

Coronavirus and the workplace

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With any outbreak of infectious disease, employers face a number of legal and practical issues. This is weighing on the minds of many employers following the growing rates of novel coronavirus overseas. Unfortunately, the legal and practical issues associated with coronavirus and employment are not straightforward. There are issues about whether employees are entitled to, or ought to, be paid, whether they are required to work and where, and what type of leave should be used to cover absence. There is also the potential for the workplace to be affected to the extent that it is not feasible to continue operating business as usual.

Below, we address some frequently asked questions that employers may consider in order to formulate short and long-term strategies to address situations, including the current coronavirus. It is important to bear in mind that the considerations addressed below may vary as the impact is further assessed, so employers are encouraged to stay up to date with any official Ministry of Health (or similar) announcements and revisit these considerations as required.

When is an employee entitled to take sick leave?

An employee who is sick, or who needs to care for a spouse or dependant who is sick, is entitled under the Holidays Act to paid sick leave.

The minimum statutory entitlement is five days each year, which can accumulate to up to 20 days. However, some employment agreements provide for more sick leave than this, and some employers allow employees to take more leave as a matter of discretion.

Once an employee's sick leave entitlement is exhausted, an employee may wish to take paid annual holidays in order to ensure consistent income. The parties can agree to this approach, but an employer should not automatically place an employee on paid annual holidays without the employee's consent. Once those are used up, assuming the employer does not allow the employee to take annual holidays in advance, there is no obligation on the employer to pay the employee for any further time off work due to sickness.

What if the employee is off work because of the risk of coronavirus, but does not actually have the virus?

There will be situations in which an employee is not at work because he or she has been exposed to the risk of infection, but neither is actually infected or sick.

As a general rule, the employee is not entitled to paid sick leave if there is no identifiable illness or injury (unless the employment agreement says differently). However, many employers may agree to recognise this as sick leave in the circumstances. Any agreements made should be recorded in writing, even if simply by email or text.

Even if the employee is not on paid sick leave, the employee may still be entitled to be paid during their absence. This will depend on the answers to different questions, addressed below.

Can an employer require an employee to stay away?

In general terms, if an employee is ready, willing and able to work, the employer is obliged to provide the employee with work. However, an employer may want an employee who is suspected of having come into contact with coronavirus to stay away from work, so as not to pose a risk to others in the workplace.

In our view, an employer will be entitled - and perhaps obliged under the Health and Safety at Work Act 2015 (HSWA) - to direct that the employee not come in to work. If there is a risk of general infection, or if the workplace is unable to function effectively due to employee absences, an employer may also be justified in closing down the workplace altogether.

A key issue for employers in those circumstances will be whether absent, but healthy, employees are entitled to be paid.

Is an employer obliged to pay an employee it requires to stay away?

Some employment agreements contain clauses that excuse payment where an employer requires the employee to stay away, for instance due to the risk of infection. However, generally speaking, if it is the employer deciding that the employee must stay away, the employee is entitled to be paid so long as the employee is ready, willing and able to work.

Some employers might be able to rely on a 'force majeure' type clause if one is included in their employment agreements, which will usually release a party from its contractual obligations to pay an employee or provide them with work when an extrinsic event renders the employment agreement impossible to perform. This can be a high threshold to reach and will depend on the severity and likelihood of the risk posed to the workplace. If your employment agreement does not contain such a clause, the doctrine of frustration of contract may provide some relief, but this is often difficult to make out.

What if the employee is compulsorily quarantined?

In these circumstances, the employee is not ready, willing and able to work. The starting point, therefore, is that the employee is not entitled to be paid.

However, before an employer decides not to pay, it will need to consider other options, such as working from home, working different hours or taking other measures to avoid personal contact. The employer and employee may also agree to the employee using other entitlements, such as sick leave or annual holidays (as discussed above).

Most employers will want to do the best by their employees, and assist them where possible. Even so, payment will not always be an available or acceptable option, particularly if the issue is widespread or recurring.

What if an employee needs to stay home to care for a child?

There is already a possibility of school closures, or of children otherwise staying home (or being made to stay home) to minimise the risk of infection, in which case some employees may also need to stay home to care for their children.

If the child is sick, the employee is entitled to paid sick leave, at least until that runs out. However, if the child is not sick, then unless the employment agreement provides for payment, the employer will not be obliged to pay an employee who needs to stay at home to care for the child. The employer and employee can of course agree different arrangements as above.

Can an employee refuse to attend work?

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. An employee may also have a broader right to refuse to attend work where the employee has a reasonable (and not remote) fear of contracting coronavirus in the workplace.

Either way, employees will be obliged to discuss such an issue with their employer, and they may be able to find other solutions, such as working from home, working different hours or taking other measures to avoid or limit personal contact.

If an employee refuses to attend work, the employer is probably not obliged to pay the employee unless the employer is at fault in some way. For example, if the employer allows an evidently infected employee to continue working with a risk of infecting others in the workplace, as this would not be compliant with the HSWA. In that circumstance, the employer would be obliged to pay any employee reasonably refusing to work (and without having to use their accrued holidays and leave entitlements).

Does an employee have to be paid if they are voluntarily staying away from work?

Some employees may want to voluntarily remain at home due to a risk of exposure to the virus, and not wanting to run the risk of infecting others.

As set out above, it is possible that the employer does not have any obligation to pay the employee. However, if an employer does not elect to reach an agreement whereby the employee is paid for such an absence, the employee may feel that they have to attend work after all. As such, before making a decision to withhold payment to employees proposing voluntary quarantine, employers should ensure they have a clear understanding of the extent of the risk that may be posed by that employee attending work, considering its obligations to other people in the workplace who may be impacted.

General information on the risks posed by coronavirus and ways of managing those risks can be found at www.moh.govt.nz.

Can employers require employees to undergo medical testing?

In short, no - employees must consent to medical testing.

An employer would most likely be justified in requiring an employee to stay home, and possibly in not paying that employee, if he or she refused to take a test to confirm infection, where there was a reasonable chance of that having occurred.

Can employers require employees to take annual holidays?

The Holidays Act requires an employer and employee to try and agree on when annual holidays are to be taken. Failing agreement, an employer can direct an employee to take annual holidays on 14 days notice. The length of the notice period

probably means that this will not be a suitable option for dealing with coronavirus.

What can employers do now?

We recommend that employers proactively consider these issues and what their response might be, bearing in mind that the situation is likely to evolve over time.

Unfortunately, coronavirus is not a one-off scenario, as we have seen before with matters such as swine flu and measles. As such, it would be prudent for employers to develop policies to address these sorts of questions. Because of the different scenarios that might arise, we recommend that any policy be sufficiently flexible to enable the employer to deal with each situation on its merits, while still providing guidance to both the employer and employees.

As always, preparation and open communication are key. Aside from health and safety considerations, employers would be prudent to recall the overarching obligation of good faith, which applies to all employment relationships, when making decisions on how to deal with individual circumstances. Employers are encouraged to discuss and agree a format for dealing with individual risks in a way that is suitable to both parties, whilst ensuring wider compliance with duties under the HSWA. We recommend such agreements are clear and in writing, to avoid any doubt.

Powers to send children home and to close schools

Under the Health Act 1956, a medical officer of health who has reasonable grounds to believe an attendee of an education institute has an infectious disease which has a substantial risk of spreading to other persons, can direct specific persons to remain away from the education institute, or close all or part of that facility. It is an offence not to comply with these directions, and an individual failing to comply may be liable to a fine not exceeding \$2,000.

A school may also elect to close in the case of an epidemic or other emergency (section 65E of the Education Act 1989).

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