. Employers have a duty to keep other employees and workers safe, and to eliminate or minimise risks and hazards in the workplace. You should explore all options available, including whether the employee can work remotely for the remainder of the 14 day period. If this is not possible, and you consider it is best to keep the employee away from the workplace, you may have to pay the employee for the remaining 7 days because the employee is **ready willing and able to work**. However, if the employee is acting contrary to the Ministry of Health's expectations for self-isolation (see their website for up to date information), employers may be justified in stipulating that the employee stays at home for the entire 14 day period.

#### **Can an employee refuse to attend work because of Covid-2019?**

Under the HSWA, employees can refuse to work if they have reasonable grounds to believe that the work they are required to perform is likely to cause them serious harm. – employees could potentially refuse to work if they have **reasonable grounds** to think that they may contract Covid-2019. Employees should first discuss any concerns with their employer see if alternative arrangements can be made (e.g. working from home).

If an employee refuses to attend work on health and safety grounds if, for example, because the employer allowed an infected employee to attend the workplace which would be in breach of the HSWA, the employer would have to pay the employee (and not require the employee to use sick leave or annual leave).

**When is an employee entitled to take sick leave?**

Under the Holidays Act 2003 an employee is entitled to take sick leave when they are sick or to care for a spouse or dependant who is sick and is entitled to a minimum of 5 days' sick leave each year, which can accumulate up to 20 days. Employees will be able to take sick leave if they, or their dependant, is sick with Covid-2019 (or if, as outlined above, they are quarantined).

**What happens if an employee runs out of sick leave?**

Once an employee's sick leave is exhausted, the employee can use annual leave, if the employer agrees to this. Employers should not automatically place employees on annual leave but should discuss this with the employee and see if this is what they want to do.

**What happens if the employee has run out of both sick and annual leave?**

Once sick and annual leave is exhausted, employers have no obligation to pay the employee for any further time off work due to sickness unless the employment agreement provides otherwise (i.e. additional special paid leave). However, you may allow the employee to take sick leave or annual leave in advance. If you allow an employee to take sick leave or annual leave in advance, this should be recorded in writing (as well as the requirement to pay back any leave taken in advance if the employment relationship ends).

Employers can always choose to grant paid special leave in such situations. However, you should be mindful that you treat all employees consistently.

**Can employers require employees to take annual holidays?**

Under the Holidays Act 2003, employers and employees should try and agree on when annual leave can be taken, but if agreement cannot be reached, employers can direct employees to take annual leave on 14 days' notice. Given the length of this notice period, requiring employees to take leave if they can't come to work as a result of possible exposure to Covid-2019 won't work.

**Final thoughts...**

As our understanding and the impact of Covid-2019 continues to unfold, employers are encouraged to be proactive in identifying any possible work-related exposure or health risks to their employees. The current situation also serves as a timely reminder for employers to develop (or in some instances refresh) a business continuity plan. Employers should be planning now for the possibility of Covid-2019 becoming more widespread and assessing how your business will operate in the worst case scenario and start planning for this – i.e. Can employees work remotely or work alternative hours?

When considering remote working, employers should not only consider how to set up employees for productivity, but also for maintaining collaboration, connection and workplace culture (e.g. using video conferencing, messaging apps). Having one person or a team of people who are responsible for the remote working experience can help with this.

The above is a high-level guide only - as the situation is changing daily, we recommend seeking advice in relation to specific queries.