

'Flyer beware' – the employment implications of overseas travel

[Hamish Kynaston](#), [Peter Chemis](#), [Sherridan Cook](#), [Susan Rowe](#), [Nicola Cuervo](#), [Alastair Sherriff](#), [Mere King](#), [Holly Hedley](#), [Shaun Brookes](#), [Lorraine Hercus](#), [Emma von Veh](#)

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After months of public speculation, the Government has announced that the Trans-Tasman bubble will open on 19 April. However, the Government has warned that a 'flyer beware' policy applies to quarantine free travel between New Zealand and Australia. Those planning on travelling within the bubble should have contingency plans in case of an outbreak. There are a range of questions employers may want to consider as the leave requests start coming in.

1. Can employers introduce a 'flyer beware' policy to give employees advance notice that if they choose to go to Australia and the bubble closes, they agree that they will not be entitled to be paid for any time they cannot work as a result?

There is no reason why an employer cannot make its agreement to allow an employee to take leave subject to reasonable conditions eg if upon your return, the guidance from MOH is that you should self-isolate and you therefore cannot work, you will need to bear this cost by taking leave without pay or further annual leave.

2. Can employers simply refuse to approve an employee's leave request to go to Australia because the business cannot afford for them to get stuck overseas for an indefinite amount of time?

The core legal principle is that parties must try to agree fairly, reasonably and in good faith when holidays are taken. Whether an employer is acting fairly and reasonably in declining leave will be assessed against the prevailing circumstances. These may include the prospect that leave for, say, two weeks could morph into four weeks (ie because of isolation requirements or the bubble closing) and that this length of absence cannot reasonably be covered.

The important points here are that employers must have a good and sufficient reason for declining leave, which includes considering options for managing the possible extra time away, and must discuss those with the employee.

3. Do employers have to pay employees if the bubble closes while the employee is overseas and they cannot return to New Zealand as planned?

The key inquiry at this stage is whether the employee is ready, willing, and able to work.

(a) What if the employee can work from Australia?

If the employee can carry out their work from Australia (ie the nature of their job allows them to work remotely, and they have the necessary equipment to do so) then they are most likely ready, willing and able to work, and therefore entitled to be paid for the hours worked.

We recommend employers and employees take steps where possible to assist the employee to be able to work remotely, should the need arise, such as taking a work laptop and other necessary equipment to Australia.

(b) What if the employee can't work from Australia?

Where the nature of the role means the employee is not able to work remotely, the issue is more difficult. In this case, because the employee is not able to work as they are not able to attend the workplace. Therefore, it is open to the employer to decline to pay them. The employer could offer for the employee to take further annual leave, or unpaid leave.

(c) What if the employee has to isolate on their return?

The key question is still whether the employee is ready, willing, and able to work. As above, if an employee cannot carry out their role from home, or in isolation, there is a good argument that they are not able to work and therefore not entitled to be paid.

An employer owes health and safety obligations to its employees and others under the Health and Safety at Work Act. This extends to adhering to the Ministry of Health guidelines and refusing to allow an employee to return to the workplace before they have completed any isolation requirements.

4. If an employee travels to Australia for a work trip and gets stuck over there, do my obligations as an employer change because it was a business trip?

While in this case the legal principles of an employee being ready, willing and able still apply, there is an added layer because the primary reason the employee was overseas was for work purposes. Although this situation would likely be rare, with most employees who travel for work being able to work remotely, an employer who requires an employee to travel is likely obliged to pay the employee their usual wages in these circumstances, because they arose out of the employer's actions.

It should be noted finally that, although the Government has allowed people to travel quarantine free to and from Australia, employers should still be mindful of their health and safety obligations, and the potential impact for the employee and their family of the employee's stay being extended when deciding whether they will send employees to Australia for work.

This article was written by [Hamish Kynaston](#) (partner) and Phina Conroy (solicitor).

Auckland

**188 Quay Street
Auckland 1010**

**PO Box 1433
Auckland 1140
New Zealand**

**P: +64 9 358 2555
F: +64 9 358 2055**

Wellington

**Aon Centre
1 Willis Street
Wellington 6011**

**PO Box 2694
Wellington 6140
New Zealand**

**P: +64 4 499 4242
F: +64 4 499 4141**

Christchurch

**83 Victoria Street
Christchurch 8013**

**PO Box 322
Christchurch 8140
New Zealand**

**P: +64 3 379 1747
F: +64 3 379 5659**