

## Level three employment considerations

**With New Zealand moving to a Level 3 alert at 11.59pm on Monday, 27 April 2020 many employees will be returning to work. The below article considers what factors an employer should be considering in order to facilitate this return to work, as well as a return to full profit and productivity.**

### Health and safety

- Employers as Persons in Charge of a Business or Undertaking (**PCBU**) must adhere with health and safety obligations under the Health and Safety at Work Act 2015, including the obligation to ensure, so far as is reasonably practicable, the health and safety of workers and persons influenced or directed by the PCBU. This obligation extends to ensuring the PCBU is providing a work environment that is without risks to health and safety.
  - In order to comply with this obligation, it is important that employers:
    - take into account the need for social distancing and the need for personal protective equipment (**PPE**);
    - provide information, training and instructional supervision necessary to protect all persons from risk to their health and safety; and
    - monitor the health of workers at the workplace (including at home).
  - All businesses resuming operations will also need to develop a health and safety plan which details how they will deal with risks posed to health and safety, as a result of Covid19 (prior to the employees resuming work). WorkSafe may be conducting remote audits, to ensure compliance with these health and safety obligations.
- WorkSafe has provided significant guidance about what these plans should address, which can be found [here](#).

### New contracts / changes to existing contracts

- In order to increase productivity and profitability, employers may need to consider alternative means of structuring their contracts and work force.
- For example, small and medium sized employers (with less than 20 employees) could consider implementing trial periods in the individual employment agreements of any new employees (in order to minimise the risk associated with taking on staff when they may become surplus to requirement due to unpredictable workloads). Employers should be aware of the requirements in the Employment Relations Act 2000 (the **Act**) when implementing trial periods.
- Employers could also consider using:
  - casual contracts, where work flows are uncertain; and
  - fixed term agreements (within the parameters of the Act) for project based work, or where there is otherwise a legitimate need for fixed term contracts.
- Employers could also look at changing the structure of their shifts, and consider implementing "24hour shifts" (for instance where there is a "day shift" team and a "night shift" team).
- Employers could also consider seconding an employee to a business in the same industry. However, employers should be aware of the risk that they may be liable for the actions of the other employer as of 27 June 2020, pursuant to the

---

## Level three employment considerations (Continued)

Employment Relations (Triangular Employment) Amendment Bill.

- If an employee needs a secondary job in order to increase their income, the employer could consider amending (and relaxing) restraint of trade provisions within individual employment agreements, and clauses preventing secondary employment. Employers will need to ensure sufficient protection to protect their confidential information remains.
- Employers will need to follow proper process when proposing and documenting any variation to an existing employment agreement, including consulting with the employee.
- When making any change to shift structures, and when considering unpredictable workflows and the need to have employee capacity on-call, employers will also need to ensure that they comply with availability and cancellation provisions of the Act.

### Access to tools and equipment

- With the short notice period before New Zealand transitioned into Level 4 in March 2020, many employers may not have had sufficient time to adequately prepare their employees to work from home.
- With the move to Level 3, employers will now have little excuse not to ensure their employees are well set up at home, including having access to proper equipment (such as appropriate desk chairs) so they are not at risk of a work place injury.
- Employers should consider whether it is necessary and feasible to undertake "workplace assessments" of home set ups, to ensure that employees have appropriate access to equipment.
- As mentioned above, it is critical that employers comply with their health and safety obligations to employees. This includes the obligation to ensure

employees have access to adequate PPE where that is necessary to protect their health and safety at work.

### Flexible working

- Following several weeks at home during the Level 4 period, many employees may have an increased desire to improve their work life balance. Many employees may have enjoyed working from home, and want that to continue.
- An employee may make a request for flexible working arrangements at any time, but must comply with the requirements set out at section 69AAC of the Act.
- The employer must consider any request made for flexible working and either approve or decline the request within the parameters of the Act.

### Employee welfare

- What happens where an employee refuses to come back to work during level 3, on the basis of concerns about their health and safety? The employer should discuss the employee's concerns with them, and assess whether or not those concerns are reasonable. The employer should advise the employee of steps that are being taken to minimise risk and to address the employee's concerns. If an employee still refuses to attend work, the employer should properly consult with their employee about the impact of that. For instance, the employer might write to the employee addressing the concerns, the steps taken to address the concerns, and noting that the employer does not consider the refusal to come to work as reasonable. The employer may propose that if the employee does not attend work, they will not be paid, and request the employee's feedback on that proposal.
- What about where an employee wants to come back to work, but they are deemed high risk (for instance if an employee is immunocompromised)? The

---

### Level three employment considerations (Continued)

employer should again make sure they properly consult with the employee about the risks. The employer may ask the employee to obtain a medical certificate confirming it is safe for them to attend work (with the medical professional having considered the specific risk factors the employer is concerned about). The employer should meet the cost of this medical assessment.

- Employers should also be aware of the stress and impact that the lock-down has had on their employees. Many families will have lost an income, or have friends and family that have been directly impacted by Covid19. Unfortunately, in many cases this stress and pressure leads to an increase in domestic violence. Employers should be aware of their obligations to employees to provide domestic violence leave, and to protect the health and safety of employees in the workplace (which, now extends to home environments where employees are working from home).

### Want to know more?

If you have any questions about the above, please contact Anna Davidson, an Associate in our Employment Team based in Christchurch, or any other member of our specialist [employment](#) team.