



BRIEFING

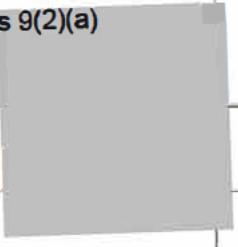
COVID-19: How self-isolating workers are treated under workplace law

Date:	4 March 2020	Priority:	High
Security classification:	In Confidence	Tracking number:	

Action sought

	Action sought	Deadline
Rt Hon Jacinda Ardern Prime Minister	Note the enclosed advice	N/A
Hon Iain Lees-Galloway Minister for Workplace Relations and Safety	Note the enclosed advice	N/A

Contact for telephone discussion (if required)

Name	Position	Telephone	1st contact
Katherine MacNeill	Acting General Manager, Labour and Immigration Policy	04 896 5810	s 9(2)(a)  ✓
Gerard Clark	Manager, Employment Standards Policy	04 901 8590	
Simon Cooke	Senior Advisor, Employment Standards Policy	04 901 8173	

The following departments/agencies were consulted:

WorkSafe, Ministry of Health

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



BRIEFING

COVID-19: How self-isolating workers are treated under workplace law

Date:	4 March 2020	Priority:	High
Security classification:	In Confidence	Tracking number:	2564 19-20

Purpose

To provide an overview of how workers affected by COVID-19 are covered by employment and health and safety law, including paid leave entitlements.

Recommended actions

The Ministry of Business, Innovation and Employment (MBIE) recommends that you:

- a Note the enclosed advice on how workers affected by self-isolation measures relating to COVID-19 are treated under current employment and health and safety at work laws

Noted

Katherine MacNeill
Acting General Manager, Labour and Immigration Policy
Labour, Science and Enterprise, MBIE

4...1...3...1...2...0

Hon Iain Lees-Galloway
Minister for Workplace Relations and Safety

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Key points

- Employers must take seriously the health risks to their worker and other people in the workplace, and to treat their employee in good faith.
- If an employee is diagnosed or sick with COVID-19, or has been advised to self-isolate under Ministry of Health guidelines for COVID-19, the first consideration for an employer should be their duties under the Health and Safety at Work Act.
- Clear guidance can be given that employers should not require, or knowingly allow, workers to come to work when they are sick or diagnosed with COVID-19, or if they have been advised to self-isolate under public health guidelines for COVID-19.
- Where an employee is willing and able, employers and employees should consider whether working from home is practicable during the self-isolation period. In that case, the employee would be paid as if ordinarily working.
- Where an employer requires an employee not to come to work, an employee should be paid. Sick and anticipated sick leave may be used if the person is sick, or needs to care for a sick dependent. Annual leave and other forms of leave can be used by agreement between the employer and the employee.
- Officials are developing clear guidance for employers and employees, based on scenarios, with NZCTU and BusinessNZ, to be communicated by the end of the week.
- Further advice on options for otherwise providing leave and pay for leave are being developed.

Context

1. This briefing provides advice on how minimum employment standards (including entitlements to sick leave and annual leave) apply to employees who are sick or self-isolating, in the context of a COVID-19 outbreak. Employers must also have regard to their health and safety at work duties.
2. These laws:
 - a. require employers to do everything reasonably practicable to manage the health and safety risks posed by COVID-19 (including, in some cases, requiring employees to stay away from the workplace). This should be the primary consideration for employers.
 - b. enable employers and employees to make decisions about how time away from work, in these circumstances, can be remunerated and categorised (eg as sick leave or annual leave). This should be a secondary consideration for employers.
3. We will provide additional advice by Friday 6 March on possible options to support workplaces to manage employee time away from work, and pay associated with that time, in the context of COVID-19. Communications materials are being developed with NZCTU and BusinessNZ.

Workplace decisions on COVID-19 must be guided by health and safety duties

4. COVID-19 presents a workplace risk that needs to be managed by employers. The Health and Safety at Work Act 2015 (HSWA) creates very broad obligations for businesses to manage the risks that arise from work and workplaces. Workers and other persons at workplaces also have duties to keep themselves and others healthy and safe.
5. For a business that is responsible for work and workers, their **primary duty of care** requires them to ensure, so far as is reasonably practicable, the health and safety of:

- workers who work for the business, while they are at work in the business or undertaking, and
 - workers whose activities in carrying out the work are influenced or directed by the business, while the workers are carrying out the work.
6. The primary duty is supported by a range of sub duties that include, among other things:
- providing and maintaining a work environment that is without risks to health and safety
 - providing and maintaining safe systems of work
 - monitoring the health of workers and the conditions at the workplace for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.
7. While at work, workers must:
- take reasonable care of their own health and safety
 - take care that his or her acts or omissions don't adversely affect the health and safety of others
 - comply with any reasonable instruction given by the business to comply with the Act or regulations
 - co-operate with any reasonable policy or procedure of the business that relates to health and safety that they have been notified of.
8. Deciding how these duties can be discharged – in respect to any emergent health and safety risk – should always be a matter for discussion between businesses and workers. There is a range of duties and processes for businesses to engage with workers and for them to participate in health and safety at the workplace.
9. Employment law also establishes an overriding duty of good faith, which requires employers and employees to (among other things):
- work constructively together.
 - be responsive and communicative for example by giving each other relevant information in a timely manner
 - be fully honest with each other
 - raise concerns or issues as soon as possible and respond to these quickly.
10. The ultimate decision about how to manage the workplace risk presented by COVID 19 rests with the employer – and they should have regard to the requirements imposed by any other law, including public health. A reasonable approach to managing the risks of COVID 19 in particular workplaces would include:
- a. Follow the public health guidance for COVID-19 and require workers who should be self-isolating to not be in contact with other people (which in many cases will mean staying away from work)
 - b. Allow people to work from home or a place of isolation where appropriate
 - c. Work in good faith with workers who are not directly covered by current public health guidance for COVID-19, to determine an approach that is workable and responsible in the circumstances.
11. Clear guidance can also be given that employers should not require, or knowingly allow, workers to come to work when they are sick or diagnosed with COVID-19, or if they have been advised to self-isolate under public health guidelines for COVID-19.
12. A worker has the right to stop work if they think that doing the work would expose them or anyone else to serious risk to health or safety, including in relation to COVID-19.

Remuneration for time away from work under employment law

13. If an employer requires an employee to stay away from work (in accordance with both parties' health and safety, or other, duties), then it is clear that the employer is liable to continue paying the affected employee.
14. Employers should give consideration to whether an employee can work from home during self-isolation for COVID-19. If the employee is able and willing to work from home, then time spent away from work would be treated as ordinary working hours and not paid as leave.
15. The law provides for payment of leave where an employee is sick, as well as options for paid leave following public health advice to an individual that they should self-isolate. In general:
 - Sick leave is available by law where a person or their dependant is sick or injured (and stress due to concerns about COVID-19 may constitute illness in some cases)
 - Anticipated sick leave can be used by agreement where the person has no current entitlement (but would otherwise be eligible to use sick leave)
 - Annual leave and anticipated annual leave can be used by agreement with both parties
 - An employer can agree to paid annual leave above entitlement (or e.g. some other form of special leave if in contract)
 - Unpaid leave can be used by agreement.
16. The law provides flexibility to account for other circumstances, where employers and employees can agree arrangements together for time away from work and how this may be paid.
17. We have set out in Annex One an overview of the kind of guidance that could be given to employers and workers in different indicative scenarios. We will develop this further in partnership with the NZCTU and BusinessNZ, for communication more widely by the end of the week.

Next steps

18. Officials are working to consolidate and clarify communications materials on how workers and employers should manage workplace absences and pay in the context of COVID-19. We are also working with the Minister of Health on how health and safety at work law and employment law applies to the health workforce in relation to COVID-19 issues.
19. We will provide initial advice on options to support employers and workers beyond the existing employment law framework by Friday 6 March.

Annexes

Table One: How decisions on managing COVID 19-related risks are guided by health and safety duties

Table Two: Sick leave and annual holidays eligibility and minimum entitlements for various types of employees/employment arrangements

Table one: Employers' decisions on managing COVID-19-related absences are guided by health and safety duties in the first instance

Worker is sick and/or has been diagnosed with COVID 19	Worker has been advised to self-isolate under public health guidance for COVID-19 (may not show symptoms or be sick)	Worker believes they are at risk of spreading COVID-19 (but has not been advised to self-isolate under health guidance for COVID-19)	Worker is concerned that attending their workplace places them at risk of exposure to COVID-19	
Scenario 1: Worker does not want to come to workplace but can work from home	<p><i>Clear guidance can be given:</i></p> <ul style="list-style-type: none"> • Worker must notify employer. • Worker can take sick leave (options for other paid leave apply) • Worker can work from home if willing and able (ordinary pay) • Employer should check-in with the worker. • The employer could be in breach of their HSWA duty if they require the worker to come to work. 	<p><i>Clear guidance can be given:</i></p> <ul style="list-style-type: none"> • Worker must notify employer. • Worker can work from home (ordinary pay), or take leave (options for paid leave apply) • The employer could be in breach of their HSWA duty if they require the worker to come to work. 	<p><i>Context specific:</i></p> <ul style="list-style-type: none"> • Worker must notify employer. • The employer may accept the worker's assessment or require a medical assessment of the "reasonableness of the worker's belief." • Worker should talk to employer about working from home. • If there is no reasonable belief, worker must go to work, work from home, or take leave in agreement with the employer. • If there is a reasonable belief, the employer could be in breach of their HSWA duty if they require the worker to come to work. 	<p><i>Context specific:</i></p> <ul style="list-style-type: none"> • The employer must develop procedures to manage risk of COVID-19 in the workplace. • Workers must follow the instructions, policies and procedures of their employer in order to give effect to their HSWA obligations. • The employer should consider the employees request to work from home in light of their duties.
Scenario 2: Worker does not want to come to work and cannot work from home	<p><i>Clear guidance can be given:</i></p> <ul style="list-style-type: none"> • Worker must notify employer. • Worker can take sick leave, options for other paid leave can apply. • Employer should check in with the worker. • The employer could be in breach of their HSWA duty if they require the worker to come to work. 	<p><i>Clear guidance can be given:</i></p> <ul style="list-style-type: none"> • Worker must notify employer. • Worker should stay at away from work (they can be paid, and options for paid leave by agreement apply). • The employer could be in breach of their HSWA duty if they require the worker to come to work. 	<p><i>Context specific:</i></p> <ul style="list-style-type: none"> • The employer may accept the worker's assessment or require a medical assessment of the "reasonableness of the worker's belief." • If there is no reasonable belief, worker must go to work or take leave in agreement with the employer. 	<p><i>Context specific:</i></p> <ul style="list-style-type: none"> • The employer must develop procedures to manage risk of COVID-19 in the workplace. • Workers must follow the instructions, policies and procedures of their employer in order to give effect to their HSWA obligations. • However, a worker has the right to stop work if they believe that doing the work would expose them or anyone else to serious risk to health or safety.
Scenario 3: Worker wants to come to work	<p><i>Clear guidance can be given:</i></p> <ul style="list-style-type: none"> • Employer should instruct worker to stay away from work. • Employer may suspend worker if worker comes to work. • Worker can take sick leave, options for other paid leave can apply. • A worker should follow the reasonable directions of the employer • If a worker failed to follow those reasonable directions they may be in breach of HSWA. 	<p><i>Clear guidance can be given:</i></p> <ul style="list-style-type: none"> • Worker should stay at home and if possible work from home (and should be paid - options for paid leave by agreement apply). • Employer should instruct worker to stay home (and may suspend worker if they come to work). • If employer lets worker come to work they could be in breach of their HSWA duty. • If the worker comes to work they are likely to be in breach of their HSWA duties. 	<p><i>Context specific:</i></p> <ul style="list-style-type: none"> • A worker may be in breach of their HSWA duty if they go to work with a reasonable belief that they are unwell or contagious. • Employer must do what is reasonably practicable to ensure that other people at work are not placed at risk. 	N/A

Table two: Sick leave and annual holidays eligibility and minimum entitlements for various types of employees/employment arrangements

Type of Leave	When employee initially becomes eligible for leave, and how much	Minimum entitlement ongoing	Ability to accumulate unused leave entitlement	Casual / non-standard hours employee	Alternatives if entitlement exhausted
Sick Leave	Six months of continuous employment with the same employer or six months employment for an average of 10 hours per week and at least one hour in every week, or 40 hours in every month	5 days of sick leave for every 12 month entitlement period	Can carry up to 15 days of sick leave, up to a maximum of 20 days in any entitlement year (unless employment agreement specifies for more)	Eligibility exists, but in practice may vary due to intermittent or irregular nature of the work (for instance if not rostered for work it may be difficult to determine what a working day is to ascertain whether sick leave could be used on a specific day)	Sick leave in anticipation Use annual leave (by agreement) Working from home or place of isolation Employer negotiated special leave
Annual Holidays	12 months of continuous employment with the same employer (full-time, part-time, fixed-term, or casual) Can (from day 1 of employment) be paid holiday pay at 8% if employed on a genuine fixed-term agreement of less than 12 months, or if working pattern means providing leave is unworkable	4 weeks of paid holidays for every 12 month entitlement period	Unused annual leave does not expire (but an employer can require an employee to take annual leave in limited circumstances)	No right to annual holidays. Employer and employee can agree to 8% 'pay as you earn' in lieu of taking annual holidays (due to lack of regular hours)	Annual holidays in anticipation Working from home or place of isolation Employer negotiated special leave

Note: Contractors have no legislative entitlements to either sick leave or annual holidays