

COVID-19 employment legal update for 'essential businesses' (and those wanting to be)

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As with all things, there is an upside and a downside. This is no different for the newest category of businesses in New Zealand – those deemed 'essential' during a pandemic. Being able to operate at the moment is a boon for employers, but doing so carries with it greater responsibilities for staff and customers. We discuss below how you might qualify for this holy grail, what additional health and safety obligations come with it, and what extra support you can now get from the Government. We also discuss when an employee can refuse to work on health and safety grounds.

What are 'essential services'?

Essential services are easy to define in a broad sense, and can be found in the Government's pandemic planning documents. They concern the provision of the necessities of life, including food, medicine, healthcare, energy, fuel, waste-removal, internet and financial support. However, when it comes to the detail, there is always room for debate. Some of the initial ambiguities have been ironed out over the past couple of weeks, resulting in rule relaxations in some areas, particularly the direction that businesses such as The Warehouse and Noel Leeming can sell essential non-food consumer products, including heaters, IT equipment and other goods (provided they are sold online and in a way that minimises the spread of COVID-19). But other rules have been tightened, such as the ban on 'click and collect' product sales for anyone but supermarkets.

A detailed list clarifying the [sectors](#) and [services](#) that will qualify as 'essential' is now provided by the Ministry of Business, Innovation and Employment (MBIE), including a list of services deemed [non-essential](#) (similar information can also be found on the Government's [COVID-19 website](#)). This information continues to be updated as the Government's response evolves, and we recommend reviewing it daily for changes. Currently, entities that provide the following services are deemed essential:

- Accommodation for essential workers, retirement villages and backpacker accommodation
- Building and construction work related to essential services and critical infrastructure
- Fast moving consumer goods, mainly food and alcohol but also some consumer goods provided these meet certain criteria and the business is registered
- Financial services such as banks, brokers and KiwiSaver funds
- Primary industries, including food and beverage production and processing (the Ministry of Primary Industries has provided further [guidance](#) for business in those areas)
- Transport for essential workers and deliveries
- Various government and related public agencies and services, such as, customs, courts, health, corrections, police and social services
- The production, supply, sale distribution or disposal of electricity, gas, water, wastewater, waste, liquid and solid fuel, and telecommunication services.

A closer examination of these categories also reveals that some businesses will qualify as suppliers or maintainers of other essential services. Also, the diversity of modern businesses might mean that only parts of their operations will qualify. But in both cases, care still needs to be taken that the provision of services is strictly limited to those allowed, and any non-essential aspects of the employer's business remain closed. Where this is not clear-cut, we can assist or you can contact MBIE at essential@mbie.govt.nz or 0800 22 66 57, as a failure to comply with these rules may have financial and reputational consequences (discussed below).

What health and safety measures do essential businesses need to consider?

Under the Health and Safety at Work Act 2015 (HSWA), all businesses have a statutory duty to ensure, so far as reasonably practicable, the health and safety of their workers and customers who attend their premises. The onus on essential services to comply with this obligation is critical and heightened during a pandemic.

Essential businesses must minimise, or eliminate where possible, physical interactions between staff and with or between customers, ensure appropriate health, hygiene and safety measures are in place and restrict activity to only what is essential during the Alert Level 4 period. If a business cannot operate in a manner that minimises the risk of transmission, it should close until appropriate measures are put in place.

The [WorkSafe New Zealand](#) and [Ministry of Health](#) websites provide further guidance about how businesses can identify and manage risks in relation to COVID-19, including sector-specific advice about personal protective equipment (PPE) and basic hygiene measures. We advise all employers to frequently revisit Government guidance as more practical steps are recommended.

We have identified the following additional steps for businesses to consider:

- Ensure all workers maintain basic hygiene practices and have the PPE that they need to work safely
- Adopt or ensure that any hygiene procedures and PPE policies accord with Ministry of Health guidance
- Regularly consult with workers about their concerns and day-to-day experiences
- Check-in on your employees' health status by asking whether they have any symptoms or may have come into contact with an infected person
- Consult on any new measures that need to be put in place
- Have systems in place to consult, co-operate or coordinate with other PCBUs with the same duties (eg where your workers are on their premises)
- Minimise personal interactions
- Promote physical distancing and consider taking other exposure reduction steps that are reasonably practicable such as split shifts or alternating lunch breaks
- Set up a register where multiple people are working to facilitate efficient contact tracing if required
- Frequent cleaning of premises (especially counters, eftpos terminals and other high-touch surfaces).

Employers should proactively consider how the official guidance is applicable to their workplace. However, recognising that different workplaces may need to adopt different or more stringent measures, employers should also consider what additional steps could be taken.

In the event of an incident, WorkSafe's consideration of what is 'reasonably practicable' in the circumstances is likely to take into account the lack of specific guidance available and the speed with which the COVID-19 situation is developing. Nevertheless, we recommend that all businesses stay up to date with official guidance. Where a business does decide to depart from this guidance, it should clearly document its reasons for doing so.

What are the consequences for non-complying businesses?

We have already seen how the 'name and shame' approach has led many businesses to re-consider their actions, with adverse publicity and reputational damage on the line where non-essential businesses remain open or where essential businesses do not properly take care of their staff. This coincided with the strong direction from the Government that enforcement measures will be used to ensure everyone complies with the directives.

Under the Health Act 1956, any person who commits an offence relating to the obstruction of a medical officer of health, or persons assisting a medical officer of health, is liable on conviction to imprisonment for a term not exceeding six months and a fine not exceeding \$4,000. The same penalty will apply to anyone in breach of the Health Minister's order requiring all premises within all districts of New Zealand to close until further notice, excluding those exempted.

Can essential workers refuse to undertake work?

The short answer is yes – workers do have a right to refuse to undertake work if their working conditions are unsafe – but the threshold is high. We have already seen an example of this where Sistema workers walked off the job, citing concerns about standing less than a metre apart and a lack of PPE. Employers should also remain alive to potential personal grievance claims based on breaches of obligations under the HSWA or a disregard for official COVID-19 guidance.

To refuse to work under the HSWA, a worker must have reasonable grounds to believe that the work they are required to perform is likely to expose them (or someone else) to a serious risk to their health or safety arising from an immediate or imminent exposure to COVID-19. They must also attempt to resolve the issue with their employer before refusing to work. We have seen instances of employees simply refusing to work, even though the employer has taken appropriate steps to protect their safety. In those instances, employers may wish to treat the period as unpaid leave. However, before doing so, the employer should seek all available information, such as proof of any asserted medical conditions, and consult with the employee on how they propose to treat their absence.

However, these issues should be somewhat alleviated with the Government's new leave scheme for essential workers, discussed

below.

Are essential workers entitled to receive payment if they are unable to work?

On 7 April 2020, the Government introduced a new Essential Workers Leave Support scheme. This will enable essential workers who take leave in order to comply with public health guidance to receive an income without feeling pressured to go to work.

To be eligible, the essential business must either:

- Have experienced a minimum 30 per cent decline in actual or predicted revenue over the period of a month when compared to the same month last year (or a reasonably equivalent month for a business operating less than a year), and that revenue loss is attributable to COVID-19
- Had its ability to support the employees named in their application negatively impacted due to COVID-19 public health restrictions.

The essential worker must advise their employer, who must then agree, that they cannot work because they:

- Are at 'higher risk' if they get COVID-19 and the Ministry of Health has recommended they stay home during the lock-down
- Have come into contact within someone who has COVID-19 and must self-isolate as per Ministry of Health guidance
- Have tested positive for COVID-19 and are required to remain off work until they have been cleared by a health professional to be released from self-isolation
- Have household members who are at 'higher risk' if they get COVID-19.

Workers will receive income from the essential business at the same rates as the Government's Wage Subsidy Scheme provides. This equates to \$585.80 per week for full-time workers (20 hours or more per week) and \$350.00 per week for part-time workers. Payments are to be made every four weeks, and businesses will have the option to re-apply for those same workers after each four-week period.

Essential businesses accessing the scheme should pay workers their usual weekly income before COVID-19 where this amount is less than the relevant rate provided. Where the workers' usual income before COVID-19 exceeds the relevant rate, employers must pay the full leave rate and make 'best endeavours' to pay at least 80 per cent of the workers' usual income.

Employers are not required to provide proof when making the application but will need to declare that the employee has told them that they meet one of the eligibility criteria and that they agree. We consider all employers should satisfy themselves that the employee does in fact fall within one of the criteria. This might involve seeking medical confirmation from the employee if they are claiming that they, or someone else in their bubble, is 'high risk'.

However, employers can only receive one type of payment for an employee. Businesses will not be able to claim the leave payment where they are already in receipt of the Government COVID-19 Wage Subsidy or any other government funding in respect of the same employee. Where an employer received the previous leave payment for an employee, they can only receive the essential worker leave support once the 14 days has expired from the date of application for the previous leave scheme.

If an employee voluntarily leaves their employment, the employer must notify the Ministry of Social Development (MSD). The employer cannot claim any other subsidy for that person, however, the employer does not need to return any of the subsidy already paid. The remainder of that person's subsidy should be used to help any other affected worker's income where possible. If there are no other staff, the employer should notify MSD and return the money. The money must also be paid back to MSD where an employee is made redundant during the four-week period.

We would be happy to assist with any further guidance or in applying for any of the Government's assistance schemes.

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