

Employment in the Post-Covid Age

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Employers are bound to pay employees who are ready, willing, and able to work in accordance with the terms of their Employment Agreements, even when a business is closed as was the case for many businesses during the COVID-19 lockdown period.

This presented a challenge for some employers who wanted to make deductions from their employees' pay because there was no work or reduced work, or who wanted to restructure and make roles redundant because of the impacts of a lockdown. In these situations, employers still have the same obligation to consult employees before making any decision affecting their employment. If the employer wants to reduce hours or make deductions from pay, they need their employee's consent to do so. An employer cannot make unilateral

changes to their employee terms and conditions of employment.

As a result of the impact of the COVID-19 lockdown, it is possible that these rules may change in the future to provide employers with the ability to make changes to employment terms. However, in the meantime, it is prudent for employers to conduct a review of their employment agreements and ensure that they contain suitable clauses in the event of a national emergency or other crisis event such as a pandemic.

Some clauses that could be included in employment agreements going forward are:

- Deductions clauses, in which employees agree to a portion of their pay being deducted if they cannot work or if work is not available to them during a national emergency event;
- Force majeure clauses, which recognise that there are unexpected events outside of either party's control (such as a pandemic) which may cause failure to meet contractual obligations;
- Business interruption clauses that allow an employer to not pay an employee if the employer's business is interrupted by an emergency event. This would require the employer to show that performance of the contract was prevented by the event, such as during a COVID-19 lockdown period;
- Furlough/Lawful Suspension clauses, which are a suspension of the whole employment agreement for a period of time, temporarily release the employer from its obligations under the agreement. These clauses have been seen overseas but it is unclear whether they would be upheld in New Zealand.

These clauses could be beneficial to employers in an emergency event if drafted with care. For this reason, it is recommended that professional advice is sought in drafting and implementing any such clauses.

Surveillance & Privacy

Since the COVID-19 lockdown, employees are increasingly taking the opportunity to work from home. One issue for employers is ensuring employees working from home are working when they are expected to. Computer surveillance technology is one way for employers to monitor the actions of an employee working from home.

Employers can use computer network records to see when an employee logged on and when they access certain files. Some software goes a step further by monitoring when a computer is active and by counting keystrokes. Built-in laptop cameras can be turned on remotely for monitoring, although it is unlikely that this would be acceptable when an employee is working at home because of privacy expectations.

As these methods all involve collecting personal information about the employee, the information privacy principles from the Privacy Act apply. This means the information collected must be necessary and for a legitimate reason, and employees must be notified that they are being monitored or recorded. It is also best practice to include this in the Employment Agreement, backed up by a policy, to ensure the employee is fully aware of their rights and obligations. Again, professional advice should be sought before making these decisions.

If you require advice on these issues, please get in touch with one of our Employment team.