

What employers should bear in mind when navigating COVID-19 (Coronavirus)

March 3, 2020

The novel coronavirus outbreak was first alerted to the World Health Organisation (WHO) by Chinese authorities on 31 December 2019 and has rapidly spread across the world. New Zealand now has its second confirmed case. COVID-19's effects are already being felt across the economy, and businesses have a range of concerns to address as they plan for its impact. This includes managing the risk at their workplaces, and dealing with concerned employees.

We have set out below some key points for employers to bear in mind as they navigate the outbreak.

- Avoid knee-jerk or panic responses which may be inappropriate, ineffective or even discriminatory. Take the time to consider and plan a strategy for dealing with the risks, and one which includes an active communication plan. The statutory duty of good faith remains in place and is even more relevant in these circumstances. This requires an employer to be open and communicative regarding any planned response.
- Under the Health and Safety at Work Act 2015 employers are required to minimise risks arising from the outbreak of a contagious disease 'so far as reasonably practicable'. In most cases, they cannot reasonably be expected to stop an outbreak. However, they will have an obligation to take some positive steps to minimise the risk.
- Employers should ensure they are informed about any particular risk factors for their workplace, and issue guidance to staff on managing risks. This could include, for example, instructions on basic hygiene and anti-infection measures, and dealing with customers who may be unwell.
- Employers should also be aware of international travel restrictions, or other restrictions which may be imposed by the government here or governments elsewhere. It will be important to review business travel and to check with employees about their own plans. Take a case by case approach to employees who have recently arrived back in New Zealand from an overseas location where there may have been a risk of infection.
- Employers have a right (and obligation) to require any sick person to leave the workplace, to ensure others are kept safe. If there are reasons to suspect a special risk, it may be appropriate to put in place flexible working arrangements so that those who are concerned about the spread of, or spreading, COVID-19 can keep away from the office but still continue to work. We are aware of some employers adopting a blanket policy which requires employees who are suffering from any cold or flu-like symptoms to remain at home. When workers have been exposed to the disease but do not have symptoms, employers may consider taking preventative measures on a case-by-case basis.
- Being in quarantine is not the same as being sick, and employees may be able to work from home. But if not it may be possible to agree to allow the employee to take sick leave while quarantined. Similarly, it could be possible to agree to use annual leave. However, such agreements should be voluntary and not forced.
- Check employment agreement terms on requiring medical examinations or evidence, and consider the

circumstances in which it might be reasonable to ask an employee to provide information about their exposure or potential infection.

- In general, employees who are not willing and able to work are not entitled to be paid. However, while this may be the starting point for those unable to come to work because of a quarantine or travel restriction, the terms of the employment agreement, the nature and width of the restriction and the particular circumstances of the employee should all be taken into account before determining the approach in relation to pay.
- Employees stood down by an employer when they indicate they are willing and able to work, and without clear evidence indicating a specific health and safety risk, are likely to be entitled to be paid. But once again, the position will depend on the provisions of the employment agreement and the particular circumstances, including any government guidance.
- Employees may refuse to come to work if they are worried. However, whether that refusal is justified and whether employers are obliged to pay them in such circumstances will depend on the reasonableness of their particular concern. If the employer has taken appropriate steps to control risks and it is reasonable for employees to attend work, the employer would not usually be obliged to pay an employee who refuses (and may be entitled to take disciplinary action in relation to that refusal).
- Many employment agreements contain *force majeure* provisions which might allow an employer to end the agreement because of circumstances beyond the parties' control. Depending on how such clauses are worded, they might be applicable to a coronavirus-type situation. However, extreme caution is required in relation to such provisions – relying upon them is not straightforward and could expose employers to unjustified dismissal claims.
- Similarly, take care before initiating any restructuring or redundancy measures. While businesses have freedom to decide how best to address any economic difficulties related to the COVID-19 situation, the usual rules related to consultation and a fair process will apply. They may also need good evidence of the financial impacts in order to demonstrate the basis for their business decision.

Please do get in touch with our specialist team if you have any queries or need assistance with these issues.

Your Key Contacts



James Warren

Partner, Auckland

D +64 9 375 1199

M +64 21 773 682

james.warren@dentons.com



Charlotte Parkhill

Partner, Auckland

D +64 9 914 7259

M +64 21 191 8881

charlotte.parkhill@dentons.com



Greg Cain

Partner, Wellington

D +64 49 16 0963

M +64 21 770 936

greg.cain@dentons.com