

Workplace Response to COVID-19

Legal responsibilities of employers regarding workplace safety concerns

Employment issues associated with responding to the coronavirus outbreak are not always clear-cut and should be considered on a case-by-case basis, but there are some basic rules.

Legally, practices must keep their employees safe – this is a requirement under the Health and Safety at Work Act. Broadly speaking, this means taking all reasonably practicable steps to understand the risks that arise for employees, the likelihood of those risks arising, the degree of harm that staff could be caused from those risks, the options to eliminate those risks, and if the risks can't be completely eliminated, the options to minimise the risks.

Practices must also of course ensure the safety of others affected by their work, including patients, under the same legislation.

The obligations include providing and maintaining a safe and healthy workplace, safe plant and structures, safe systems of work, use, handling and storage of substances, providing information to protect people from risks to their health and safety, and monitoring the health of employees, and conditions at the workplace, to prevent illness or injury to employees arising from the work they carry out.

In the case of a virus such as Covid-19, this will mean taking all reasonably practicable steps to ensure staff are not exposed to the virus as a result of their work. Of course, in many cases the risk of harm to some patients could be more serious than the risk to staff due to age and pre-existing medical conditions.

This will require taking all reasonably practicable steps to ensure that patients who may carry the virus don't appear unannounced at the surgery, don't enter the waiting room, and so forth. It might include signs at the entrance of the building, lifts, on the door etc, to set up appropriate systems for any visits without appointments, and screening questions asked when appointments are made to identify possible affected patients. Thought should be given to how visits from any patient who may be at possible risk of carrying the virus (e.g. travel from an affected area, contact with someone known to have the virus, symptoms of the virus) will be handled. This will be likely include appropriate personal protective equipment for staff interactions with the potentially affected patient, appropriate measures for the patient and any accompanying support persons, separate rooms which do not involve passing through the waiting room, cleaning and so forth. Over time if the virus becomes established in New Zealand or countries of supply there may be shortages in supply of PPE and this possibility should be anticipated, along with alternatives and contingency planning. The Ministry of Health advice should be checked regularly as advice is likely to change if the virus becomes community transmitted.

In short, the obligations to staff are to take all reasonably practicable steps to keep them safe from contracting the virus at work. This means considering all of the ways this might occur and setting up systems to manage the risk. It also might include discussing with any staff who are higher risk any special measures that may need to be taken in their case. It may also include screening for the virus if there is contact with any patient who is found to have the virus.

Bear in mind also the impacts of planning for and dealing with these issues – employees may suffer from stress and anxiety, may find self-isolation or measures for safety difficult to cope with, and may have family or friends impacted by the virus or by its wider impacts. Employers should think about whether they can provide support such as debriefing and helping with concerns and where they can access counselling and assistance if staff need it.

It would be good practice to be discussing the implications and issues with staff now so that everyone has had the opportunity to have input and is aware of steps the practice will take in the event of particular situations. Recording decisions taken in policies and plans, and reviewing as necessary, will help staff have access to up to date information when they need it.

Legal responsibilities around quarantine

A staff member may come into contact with the virus at work and be required to self-isolate. Conversely, a staff member may be required to self-isolate as a result of coming into contact with the virus outside of work. Quarantine may come about as a result of compulsory requirement or as a result of the employer taking precautionary measures.

Employers should consider how they will manage quarantine requirements if these are imposed. In all cases, the employee's employment agreement should be referred to in the first instance, as some employment agreements may provide specific provisions about what is to happen when an employee is not sick but cannot work due to possible infection. The Primary Healthcare Multi-Employer Collective Agreement (PHC MECA) contains no such provisions. If the employer has policies about quarantine or infectious diseases these should be followed.

Options may include working from home to the degree that this is practicable (telephone consultations and the like, perhaps!); taking sick leave by mutual agreement; taking sick leave in advance by mutual agreement; taking annual leave, or annual leave in advance, by mutual agreement; the employer paying the employee; or leave without pay.

Payment for an employee affected by COVID-19

There is no absolute answer to the question of whether the employer must pay the employee if the employee does not have leave available. If the employee's employment agreement or the employer's policy says this will happen, then it must happen. If the employee has come into contact with the virus as a result of work, there is likely to be a perception that the employer should pay the employee. There is an argument that if the employer is requiring the quarantine, the employer should pay, if there is no official requirement on the employee to quarantine. Otherwise, it is up to the employer and employee.

If an employee has run out of sick leave and is sick, the employee can ask their employer for sick leave in advance, use their annual holidays, ask for advanced annual leave or leave without pay. An employer could also agree to provide additional sick leave or special paid leave. The PHC MECA allows for sick leave to be anticipated at the employer's discretion.

Factors employers might want to consider are whether payment might encourage staff who need to work to be honest and upfront about the fact that they need to self-isolate, whether they can afford to pay, and whether this is the best approach to keep other staff and patients safe, and whether the employee was exposed as a result of carrying out their normal duties. There is no legal obligation to pay beyond the employee's leave entitlements if the quarantine is not imposed by the employer, but employers may choose to do so where they are in a position to do so.

An employer could decide to close their business temporarily due to coronavirus. In this case, they should first try to negotiate with their employees what type of leave they could take. If no agreement is made, the employer will have to pay the employees during that period. If the business has to close because of a government mandate for a civil emergency, the employer won't be required to pay their employees. These rules apply to all types of employees.

There is an argument that if the employer imposes the quarantine, as opposed to compulsory quarantine, then the employee should be paid. This is because the employee is ready, able and willing to work, while the employer is not providing work. This isn't the case if the employee is compulsorily quarantined, as then the employee is not able to work.

Thought should be given to circumstances where the employee has come into contact with the virus as a result of outside work factors. For example, employers might wish to have a policy that an employee choosing to travel to a country with a known high incidence of the virus at the time of departure should ensure they have sufficient annual leave to cover self-isolation on return if necessary (assuming that working from home is not an option). It would make sense to ask employees about their travel plans and proactively check with employees who have travelled to higher risk areas.

Sources: Employers Associates Ltd; Employment New Zealand

For further information, please refer to the Employment New Zealand website:

<https://www.employment.govt.nz/about/news-and-updates/workplace-response-to-coronavirus/>



Need more help?

Contact the NZMA:

Phone | 0800 65 61 61

Email | Robyn Fell: robyn@nzma.org.nz

March 2020