

Post Earthquake – Employers' Obligations

By Brannigans

Introduction

Our thoughts are with those affected by the Christchurch earthquake. The legal and practical issues for employers arising out of this event are not straightforward. Below we have addressed some of the key questions employers may have during this challenging time. This is a general summary only. If you have questions about your own situation, please call us.

Returning to the workplace

The City Council will be classifying all buildings in the cordoned-off area during Sunday - red placards for no entry, yellow for restricted use and green for no restrictions on a building's use.

Health and safety obligations

Employers need to ensure that employees are returning to a safe workplace. Where the employer reasonably considers that the workplace is not safe, they are entitled (and probably have a legal obligation under the Health and Safety in Employment Act) to require employees to stay away from work.

A full hazard identification should be made and plans to eliminate isolate and minimise where practicable.

Check for; live electrical cables, or gas leaks, the integrity of the water and sewage lines, unstable equipment, chemical spills and any security issues.

Do employers have to pay their employee where employees are not working?

It is important to remember that the law does not specifically provide what is to happen in a situation such as the one that Christchurch employers are now facing. Nor have the Courts dealt with this specific situation. The legal position will depend on what the employee's employment agreement provides, the reasons why the employee is not working and the state of the employer's business and workplace. On a more practical note, employers may first want to check their insurance policies to check the extent to which they are covered for lost remuneration for employees. In addition the Government has announced they will support some employers in this situation with the payment of subsidies.

In such a unique situation as this, wherever possible, we recommend that employers try to seek agreement with their employees and try to remain open to flexible solutions.

1. Check your employment agreements.

Some employment agreements will contain a clause which provides for what is to happen where there is an "act of God" or a "Force majeure" situation (such as an earthquake). If your employment agreements contain such a clause, follow the terms of that clause.

2. Where the workplace is not operational.

Despite some media coverage to the contrary, generally, the rule is that if an employee is ready, willing and able to work and it is the employer who is deciding that the employee needs to stay away, the employee is entitled to be paid. Employers who are faced with this situation will want to consider making arrangements for employees to work from home or from another location. The employer and employee can also agree that the employee use other entitlements during this period (such as annual leave).

In extreme situations where external events beyond the control of the employer occur which mean that the employer is not able to provide the employee with work, the employer may be able to rely on what is known as “the doctrine of frustration”. This would mean that because the employment agreement is now impossible to perform it has been “frustrated” and the employer is not obliged to pay the employee. A situation where the employer’s premises have been condemned or the business destroyed may amount to a frustration of contract. A decision to close the business for a few days while there is a clean up is unlikely to amount to a frustration of contract.

3. Where the work place is operational but staff are away from work because of their own personal situation.

In this situation, if the employees’ usual work is available, then strictly speaking they would not be entitled to be paid unless you have agreed otherwise. The exception to this would be if an employee was sick or injured (or was responsible for the care of a dependant who was sick or injured). In this situation the employee would be entitled to pay sick leave. Employers should also bear in mind that in some circumstances, employees who are suffering anxiety as a result of the earthquake may be entitled to claim that they are “sick” and entitled to sick leave.

If you have employees who are reluctant to come into work or are occupied with their personal situation (repairing properties etc), we suggest that you communicate closely with your employees and try to reach agreement as to what is to happen. This might include agreeing to pay an employee for a limited period of absence, providing paid sick leave, having employees use their annual leave entitlement, accruing negative time in lieu to be made up at a later date or requiring employees to do some work from home. Employers are not able to require employees to take annual leave until the employer has given the employee 14 days written notice of such requirement

What if my business has to close permanently?

If your business has to close on a permanent basis, then your staff will be surplus to requirements and a redundancy situation will arise. The normal rules around consultation with staff and meeting contractual obligations of notice and the payment of redundancy compensation will apply.

The NZMEA appreciates the support of Brannigans for permission to reproduce this paper.