THIS WEEK'S ARTICLES

Issue 9
3 Apr 2020

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LawNews

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EMPLOYMENT LAW

How COVID-19 affects employment law

By Catherine Stewart and Laurie Knight

For most of New Zealand, "business as usual" has gone out the window.

Essential services are now operating under tight restrictions while other businesses and organisations are closed and people are confined to their home "bubbles", which are now home offices for many.

Thousands of lives will be saved by these measures, at the cost of a deep economic downturn.

What does this mean for employment relations?

The key message is that "normal" employment law continues to apply. Employers and employees have the same duties toward one another that they had on 24 March, including the obligation to deal with each other in good faith.

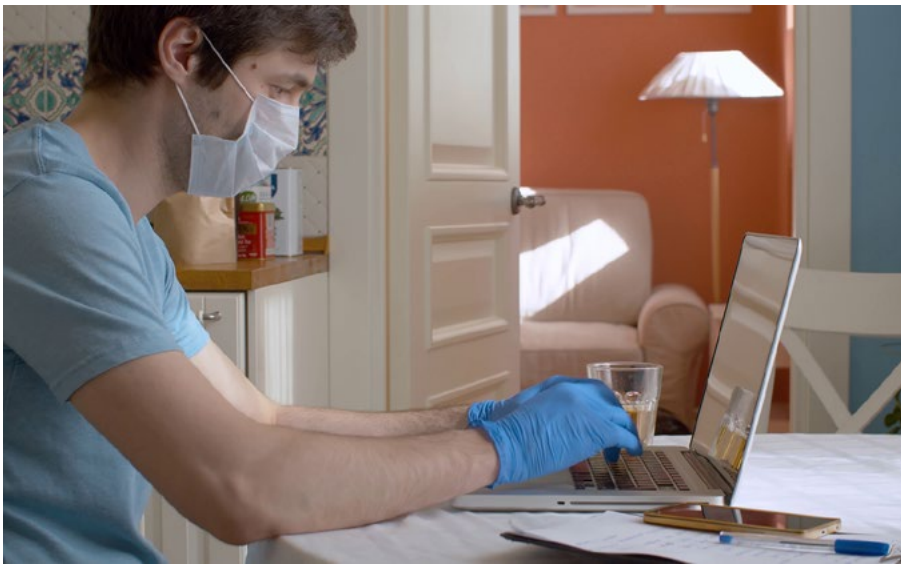
This is what it might mean in the present circumstances.

Employers feel the pinch
Many employers are feeling the financial pinch of short-notice closure.

The government is offering a wage subsidy scheme, providing a fixed payment per worker for 12 weeks, paid to employers as a lump sum, to be passed on to employees as wages. Employers are required to make best efforts to keep the subsidised workers employed for the period of the subsidy and to pay them 80% of their pre-COVID-19 income.

Even if they cannot do this, they would be expected to pass on at least the amount of the wage subsidy, except where it is higher than their ordinary income. In those circumstances they should apply the balance to other staff.

The scheme has been amended twice already; current details should be checked on the Work and Income website, where applications are made.



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Home 'bubbles' have become home offices

The key message is that "normal" employment law continues to apply

Looking beyond the subsidy, employers should be having open discussions with employees, in good faith, about their financial situation looking forward over the next 12 months.

The current four-week lockdown (or possibly level 3 restrictions) may be continued to reduce the spread of the COVID-19 virus while we wait for a vaccine to become available. The expected recession will have at least medium-term effects on demand. This is not just a four-week issue.

Employers facing serious difficulties should be discussing with employees what measures would be required to keep the business afloat and avoid job losses.

Options include reduced hours, reduced pay, taking annual leave, taking unpaid leave, taking special leave – and combinations of these. All parties should be realistic about the alternatives and open to creative solutions. Any changes to employment terms must be agreed and recorded in variations to existing employment agreements, whether individual or collective.

The employment relationship is recognised in law as a special relationship, with more obligations than apply to an ordinary contractual relationship. Employers have few unilateral options in this context. One is to require employees to take annual leave, with 14 days' notice. It was reported recently

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How COVID-19 affects employment law

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that Air New Zealand intended to take this step with non-essential staff.

These initial steps will not be enough in some cases.

Where an organisation does see the genuine need to lay off employees, it must undertake a workplace change process. This starts with documenting the business case for change and a proposal for addressing the issues, which is likely to involve fewer or different roles.

It is important that the information is fulsome, while not breaching commercial confidentiality or individuals' privacy. In these stressful times, it is important not to raise the temperature by causing employees to feel in the dark about the rationale for proposed changes.

Genuine consultation with employees is required, based on the full picture. They might come up with creative alternative solutions that management had not considered and that better meet their own needs: a win/win result.

The minimum time for consultation would ordinarily be one week. Shorter periods are risky and less likely to produce the best results; it remains to be seen whether they will be found to be lawful in the present circumstances.

Finally, it will be important for employers to convey their decisions to affected staff sensitively while stress levels are high, especially using remote communications. Any employees made redundant must be paid out in accordance with statutory minima and their contracts which will include ordinary pay for a notice period plus applicable holidays and might include specific redundancy provisions.

Some contracts include *force majeure* or business interruption clauses and the common law doctrine of frustration of contract might also apply. The thresholds for these legal options are high, so they should not be considered easy escape clauses. Employers should seek specific legal advice on whether and how they might apply in their circumstances.

Ongoing relationships

Ongoing employment relationships will require some tailoring for the circumstances.

Employers continue to have a legal duty to eliminate or minimise hazards to provide a safe workplace for employees and other people present on worksites.

"Essential businesses" are continuing to operate, including in the accommodation, food and beverage, health and disability, public safety, media and transport sectors. Workers in those sectors have extra health and safety needs arising from COVID-19 – for example, additional cleaning, personal protective equipment and social distancing measures.

Many professional workers are working from home. Their employers also need to ensure their workplaces are safe, for example in terms of ergonomics.

Employers should be paying extra attention to workers' mental health and wellbeing in these times of high uncertainty and stress. Bullying or harassment between workers might be less visible where it is taking place on phone calls and instant messages. It is a good idea for employers to check in regularly on staff wellbeing and offer EAP (employee assistance program) or similar supports.

It can be difficult for employers to trust that employees are working at home when they are being paid to do so.

The traditional legal practice of daily recording billable units provides a high level of accountability. In other sectors, employers can conduct a reasonable level of activity monitoring, such as through phone calls and emails, video-link meetings and checking system usage data. It would probably be unreasonable, however, to require an employee to keep a video connection open during his/her entire shift or workday.

Finally, it is important to acknowledge that many workers have children at home within their "bubble" and have no choice but to juggle their work with providing care and education. Working arrangements should be flexible enough to accommodate these basic needs.

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LawNews

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LawNews is published weekly (with the exception of a small period over the Christmas holiday break) and is available free of charge to members of ADLS, and available by subscription to non-members for $140 (plus GST) per year. To subscribe, please email reception@adls.org.nz.