

Health and safety issues related to COVID-19 to consider when working under alert level 3

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Now that we are in alert level 3, many more businesses are able to return to work if they can do while 'operating safely'. It is timely to bear in mind the following important points relating to workplace health and safety.

1. Engagement with workers is key

Under the HSW Act, a PCBU must engage with workers who are directly affected by a matter relating to work health or safety. That includes when the PCBU is making decisions about how to eliminate or minimise risks, including those related to COVID-19. Any changes or proposed changes to health and safety policies and procedures to deal with the return to work at alert level 3 should be discussed with workers in accordance with your existing worker engagement procedures.

Further, many workers will be anxious about returning to site. Communication from senior management is crucial, and it needs to be empathetic and tailored to the workers' needs, rather than directive or controlling. Poorly considered communication to workers may only serve to increase anxiety levels.

2. Communication with PCBUs is also key

Section 34 of the HSW Act requires a PCBU to, so far as is reasonably practicable, consult, cooperate with, and coordinate activities with all other PCBUs who have a duty in relation to the same matter. It is particularly important to ensure you are properly complying with that duty in respect of other PCBUs that have similar duties, including contractors and members of the supply chain.

The measures that the Government and each PCBU will require to properly protect workers from COVID-19 are constantly changing. Each PCBU's risk assessment will change as the risk of COVID-19 evolves. As a consequence, the risk management for other hazards present at the workplace may also need to adjust. It is important that you maintain open lines of communication about changes in business operations with other PCBUs to ensure that appropriate coordination of activities.

3. Site visits by WorkSafe and the Police

WorkSafe has indicated that it will be conducting random site assessments at alert level 3. You may find that these will be different to usual – WorkSafe are looking at completing assessments virtually (via call and video conferencing tools) and in person. These assessments will be to ensure that PCBUs have a COVID-19 safety plan and are implementing appropriate health and safety measures, as well as engaging with workers about what they are doing. WorkSafe has advised that assessments may be conducted with the Police or Labour Inspectors (from MBIE) as part

an inter-governmental taskforce, but each organisation's focus will be different reflecting their different functions. WorkSafe inspectors will focus on ensuring compliance with the Health and Safety at Work Act 2015 ('**HSW Act**'). The Police will monitor for compliance with the Health Act 1956.

We recommend you familiarise yourself with the industry guidelines that exist which have been endorsed by WorkSafe. These guidelines represent best practice on how to operate at alert level 3 and will be the standard by which you are assessed.

4. Use of quick enforcement tools

WorkSafe has indicated that it will not take enforcement action if a PCBU's actions meet its expectations under the HSW Act, even if a worker or other person contracts COVID-19. However, due to the severity of the risk caused by exposure to COVID-19, we expect that WorkSafe may be more inclined than usual to use quick enforcement tools to correct any sustained health and safety breaches that do occur at alert level 3 by the PCBU or its workers.

These tools include the ability to issue improvement or prohibition notices, requiring a PCBU to rectify what the inspector sees as a breach of the HSW Act before further work can be completed. These steps do not, however, stop WorkSafe from electing to pursue a full investigation (and possible prosecution) after-the-fact.

5. Increased costs of compliance

The additional health and safety measures that are required when working at alert level 3 (and which are likely to flow into alert levels 1 and 2) will come at a cost – for example, the purchase of additional PPE and managing the works around the new requirements for physical distancing. For contracts entered into in the pre-COVID world, these costs will not have been factored into the contract price. Parties to construction contracts will be concerned to understand who bears responsibility for these costs.

For contracts based on NZS3910, there may be an entitlement for contractors to claim a variation under clause 5.11.10 for a change in statute or regulation on the basis of the prescriptive health and safety requirements in the Health Act order for alert level 3 made on 24 April 2020. The COVID-19 Construction protocols being implemented throughout the industry are endorsed by WorkSafe and based on public health guidance issued by the Ministry of Health. The specific reference to the guidance in the Health Act order provides further support for these claims.

From a time perspective, the physical distancing requirements in particular may result in further delays to the completion date, in addition to delays arising from the mandatory stand-down period for alert level 4. Extensions of time under clause 10.3.1(a) for the net effect of the variation under clause 5.11.10 and/or under clause 10.3.1(f) for a circumstance not reasonably foreseeable by an experienced contractor at the time of tender, will need to be considered.

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