

We Wish You an Enjoyable Festive Season

After over 100 days in lockdown in Auckland it feels like we have re-emerged into a different world of vaccine passes, traffic light rules and vaccine mandates.

It has been an extraordinarily challenging time keeping on top of laws that changed almost daily in 2021. We hope that 2022 brings with it a sense of (relative) normality for business and employees under the traffic light framework.

In this update – our final one for 2021 – we touch on the new Vaccination Assessment Tool, and note a couple of important Court decisions on COVID-19 and general employment issues.

We note that the SBM Legal office will be closed over the break, and will reopen on Monday, 17 January 2022. However, we are contactable for urgent issues over that time. You can call 09 520 8700 and our answering service will ensure that your message is passed on.

We hope that all of you are able to enjoy the new freedoms over summer, and a well-deserved rest. We wish everyone a safe and happy festive season and we look forward to working with you again in 2022.

New Vaccination Assessment Tool Released

In our update on 25 November 2021, we outlined some key issues for employers arising from the COVID-19 Response (Vaccinations) Legislation Act. This legislation set out the broad steps an employer was required to follow to implement a mandatory vaccination requirement, and consequential employment obligations.

Regulations have now been made prescribing the Vaccination Assessment Tool that employers can use to determine whether or not it is reasonable to require their employees to be vaccinated to perform their work.

What is made clear in the Regulations is that an employer can choose to use the Assessment Tool, or perform its own risk assessment.

The Assessment Tool appears to be a basic checklist exercise – three checks out of four, and it is reasonable to require employees to be vaccinated. The factors are:

- If the size of the workplace is less than 100 square metres, it is a yes.
- If it is unreasonable for an employee to maintain physical distancing of 1 metre or more from others during all or part of their work time, it is a yes.
- If the employee carries out work for more than 15 continuous minutes at a distance of less than 1 metre from the same individual, it is a yes; and
- If the employee provides a service to people “vulnerable” to COVID-19, the answer is yes. “Vulnerable” in this context means minors, those exempt from being vaccinated, and those who are at risk of serious illness from COVID-19. We think this latter category is intended to include those who are unvaccinated, as those people are more at risk of serious illness as a result.

This simplicity is likely to be helpful for small businesses, but oversimplification may actually be unhelpful for larger businesses. But, again, employers can do their own risk assessments.

It is important to note that the obligation to consult with employees still applies to this simplified Assessment Tool.

Court of Appeal Decision in Gate Gourmet Case

The Court of Appeal recently overturned the Employment Court's decision in this case (*Sandhu v Gate Gourmet* [2021] NZCA 591).

The key outcome is that during the first COVID 19 lockdown in March 2020, Gate's workers had to be paid at least the minimum wage for the hours they had agreed to work but did not actually work due to the company's direction, as opposed to the requirements of the lockdown itself. The case was decided on a narrow point related to the Minimum Wage Act 1983.

While the Court of Appeal's decision may on first view be cause for concern for employers who paid 80% of wages during earlier lockdowns, this won't necessarily be the case. The decision does not affect the pay of employees who could not work at all during lockdowns due to the requirements of the lockdown – those employees were not "able" to work as part of the "ready, willing and able" test. It also doesn't affect the pay of those who agreed to receive 80% of wages but remained above the minimum wage at all times.

Unvaxxed Airport Worker Gets Interim Reinstatement

A recent decision of the Employment Court gave an employee interim reinstatement to their job when that employee was unvaccinated and likely subject to a government vaccination order. The case is *WXN v Auckland International Airport Limited* [2021] NZEmpC 205.

The decision came out before the COVID-19 Response (Vaccinations) Legislation Act was passed. However, the key outcome of the case is that consultation with employees about the impact of a vaccination requirement, an employer's risk assessment, redeployment issues and alternatives to termination must be extensive. The Court found that AIAL had not adequately considered proposals the employee made, including him taking a period of unpaid leave, and that interim reinstatement should be granted. We understand the case has since been settled.

Holidays Act Decision on Discretionary Payments

Helpful clarification from the Court of Appeal has been released on what amounts to a "discretionary payment" under the Holidays Act 2003, in *Metropolitan Glass & Glazing Limited v Labour Inspector* [2021] NZCA 560.

Metro Glass had a short-term incentive scheme setting out targets and payments that would be made if the targets were met. Importantly, the invite letter said that any payments under the scheme were "totally at the discretion of Metro Glass", and there was no guarantee of any payment even if the targets were met. The letter also described Metro Glass's sole discretion to amend, revoke or discontinue the scheme at any time.

The Court of Appeal said that payments under Metro Glass's scheme was not guaranteed or conditional. Metro Glass had included an express term in its scheme that even if all of the conditions were met, it retained the discretion not to make any payment. The Court said this meant the payments remained discretionary, and so did not have to be included in gross earnings under the Holidays Act.