

## Coronavirus:

### Key Employment Law questions

**The outbreak of the 2019-nCoV (Coronavirus) epidemic in China has New Zealand at stage II of its framework for action: New Zealand Influenza Pandemic Plan (NZIPP). We are currently attempting to "Keep It Out" through border controls, restrictions and preventative action so that we never need to move to Stage III and IV; stamping it out or managing it.**

The Government has not, and may never need to, issue an Epidemic Notice under the Epidemic Preparedness Act 2006. So far no-one in New Zealand has been diagnosed with the infectious coronavirus, but, unfortunately, that remains a risk. What we do know is that despite there being no known cases in New Zealand, there have been immediate impacts on businesses that deal with or operate out of China. The question remains whether or not coronavirus will cause serious disruption to our businesses and economy. Only time will answer that question but in the meantime, businesses cannot stand back and do nothing - they need to be proactive and start undertaking risk assessments to better understand and respond, if coronavirus is declared an epidemic.

New Zealand businesses are already experiencing the direct impact of coronavirus, particularly in the international trade sector and local tourism markets. We have seen some exports to China stop overnight (lobsters and logging) because ports in China have been closed to incoming goods. Tourism, which relies on the Chinese market, has seen thousands of cancellations at peak times due to international travel bans and fear associated with coronavirus.

While we can all hope for the best, we should always plan for all eventualities. Coronavirus may never reach New Zealand but what happens if our borders are breached? Is your business prepared? Has it thought that far ahead? This article briefly addresses some of the key employment law questions that businesses could face.

#### Health and safety

Under the Health and Safety at Work 2015 Act all businesses have a duty to eliminate or minimise risks and hazards to their workers and any others who may come to the workplace. A workers' health and safety is paramount. The duty will extend to eliminating or removing hazards connected with coronavirus, so far as is reasonably practicable.

Exactly what this means in practical terms will depend on the business itself and whether coronavirus gets through our border controls. It may be a case of advising workers to maintain basic hygiene standards as you would expect during a normal "flu" season. However, at the other extreme, we may face an unprecedented situation where a large percentage of workers are stood down because they are affected by, or recovering from, coronavirus. That scenario, while grim, will have a major impact on any businesses' ability to maintain operations and service its clients and customers.

Businesses should be carrying out risk assessments and analyses and then putting plans in place to protect workers' health and safety. The most obvious risk will be if a worker has been in contact with or has contracted the virus. Can your business sustain a period where workers are 'working' from home, remotely or not at all?

We are aware of workers who are currently being stood down on a precautionary and voluntary basis for 14 days if they have recently returned from China or potentially been in contact with anyone who may have coronavirus. While that mitigates the health and safety risk, it also raises a number of employment considerations. Do the employment agreements or policies allow an employer to

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require an employee to be effectively quarantined and, if so, what should the employee be paid?

If the employee voluntarily agrees then there is unlikely to be any issue, provided they are paid. However, what if an employee says "I don't have coronavirus and there is no risk to me, therefore I am not going to stay away from work"? If a business forces the employee to remain quarantined on justified health and safety grounds then it is likely, from a legal perspective, that they have been 'suspended'.

Before taking action, an employer will have to have consider and consult on other options such as working from home or remotely. If the employee is required to stay away from work then one of the key issues will be 'what loss has been suffered'? Has the employee been disadvantaged? If the employee's absence does not result in them being financially disadvantaged then there is unlikely to be any real loss.

### Remuneration, leave and work travel considerations

Logically, if an employee has contracted the virus then they will be using their sick leave but employees often exhaust all their sick leave entitlement and do not have enough annual leave to cover unforeseen absences. A 14 day quarantine period will quickly eat up an employee's accrued sick leave.

If an employee doesn't have coronavirus but is staying away due to a fear or risk of contracting the virus then they are not sick or injured and sick leave is not payable. An employer could, of course, allow an employee to use their sick or annual leave in these circumstances. However, the employer would have limited grounds for disciplinary action because employees are generally entitled to down tools if they genuinely believe it is unsafe to remain at work. In these circumstances the employees may self-isolate but should have no expectation of being paid.

Employees who regularly travel might be more exposed to a risk of contracting the virus. If they refuse to travel for work, can an employer force their employee to travel to a

non-affected area? The employer can certainly issue a lawful and reasonable instruction, but would have to take into account the employee's position before deciding what to do. There will be competing considerations that need to be weighed and balanced but, ultimately, if the risk does not exist then any refusal to work may justify some form of disciplinary action.

If there was a major outbreak employers may be need to consider temporarily suspending the employment relationship or ask the employee to take indefinite leave without pay. Both of these scenarios would require genuine consultation and agreement.

### Adjusting labour input for reduced demand

While coronavirus is not present in New Zealand, the current strain on exports and tourism means that employers may need to consider reducing staff levels or hours until there is more certainty. Four day weeks could be a practical solution but agreement would be needed. Logging contractors have been told to go home and not attend work, so what happens with their pay? Because they are likely to be ready and willing to work, an employer will have to pay them unless the employment agreement states otherwise.

Whenever there is any downturn in the economy, restructuring and redundancies become common as was apparent from the global financial crisis. If an employer can't sustain an employee because there is no work, or they are suffering financially from the effects of coronavirus, there is no obligation to maintain that employment. However, an employer's good faith obligations require a fair process to be carried out and consultation in good faith. Discussions must be open and communicative and an employer is required to provide all relevant information to the employee that relates to any proposal to restructure. Usually, a restructuring process happens over a number of weeks but here the effects of coronavirus might be a lot more immediate, as the logging industry has experienced, and possible reductions in staff may need to occur over days rather than weeks.

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## Coronavirus: Key Employment Law questions (Continued)

As a means to avoiding redundancies or having to make that decision in uncertain times, employers might want to consider the possibility of an employee taking their annual leave if there is no work available. The Holidays Act 2003 requires 14 days' notice. However, employees may agree to less notice in drastic circumstances.

### Next steps

Employers need to start addressing and planning for all eventualities that may arise if coronavirus reaches New Zealand. Policies should be prepared and implemented and then routinely evaluated as more information and certainty around coronavirus occurs.

Employers cannot wait to rely on the Prime Minister to issue an epidemic notice. That can only be done when the Prime Minister is satisfied that a particular quarantinable disease is likely to disrupt essential government and business activity in New Zealand. One of the powers available under the Epidemic Preparedness Act 2006 is the modification of other legislation. In other words, in the context of an epidemic, obligations under the employment legislation may be modified to allow employers to take more reactive steps to deal with the impact of an epidemic. Theoretically, but perhaps unlikely, the obligation to consult in good faith might be significantly reduced, as might the obligation to pay employees if they are away from work due to sickness associated with the virus. However, this is no more than speculation.

The more practical and reasonable approach will be for employers and businesses to look at their own situation and respond proactively. Employees have obligations to comply with reasonable policies that employers impose. A review of current policies, employment agreements and health and safety obligations is therefore necessary.

Consultation underpins the employment relationship. Providing regular updates to employees, and providing guidance as more factual information about coronavirus comes to hand, will be important. Employees need to know that their employers have plans and contingencies

in place and that they will be protected if (and it is a big 'if') there is an epidemic in New Zealand.

There are clearly plenty of challenges ahead for employers. For some employees coronavirus will not be a worry, while others may suffer stress if they are put in situations where there is a risk, real or perceived, of contracting coronavirus.

### Want to know more?

If you have any questions about how the coronavirus may impact your organisation's employment considerations, please contact our specialist [Employment](#) Team.