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**NEWS**

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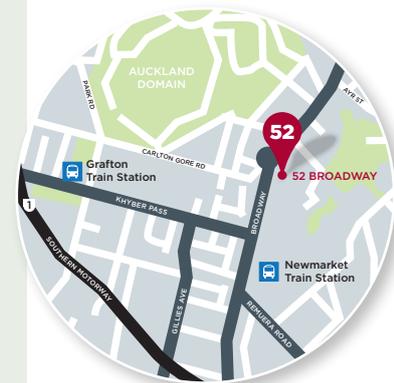
EMPLOYMENT ♦ HEALTH ♦ EDUCATION ♦ SPORTS

# COVID-19 challenges & choices

We hope that you are all keeping well and safe during these difficult and unusual times. We at SBM are very much looking forward to being back in the office and having a bit more normality as soon as possible. In the meantime we are pleased that we have been able to maintain our service to you all while working safely from our homes.

As New Zealand moves through the Alert Levels again following the outbreak of the Covid-19 Delta variant in August, employers and employees are once again faced with uncertainty about the effects on their employment relationships. Many of the issues we have been advising on over the past few weeks relate to what employees should be paid, and whether employers can require employees to be vaccinated against the virus. Both of these issues can be legally complex, and we hope that this newsletter will demystify them for you.

Of course this is general guidance - every situation is different, so if you have any questions about your own circumstances, please feel free to contact us for advice.



## IN THIS ISSUE:

Employment law and Covid-19 vaccinations

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Payment of employees during lockdown



# Employment law and COVID-19 vaccinations

As New Zealand grapples with community transmission of the delta variant of COVID-19, the resulting alert level restrictions and lockdowns, and the ramping up of vaccinations, we have been receiving a range of questions about the approach of employers to vaccinations and how these tie in with employment law obligations.

## Can employers make vaccinations mandatory?

There is no single answer to this as it will depend on the nature of the role.

### Employees under Government Order – Border Workers

Earlier this year, the Government issued an order that mandated vaccinations for border workers in specified roles at managed quarantine and isolation facilities, and at airports and ports.

The upshot of this was that if employees in those roles did not obtain both vaccinations within the required timeframes, or were not able or willing to provide evidence of having done so, the employees could not lawfully continue to be employed in their roles. This meant that for these non-vaccinated employees to continue employment they would need to be redeployed to another role or other

alternative arrangements made, otherwise their employment would be terminated.

There has already been one case brought by a Customs Service worker who was dismissed in reliance on this Order. The worker alleged the dismissal was unjustified. The Employment Relations Authority (*GF v New Zealand Customs Service*) last week upheld the dismissal.

### Employees not covered by the Government Order

For employees not covered by the Government order, the law is not quite so straightforward. In our view, while employers are free to encourage employees to be vaccinated, mandating vaccinations for existing employees who are not covered by the Government order, lends itself to significant legal risk. There are various applicable statutes that affect the situation.

The Health and Safety at Work Act requires that employers take reasonably practicable steps to ensure the health and safety of workers and others in the workplace, including customers and clients. While there may be a legitimate argument in some workplaces that health and safety considerations would require that some or all workers be vaccinated, that will need to be carefully weighed up against the individual's right to refuse medical treatment (a vaccine) that is enshrined in the Bill of Rights Act.

The Privacy Act also requires that collection of information about individuals (including whether they have been vaccinated) must be for a lawful purpose connected with the



business. Health and safety of workers and others on the premises would probably be such a lawful purpose – and, while many employees may be happy to provide that information, they are not obliged to do so. Further, an employee may not be subjected to any unjustified disadvantage by the employer based on their decision to not be vaccinated, or not to provide the information.

The Human Rights Act might also apply, such as where a person's reason for not being vaccinated is based on religious grounds, or where there is a medical reason that prevents their being vaccinated. Care must be taken not to unlawfully discriminate against any individual under this Act.

Even if the employer has the information about whether its employees are vaccinated, the use to which that information is put must be lawful and reasonable.

If an employee is not vaccinated, or will not disclose whether they are vaccinated, the next question is what

if any action the employer can take in relation to that employee, and whether it might be reasonable to require the employee to be vaccinated. The answer to that question will depend on the individual circumstances of the case. We consider that employers should take the same safety precautions with employees who will not disclose their vaccination status as they would with employees who are known not to be vaccinated.

Bear in mind when weighing up the factors that the underlying basis for even considering whether employees should be vaccinated is the obligation under the Health and Safety at Work Act to take reasonably practicable steps to ensure the health and safety of workers and others in the workplace.

Factors to be considered include:

- a. The severity of the health and safety risk that might exist in the workplace as a result of workers or others being exposed to COVID-19 – this will vary according to the nature of the business. For example, an aged care home would carry a higher level of risk than an office based business with minimal client or customer contact.
- b. Whether there are other practicable steps that can be taken to discharge the health and safety obligation – such as the wearing of PPE, or moving unvaccinated workers to other roles or parts of the premises where the risk is mitigated, such as away from contact with members of the public.
- c. What the reasons are for the employee not being vaccinated – which could include medical reasons.
- d. What if any provisions of the relevant employment agreement might apply.

Where the risks of not being vaccinated cannot be mitigated by making operational adjustments, employers may wish to consider instructing the employee to be vaccinated – any such instruction would need to be both lawful and reasonable, and, if that is unsuccessful, taking disciplinary action up to and including dismissal because of a refusal to be vaccinated.

We do not recommend these steps be taken without first seeking advice about the circumstances. Either of these steps would provide

grounds for the employee to raise a personal grievance, which would then require the employer to be able to justify the decision both substantively and procedurally. If the decision cannot be justified, the employee would be entitled to remedies including potentially reinstatement, lost remuneration and monetary compensation.

## Prospective employees

Employers are in a much stronger position when it comes to making it a condition of employment for prospective employees that they be vaccinated against COVID-19. This requirement could be based on health and safety considerations under the Health and Safety at Work Act, similar to a requirement for satisfactory results of a pre-employment drug test.

Note however that it is still unlawful to discriminate on a protected ground under the Human Rights Act when it comes to the offer of employment. We recommend that even a pre-employment requirement to be vaccinated should be related to the nature of the role to which the employee is being recruited, and the extent of the risk posed by that role to the employee and others.

## Conclusion

While employers can strongly encourage vaccinations, and make policies accordingly, we do not consider that there is a general right to require employees to be vaccinated. The only exception is if there are government Orders in place that make it compulsory for people in particular roles to be vaccinated. There may be some roles where there is a strong health and safety reason for vaccinations, backed up by a health and safety risk assessment, which would entitle an employer to consider mandatory vaccinations, but imposing such a requirement on existing employees should not be entered into lightly.

The situation with prospective employees is more straightforward, and where there is a legitimate health and safety imperative (subject always to the provisions of the Human Rights Act) it can be a condition of any offer of employment that they be vaccinated.

If you are needing advice regarding your own unique circumstances, we will be happy to help. ■



# Payment of employees during lockdown

As we navigate through our second Alert Level 4 lockdown, employers once again have been faced with the question of what changes, if any, they can make to employees' pay, while they are faced with an inability to open their businesses in Levels 4 and 3, and employees are obliged by the government to stay at home.

**T**his issue created much debate during the 2020 lockdowns, but unfortunately, 18 months down the track, there is no definitive answer from the Courts. We hope that this article will provide clarity for you.

Our view has remained the same since the beginning of the pandemic, and it is based on the fundamental principle of contract law that an employee must be ready, willing and able to perform work in order to be entitled to wages. In Level 3 and Level 4, an employee

may be ready and willing, but is only “able” to work if they are either an essential worker, and therefore exempt from the obligation to stay at home, or a worker who is able to perform their work from their home.

Although it is not the fault of the employee, that employee is not “able” to work, and has no entitlement to pay. This “ready willing and able” principle has been supported by the Courts on numerous occasions in the past, including in circumstances such as where there has been a strike, or where employees have been unable to access their workplace due to a picket line. It is also implicitly supported by the Wage Subsidy scheme which is based on the presumption that an employee may not be entitled to pay, but requires the employer to use “best endeavours” to pay at least 80% of the employee’s pay.

Having said that, care should be taken to ensure that there are not provisions in the relevant employment agreement that might override this fundamental principle. Such a provision would be rare, but may nonetheless exist.

It is also always open to an employer who is in a position to do so to use its discretion to pay an employee’s full pay rate – but that is a discretion exercised by the employer, not an entitlement of the employee.

### *So, what are the pay entitlements?*

#### **Where the employee cannot work from home, or is not an essential worker in Alert Levels 4 and 3**

- In Level 4 and Level 3, everybody is required to stay at home and not go to work, except those who are designated as essential workers. If they are not able to go to work, or to do their job from their home, they are not entitled to their salary or wages. The payment provisions in their employment agreements do not apply while they are not able to work, regardless of how that inability occurred.
- Some employers may choose to maintain an employee’s wages or salary during the lockdown – any such payment is at the employer’s discretion.
- The Wage Subsidy is provided to employers to pass on to their employees, on condition (among other things) that the employer uses its best endeavours to pay at least 80% of the employee’s normal wages or salary.

#### **Where the employee can work from home in Alert Levels 4 and 3, or is an essential worker**

- Employees in this category are “able” to work, and so are entitled to be paid in accordance with their employment agreements.
- If there is a business need (such as where the business is not fully operational) to pay employees in this category less than their normal wages or salary, or for the employee to work fewer than their normal hours, that can only happen with agreement of the employee. Any

such agreement will be a variation to the employment agreement, and should be recorded in writing.

### **Alert Level 2**

- Under Alert Level 2, businesses may open and employees are “able” to work. They are therefore entitled to be paid in accordance with their employment agreements
- Where the business does not require the usual number of employees, or needs to have the employees working less than their normal hours, those adjustments must be made by agreement with the employees concerned. Any variations to the employment agreement along these lines should be recorded in writing.

We strongly recommend that employers continue to consult with their workers about these issues and if possible obtain agreement (regardless of whether it is legally required) as this will avoid any arguments down the track.

We realise that a few commentators (including unions) have made public statements to the effect that all employees should be paid 100% of their wages at all times, regardless of the lockdown level and whether they are working. We do not agree with that, for reasons set out above.

We recommend that you seek advice if you are unsure, and of course every business has its own circumstances, but in summary our overarching advice is:

- a. If the employee is not able to come to work, or to work from home, then there is no entitlement to pay. No agreement is needed to not pay the employee when they are not able to work (although it is desirable to consult and get agreement, given the lack of case law in this area).
- b. If the employee is able to do some or all of their work from home, they are entitled to pay, and any changes to their pay or working hours must be achieved by a written variation to their employment agreement.
- c. If it is the employer’s proposal that an employee not work, or that there be a reduction in an employee’s hours, those changes can only be achieved by means of a written variation to the employment agreement.
- d. If the employer is receiving the wage subsidy, it must be applied to the employee in respect of whom it has been claimed. Receipt of the wage subsidy does not affect the principles above – the amount an employee will receive will depend on whether they are able to work – but keep in mind that a condition of the wage subsidy is that the employer must use best endeavours to pay at least 80% of the employee’s usual wages or salary.

Lockdowns and alert level changes tend to bring with them unique situations that are difficult to interpret. We will be happy to provide assistance to you regarding your circumstances, should you need any help navigating the employment law complexities of an employer’s obligations during these unsettling times. ■



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